California Bar Examination

Performance Tests and Selected Answers

February 1997

TUESDAY AFTERNOON
FEBRUARY 25, 1997

California Bar Examination

Performance Test A

INSTRUCTIONS AND FILE

THE STATE BAR OF CALIFORNIA

OFFICE OF ADMISSIONS

PERFORMANCE TESTS AND SELECTED ANSWERS

FEBRUARY 1597 CALIFORNIA BAR EXAM

This publication contains two performance tests from the February 1997 California Bar Examination and two selected answers to each test.

The answers received good grades and were written by applicants who passed the examination. The handwritten answers were typed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors and may not be reprinted.

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In re Denise Walsh

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 governmental agencies.

2. The problem is set in the fictional state of Columbia, one of the United States. Your firm represents Denise Walsh in an administrative hearing involving her welfare benefits before an administrative law judge of the Department of Human Resources.

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 persuasive memorandum concerning the various ways in which the administrative policies and procedures of the agencies involved fail to conform with legal requirements.

4. The File contains factual information about your case. The first document is a memorandum to you from Andrew Sherman, containing the instructions for the memorandum you are to prepare.

5. The Library contains the legal authorities needed to complete the tasks. 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 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 your responsiveness to instructions and on the content, thoroughness, organization, and persuasiveness of the memorandum you write.

Hager and Sherman
Attorneys at Law
201 South Market Street
Rockville, Columbia

MEMORANDUM February 25, 1997

To: Applicant
From: Andrew Sherman
Re: Denise Walsh

Denise Walsh is a former client for whom I obtained a support order in May 1992. She was referred from the family law unit of the Columbia Legal Services Program to our pro bono committee for help in obtaining child support. In April 1992, I spoke with someone in the Department of Human Services (see my 4/25/92 memo to File) and found out what the procedures were. We had a hearing, after which the commissioner entered an order against Lawrence Kress, the father of her child, for $260 per month. Mr. Kress then consented to a wage assignment order, requiring his employer, Buswell & Bennett (B & B), a property maintenance company, to withhold the amount of child support from his wages.

Also in May of 1992, Ms. Walsh began to receive a monthly grant of $336 through the Aid to Families with Dependent Children program (AFDC). In return, she -had to assign her support payments to the State in partial reimbursement for her AFDC grant. In addition to the AFDC grant, Ms. Walsh was entitled to and began receiving a $50 per month "pass through" from the monthly child support payment made by Mr. Kress. Thus, Ms. Walsh was to receive $386 per month, $336 in AFDC and $50 in child support "pass through." I pulled from Ms. Walsh's closed file material which explains this in more detail.

On February 19, 1997, Ms. Walsh called me with a problem. Until three months ago, she reported she had received all of the funds to which she was entitled. She has not, however, received her "pass through" for three months (including this month) and does not understand the reason. She has attempted to find out the nature of the problem from her AFDC caseworker and from the court, but has been unsuccessful. According to Ms. Walsh, Lawrence Kress changed jobs, but has been working continuously. (I have attached my February 19, 1997 memo of my telephone conversation with her.)

I have done some investigation and legal research, and the results of both are attached. Apparently, this "pass through" program has been the subject of litigation in other states and there are several U.S. District Court cases that have ruled on this. The omissions that have caused our client's problems seem to be indicative of systemic failures within the administration of the program. It also appears that each of the missed monthly "pass through" payments may involve separate and distinct policy or procedural errors. There also may be errors common to all of the missed payments.

Columbia law permits us first to raise all of these questions in an administrative "fair hearing." I have, by telephone, requested such a hearing. I need your help in preparing for that hearing.

We have two goals here. Our first objective is to get our client the three $50 payments. In addition, we want the administrative law judge to recommend corrections to the underlying policies and practices to prevent our client and many others from having these problems in the future.

Specifically, to accomplish these goals, I want you to write a draft of the persuasive brief to be filed with the administrative law judge. I have attached an intra-office memorandum explaining this firm's policy for drafting this type of document.

- The first part of the brief should argue that our client is entitled to the three $50 payments. Your draft should use the facts of our case to illustrate the various ways in which the administrative policies and procedures fail to conform with legal requirements. My quick read indicates there are a number of important dates. Be sure you have a good understanding of the chronology of events before you begin.

- The second part of the brief should argue for specific corrections to the underlying policies and practices that cause these problems. The administrative law judge has authority to order changes under §3-5 of Title 3, Subchapter X of the Columbia Code.

Hager and Sherman
Attorneys at Law
201 South Market Street
Rockville, Columbia

INTRA-OFFICE MEMORANDUM January 10, 1995

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, or administrative officer, shall conform to the following guidelines.

All briefs 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 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 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.

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.

Hager and Sherman
Attorneys at Law
201 South Market Street
Rockville, Columbia

MEMORANDUM April 25, 1992

To: File
From: Andrew Sherman
Re: Telephone Conversation with Janet Hughes

Janet Hughes, a supervisor at the Department of Human Services (DHS), explained that in Columbia the AFDC program is a "state plan" administered pursuant to federal requirements. In other words, the State of Columbia is entitled to administer its own federally-funded AFDC program as long as the state plan meets the requirements set out in the Federal Regulations. Under the Columbia State Plan, DHS obtains an assignment of support rights from any applicant for AFDC, ultimately receives the child support money paid by an "absent parent" (i.e., a noncustodial parent), and makes the "pass through" payment to the AFDC recipient.

DHS establishes and collects child support from noncustodial parents with dependent children. Where the children are part of an AFDC unit, DHS, pursuant to the assignment of support rights to the state of Columbia, normally undertakes court action to get a child support order and then proceeds with enforcement of the order.

DHS has cooperative agreements with other organizations and state agencies to facilitate establishment and enforcement of the child support obligations. Under one of these agreements with the Family Division of the Columbia Superior Court, the Child Support Branch of the Family Division has a variety of enforcement responsibilities, including collection and distribution of child support payments, and in particular, implementing wage assignments.

Normally, when a person applies for AFDC and has no support order, DHS obtains the assignment of support rights and oversees the process of obtaining a court order. Once an order is entered, payments normally go to the court. The court keeps a record of the payments, provides information about the payments should enforcement be necessary, and forwards the payments to DHS. DHS then sends out "pass through" checks to eligible recipients. The "pass through" check is normally issued in the month following collection of the child support.

Hager and Sherman
Attorneys at Law
201 South Market Street
Rockville, Columbia

MEMORANDUM February 19, 1997

To: File
From: Andrew Sherman
Re: Telephone Conversation with Denise Walsh

Ms. Walsh called because her $50 "pass through" payment did not come last month (January) or the month before (December) and it has not come yet this month. The payment normally would have come today. She is distraught because she desperately needs and counts on the money just to get by each month. She needs it even more now that she is in a job training program for which she receives no payment or additional grant, even for transportation or child care. (Her AFDC grant of $336 per month has not been increased since I represented her five years ago, although her living expenses have risen.) Also, Maria's birthday is next month, and Ms. Walsh would like the money for a birthday present.

When the second check did not come last month, Ms. Walsh called her DHS caseworker, Gary Morrison, who didn't get back to her for three weeks. He said that her $50 check was handled separately from her regular welfare check and denied responsibility for child support "pass throughs". He told her to call the court to find out what the problem was. She called the court and spoke with Ann Sharff in the Family Division but could get no answers.

When the third check did not come today, she called me for help. Ms. Walsh believes that Mr. Kress changed jobs several months ago (she's not sure exactly when), but that he was working continuously. At least one check came after the change in jobs so she didn't think that was the problem.

I talked with Ms. Walsh about the different bureaucracies that were involved. She was feeling very frustrated at being shunted from place to place, not knowing what was going on, with no one being able to help. I said I would look into the problem and see if it was possible to get things cleared up. I told her I would get back to her as soon as I was able to figure out what was going on.

Hager and Sherman
Attorneys at Law
201 South Market Street
Rockville, Columbia

MEMORANDUM February 19, 1997

To: File
From: Andrew Sherman
Re: Telephone call with ,Ann Sharff in the Child Support Section of the, Family Division of the Superior Court

At my request, Ann Sharff looked into the matter of Denise Walsh's child support payments. Ms. Sharff was unable to check on the payment history because the computer was down. She called Mr. Kress's present employer, Forrest Creek Apartments. A temporary bookkeeper had neglected to send the payments to the court. Thus, Forrest Creek did not send support payments either last month or so far this month. Ms. Sharff explained the employer was required to send the checks. The employer agreed to withhold the money this month when the current pay period ends and to send the check out to the court immediately. The employer also agreed to withhold an additional 25 % of the child support order for the next several months to cover the accumulated arrearage.

Ms. Sharff said that the file indicated that Mr. Kress had come into the court on the 26th of December and executed a Wage Withholding Request form. The court sent notice to Forrest Creek Apartments in January.

Ms. Sharff promised that the court would send the Forrest Creek check to DHS the day after it arrived and that DHS would be likely to send out the "pass through" check to Ms. Walsh next month.

I asked Ms. Sharff when Ms. Walsh would receive her $100 for the arrearage for January and December. She believes that public assistance recipients are not given payments from arrearages, but that I would need to check with DHS, as that is not her department.

Hager and Sherman
Attorneys at Law
201 South Market Street
Rockville, Columbia

MEMORANDUM February 19, 1997

To: Denise Walsh File
From: Andrew Sherman
Re: Mr. Kress's Employment History

I called Buswell & Bennett and learned that Mr. Kress left their employment at the end of October. I then called Forrest Creek Apartments and they told me that Mr. Kress had started working the first Monday in November. Forrest Creek's bookkeeper, Bea Delbert, said that they had not withheld any child support payments from his pay. She confirmed they had never received any inquiry from DHS or the court about the failure to withhold and send in money from Kress's pay. She agreed to sign a declaration if I send it to her. I have done so. Check in ten days to see if returned.

Hager and Sherman
Attorneys at Law
201 South Market Street
Rockville, Columbia

MEMORANDUM February 21, 1997

To: Denise Walsh File
From: Andrew Sherman
Re: Investigation of Court Records

When I was at Superior Court yesterday, I reviewed the following documents in the Walsh court file:

1. A copy of the (Voluntary) Notice and Order to Withhold sent to Buswell & Bennett when the original wage withholding order was issued in 1992 (see attached).

2. A copy of the Interrogatories to be answered by Employer-Garnishee, sent to Buswell & Bennett when the original wage withholding order was issued in 1992 (see attached). There is no indication that these interrogatories had ever been answered.

3. The same (Voluntary) Notice and Order to Withhold and **Interrogatories were** sent to Forrest Creek on the 15th of January. The order included $65.00 per month for arrearages for a total monthly withholding of $325.00. These were signed and returned with none of the blanks filled in, but with a letter providing information about wage withholding for Mr. Kress. I did not get copies of the forms, as they are the same as #1 and #2 above. I did get a copy of the letter from Forrest Creek Apartments (see attached).

The computer was working, so I also obtained a payment history.

• Payments of $260.00 were received regularly by the court through October. These were also disbursed regularly on the day following payment.

• In November no payment.

• In December, $100.00 payment received on the 2nd.

• No payment was received for last month (January) or this month.

Hager and Sherman
Attorneys at Law
201 South Market Street
Rockville, Columbia

MEMORANDUM February 21, 1997

To: File
From: Andrew Sherman
Re: The Arrearages

As Ms. Sharff suggested, I called Gary Morrison, Ms. Walsh's caseworker at DHS regarding the three missed $50 "pass through" payments. First, he confirmed that Ms. Walsh will receive a "pass through" next month for the wages withheld this month by Forrest Creek. Next, he said that AFDC recipients are not entitled to receive a "pass through" for arrearages collected by the department. When I pressed him about whether the reason for the arrearage made any difference in determining an entitlement to a "pass through," he became flustered and defensive. He claimed to know nothing about the reasons for the arrearages in the three months at issue and that anyway, as far as he knew, whenever child support is not collected, no "pass through" check is issued. He said that I would have to speak with Molly Chisolm, in the child support office of DHS.

Molly Chisolm also had little information. There was no documentation from Buswell & Bennett regarding Mr. Kress' termination of employment. There also was no record of any attempts to contact Mr. Kress. She could only surmise from the file that he had left his former job and had begun working at Forrest Creek Apartments. There was no indication of his starting date.

She did, however, clear up the mystery of the $100.00 payment received by the court on the 2nd of December. Kress had sent a personal check to the court which was credited toward the missed payment for November. She did not know when Mr. Kress had sent the payment, but told me (from a copy of a check in her file) that the check was dated the 29th of November, but could not tell me the mailing date.

Ms. Chisolm stated that recipients are not entitled to a "pass through" payment from AFDC for months in which child support is not collected. When the arrearage for those months is ultimately paid, the recipient does not get any "pass through" payments for the months when there was initially no collection. When I noted that Kress had gone to the court in December and had requested wage withholding, but that it had not occurred in either December or January, she said that the court's administrative procedures had followed their normal course and that DHS could not be responsible for employer failures.

SUPERIOR COURT OF THE STATE OF COLUMBIA

FAMILY DIVISION - DOMESTIC RELATIONS BRANCH

State of Columbia ex rel. Denise Walsh,	)	
Petitioner,	)	
vs.	)	Case Number 267853
Lawrence Kress 407 Front Street, Apt. 17 Merion, Columbia	)	
Respondent.	)	

VOLUNTARY NOTICE AND ORDER TO WITHHOLD

T0: Buswell and Bennett (garnishee)

WHEREAS an order to pay child support has been entered against the Respondent:

YOU ARE HEREBY ORDERED to withhold $260.00 monthly from the earnings of the Respondent for support plus _____ per month for arrearages, which amounts to a total of $260.00 monthly until further order of the Court.

Send the amount withheld to: Family Division Clerk's Office, Superior Court, Rockville, Columbia. The check must be made out to: Clerk, Superior Court.

You are required to send the withholding to the Court on the same date the Respondent is compensated.

Within ten (10) days after a change in the amount on Respondent's earning or the payment of any bonus, or within ten (10) days after you receive notice that the Respondent will terminate employment, or within ten (10) days after that termination, whichever occurs earlier, you must notify the Court and provide the Respondent's last known address and the name, address, and 30 telephone number of Respondent's new employer, if known.

You maybe fined up to $10,000 for discharging the employee from employment, refusing to employ an employee, or taking any disciplinary action against any employee because of the withholding.

If you fail to withhold earnings or other income as required under this order, judgment shall be entered against you for any amount not withheld and for any reasonable counsel fees and court costs incurred by the obligor or his representative. This shall not apply if you can prove that failure to withhold was due to circumstances beyond your control.

You are required to comply with the above and to complete the attached form under penalty of perjury, and to file one copy of this paper with the answers written thereon in this Court within ten (10) days after this order is served upon you.

WITNESS the Honorable Chief Judge of this Court this 14th day of May 1992

Clerk of the Superior Court of the State of Columbia

Laurie Allworth

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INTERROGATORIES TO BE ANSWERED BY EMPLOYER-GARNISHEE

If the respondent is employed by you, state separately (a) the amount of gross wages and (b) the disposable earnings, said respondent earns and when it is paid.

ANSWER: (a)

(b)

I declare under the penalty of perjury that the answers to the above interrogatories are, to the best of my knowledge and belief, true and correct as to every material matter.

DATE:_____ _____

Employer-Garnishee

_____

NOTICE THAT RESPONDENT HAS TERMINATED EMPLOYMENT

Employer must retain a copy of this Form in its personnel records and must execute and file the Notice when the respondent terminates employment with the -employer.

Respondent's Name and Case Number _____

I certify under penalty of perjury that the respondent's employment terminated on 19_____ and that the last known address of the Respondent is _____

_____

and the Respondent's new employer is _____

_____.

Signed,

_____

Columbia Department of Human Services
160 Maple Avenue
Rockville, Columbia

October 22, 1996

Denise Walsh
3541 Chesterfield Street, #103
Merion, Columbia

Re: Case #267853

Dear Ms. Walsh:

In accordance with federal regulations, we are reporting to you amounts collected and distributed on your child support cases) for the past fiscal year. Since you are an AFDC client or a former. AFDC client, some of these monies have been kept by Columbia to reimburse the cost for any public assistance that you received. The collections made on your cases) from October 1, 1995 through September 30, 1996 were:

ABSENT PARENT	DOCKET NUMBER	AMOONT COLLECTED
Lawrence Kress	S267-85-3	$3,120.00

During this period the total amount paid to you was: $600.00.

This is a notice only of collections made and distributed for the past fiscal year. It is not a bill and does not indicate monies which may still be owed to you by the absent parent.

THE STATE OF COLUMBIA SUPERIOR COURT
DOMESTIC RELATIONS BRANCH
CHILD SUPPORT ENFORCEMENT SECTION
WAGE WITHOLDING REQUEST FORM

Date: 26th day of December, 1996
[ ] Mandatory [✓] Voluntary Case Number:

Employee's Name: Lawrence Kress Social Security Number: _____

Address: _____

City: Merion State: Col Zip: _____

Home Phone: _____ Work Phone: _____
Employer's Name Forest Creek Apartments Phone: 733-1729

Employer's Address: 4833 Rugby Ave.

City: Merion State: Col Zip: _____
Obligation: Amount To Be Applied to Arrears: $ _____ per _____

Signature of Requestor: Lawrence Kress
If Voluntary, Payor to Sign Here:
Voluntary Withholding Amount: $ _____ Frequency: _____

FOR COURT USE ONLY

[✓] IV-D [ ] Non IV-D IV-D Number:
Employment Verified? [✓] Yes [ ] No Annual Income: $ _____

Payroll Contact Person: Teresa Rawls Phone: 733-1729

Payroll Address: 4833 Rugby Avenue

City: Merion State: Col Zip: _____

Total Arrears This Date: $ _____ Pay Frequency: _____
Total Arrears This Date: $ _____ Pay Frequency: _____

Forrest Creek Apartments
4833 Rugby Avenue
Merion, Columbia

February 11, 1997

Family Division Clerk's Office
Superior Court
Rockville, Columbia

Re: Lawrence Kress, Case No. 267853

Dear Sir or Madam:

I am in receipt of the above-referenced Notice and Order to Withhold and provide the following information as an answer to the Interrogatories:

The Respondent is employed by Forrest Creek Apartments. As employer Forrest Creek Apartments will withhold from Mr. Kress's wages as prescribed and will forward the payments to the Clerk's Office.

The following is a breakdown of the Respondent's bi-weekly salary:

Gross:	$4,00.00	
	Less $30.60	(FICA)
	Less $40.25	(Federal income tax)
	Less $18.60	(State income tax)
	Less $38.00	(Hospital insurance)
Net:	$272.55	

Withholding will begin with the pay period ending February 23, 1997. If you have any questions regarding this matter, please contact the Undersigned.

Sincerely,

Bea Delbert

Bea Delbert
Accounts Payable Clerk

Enclosure

TUESDAY AFTERNOON
FEBRUUARY 25, 1997

California Bar Examination

Performance Test A

LIBRARY

In re Denise Walsh

LIBRARY

State of Columbia Code 1981
Title 3 Public Assistance.
Subchapter X. Hearing Procedures.

§3-2. Right to hearing; notification of right.

An applicant for, or recipient of, public assistance, aggrieved by the action or inaction of the Agency, shall be entitled to a hearing. Each applicant or recipient shall be notified of his or her right to a hearing. Upon request for a hearing, reasonable notice of the time and place thereof shall be given to the applicant or recipient.

§3-3 Grounds; objectives of hearing process.

(a) The Agency, upon receipt of an oral or written request, shall grant a fair hearing to any applicant for, or a recipient of, public assistance, whose claim for assistance has been denied or who is aggrieved by any other action or inaction of the Agency which affects the receipt, termination, amount, kind, or conditions of assistance.

(b) The following are the major objectives of the hearing process in public assistance:

(1) To ascertain the facts regarding the disputed action or inaction and, through application of the law and policies, to reach a just and equitable decision.

(2) To safeguard applicants and recipients from mistaken, negligent, unreasonable, or arbitrary action by agency staff.

(3) To reveal aspects of agency policy that are inequitable or constitute a misconstruction of law. It is intended to submit policy to test and argument, and to place in the hands of policy-making officials evidence indicating the need for modification of policies and standards, and the nature of the needed modification.

§ 3-4 Hearing procedure enumerated.

The administrative law judge shall insure that both the claimant and the Agency's agent have the opportunity to present all facts that have a bearing on the disputed action or inaction, and have adequate opportunity to examine material that will be introduced as evidence. The claimant or his or her counsel shall be allowed to examine and cross-examine witnesses and present oral argument and documentary evidence.

§3-5 Correction or change in policy, construction, or interpretation.

Whenever a claimant challenges a departmental policy or the administrative construction or interpretation of relevant statutes, regulations, orders, or departmental directives, and his or her claim for relief is granted by the administrative law judge, the Agency will correct the challenged policy, construction or interpretation.

United States Code
Title 42. The Public Health and Welfare.
Chapter 7. Social Security.
Subchapter IV, Part A. Aid to Families with Dependent Children;
Part D. Child Support.

§657. Distribution of proceeds

The amounts collected as support by a State pursuant to a plan approved under this part shall be distributed as follows:

* * *

(b) (1) of such amounts as are collected periodically which represent monthly support payments, the first $50 of any payments for a month received in that month, and the first $50 of payments for each prior month received in that month which were made by the absent parent in the month when due, shall be paid to the family without affecting its eligibility for assistance or decreasing any amount otherwise payable as assistance to such family during such month;

(2) such amounts as are collected periodically which are in excess of any amount paid to the family under paragraph (1) and which represent monthly support payments shall be retained by the State to reimburse it for assistance payments to the family during such period;

(3) such amounts as are in excess of amounts retained by the State under paragraph (2) and are not in excess of the amount required to be paid during such period to the family by a court or administrative order shall be paid to the family ....

§666. Requirement of statutorily prescribed procedures to improve effectiveness of child support enforcement

(a) Types of procedures required

(1) In order to satisfy section 654(20)(A) of this title, each State must have in effect laws requiring the use of the procedures described in subsection (b) of this section and in the regulations of the Secretary, to increase the effectiveness of the program which the State administers under this part.

* * *

(b) Withholding from income of amounts payable as support

The procedures referred to in subsection (a)(1) of this section must provide for the following:

(1) In the case of each absent parent against whom a support order is or has been issued or modified in the State, and is being enforced under the State plan, so much of such parent's wages (as defined by the State for purposes of this section) must be withheld, in accordance with the succeeding provisions of this subsection, as is necessary to comply with the order……

* * *

(3) (A) The wages of an absent parent shall be subject to such withholding, regardless of whether support payments by such parent are in arrears, on the effective date of the order . . . .

* * *

(5) Such withholding must be administered by a public agency designated by the State, and the amounts withheld must be expeditiously distributed by the State or such agency in accordance with section 657 of this title under procedures (specified by the State) adequate to document payments of support and to track and monitor such payments, except that the State may establish or permit the establishment of alternative procedures for the collection and distribution of such amounts . . . so long as . . . such procedures will assure prompt distribution, provide for the keeping of adequate records to document payments of support, and permit the tracking and monitoring of such payments.

(6) (A) The employer of any absent parent to whom paragraph (1) applies, upon being given notice, must be required to withhold from such absent parent's wages the amount specified by such notice . . . and pay such amount . . . to the appropriate agency . . . for distribution in accordance with section 657 of this title.

* * *

(C) The employer must be held liable to the State for any amount which such employer fails to withhold from wages due an employee following receipt by such employer of proper notice under subparagraph (A).

(D) Provision must be made for the imposition of a fine against any employer who discharges from employment, refuses to employ, or takes disciplinary action against any absent parent subject to wage withholding required by this subsection because of the existence of such withholding and the obligations or additional obligations which it imposes upon the employer ....

* * *

(9) The State must extend its withholding system under this subsection so that such system will include withholding from income derived within such State in cases where the applicable support orders were issued in other States, in order to assure that child support owed by absent parents in such State or any other State will be collected without regard to the residence of the child for whom the support is payable or of such child's custodial parent……

Beasley, et al., Plaintiffs v. Ginsberg, et at., Defendants

United States District Court for the District of Connecticut (1989)

Plaintiffs bring this action pursuant to 42 U.S.C. § 1983 on behalf of themselves and their minor children as recipients of Aid to Families with Dependent Children ("AFDC") benefits through the Connecticut Department of Human Services (DHS). Plaintiffs' motion for final class certification was granted and includes "(a111 families who have received, are currently receiving, or will receive AFDC benefits from the State of Connecticut and on whose behalf child support has been paid, is being paid, or will be paid by the absent parent."

Defendants are the commissioners of the Department of Human Services and the Family Division of the Judicial Department ("FD"). Plaintiffs seek declaratory and injunctive relief from defendants' allegedly illegal practices in connection with the child support "pass-through" provisions of the Deficit Reduction Act of 1984 ("DEFRA"), 42 U.S.C. §657(b)(1), et seq., claiming that:

(1) Defendants have violated 42 U.S.C. §657(b)(1) by improperly determining when pass-through payments should be made.

(2) Defendants have violated 42 U.S.C. §§666(a)(1) and 666(b)(5) by failing to comply with and enforce the wage-withholding provisions of Title IV-D -of the Social Security Act.

(3) Defendants have violated 42 U.S.C. §657(b) and the due process guarantees of the Constitution by not providing plaintiffs with notice as to the amounts of child support received on their behalf, the date of such receipt, whether a pass-through payment will be made, and the procedures for requesting a hearing to correct any claimed errors.

Plaintiffs also claimed that defendants' policy and practice of not forwarding child support payments to AFDC families until three months after receipt violates the "reasonable promptness" requirement of the statute and deprives plaintiffs of their property without due process of law, in violation of the Fourteenth Amendment to the United States Constitution. Defendants argue that "prompt" should be defined as that which is administratively feasible.

Due to the implementation of a new computer system, payments are now being made one month after the close of the month of collection. Plaintiffs concede that the current practice satisfies "promptness" requirements and no longer seek relief on these counts.

I. Statutory History and Background

Congress enacted the AFDC program (1) to encourage the care of dependent children in their own home or that of relatives and (2) to ensure that parents or guardians are financially able to provide for these children. 42 U.S.C. §601. Title IV-A governs the administration of the program and provides for monthly assistance payments. The program is a federal-state cooperative effort. State participation is optional, but states that choose to participate must design a program defined in a state plan that meets federal requirements. Congress also enacted Title IV-D, 42 U.S.C. § §651-67 which requires participating states to provide child support enforcement services pursuant to a state plan that meets specific federal criteria and places certain child support enforcement obligations within the AFDC program under Title IV-A. Under this combined program, each applicant must assign to the state his or her right to child support and must cooperate in obtaining support payments. Title IV-D also requires states to form cooperative agreements with the appropriate courts and law enforcement officials to assist in obtaining child support.

In Connecticut, an applicant for aid must assign his or her right to child support to DHS and assist in enforcing support obligations. Upon approval, the applicant receives monthly payments fixed by regulations. DHS has a duty to "coordinate, plan and publish the state child support enforcement plan for the implementation of Title IV-D." Through agreements DHS has enlisted FD to ensure that absent parents comply with child support orders. One means by which FD seeks compliance is through wage executions.

II. Facts

Beasley alleges that her former husband has been paying child support payments of $200 through the Sacramento (California) County Child Support Unit on behalf of her four children. These payments are forwarded to Connecticut monthly. In January 1985, Beasley received a pass-through payment representing her husband's October 1984 support payment. From January 1985 through September 1985, and from November 1985 through April 1986, Beasley

received monthly pass-through support payments for child support paid three months earlier. In October 1985 and May 1986, Beasley did not receive pass-through payments, despite her belief that her husband made payments which would have entitled her thereto. She was not told that the pass through payments would not be made, why they would not be made, nor was she afforded a hearing to contest the non-payment.

DeJesus is also an AFDC recipient. The father of her children has been paying child support of $40 per week through a wage garnishment. Despite DHS's and FD's legal ability to enforce regular collection of such garnished wages and, despite the fact that the employer regularly withholds the wages, support payments have been collected only for August 1984, December 1985, and May 1986. She also was not given notice that she would not receive pass-through payments and was not given a hearing to contest the non-payment.

III. Discussion

A. Obligor Payment

Plaintiffs claim that the state's policy of making child support pass-through payments only when the payments are received by DHS in the same month in which they are due violates 42 U.S.C. §657(b). A support payment made by an obligor within a given month, but not forwarded to DHS in the same month because of bureaucratic delays is certainly no basis to penalize an AFDC family. No rational purpose is served by denying child support to a needy family because the state itself has not received nor promptly entered the money into its books.

B. Withholding

The Act, 42 U.S.C. §657(b), requires that, where child support is withheld by the absent parent's employer in the month when due, even if forwarded late by the employer, the AFDC family is entitled to a pass-through of $50. If an employer withholds child support in the month the support is due and subsequently pays that support to the IV-D agency in a later month, the $50 pass-through must be credited for the period during which the withholding actually occurred. Defendants assert that they do consider the payments "made" when the employer irrevocably withholds the wages and they have complied with the Act by having DHS notify employers that they are required to furnish the state with the date the support payment is

withheld. The point of contention is the extent of defendants' obligation to ascertain the date of the wage withholding. Defendants will pass-through $50 of child support withheld in the month when due, but forwarded by the employer in a subsequent month, only if the employer provides the withholding date to the IV-D agency. Where the withholding date is unavailable, the date of receipt is used for posting purposes and no pass-through payment is automatically generated. However, if the AFDC recipient provides or the child support caseworker otherwise determines the correct withholding date, a supplemental payment can be requested and manually issued. The defendants' solution is unacceptable. The AFDC recipient's entitlement is not dependent on his or her own knowledge or ability to prove when child support payments have been withheld nor the employer's documenting wage-withheld child support. Section 657(b)(1) creates no obligation on the beneficiary. As the section obliges.agency action if the facts entitle the recipient to the benefit, it impliedly creates an affirmative obligation on the IV-D agency to determine the date of withholding.

C. Enforcement

Plaintiffs also allege that the failure of DHS to enforce the timely forwarding of child support withheld by employers violates 42 U.S.C. §§666(a)(1), and 666(b)(5). Read together, these sections require the state to establish a plan for garnishment of wages and to distribute these expeditiously in accordance with §657 "under procedures (specified by the state) adequate to document payments of support and to track and monitor such payments." 42 U.S.C. §666(b)(5). Federal regulations issued pursuant to the statute require the employer to send the amount withheld to the state within ten days of the date the absent parent is paid. Defendants claim they have complied with the law by distributing a guide to over 80,000 employers outlining employer obligations regarding garnishments, including the ten day forwarding requirement. They also point to the capabilities of the new automated child support system to facilitate enforcement of employer compliance with garnishments. However, the employer does not report the date the obligor is paid, which is the date of withholding, and the system is not set up to keep this information. Absent such recording, the state cannot determine when an employer fails to forward withheld amounts within ten days. Therefore, defendants do not have procedures to track the date of withholding and to enforce timely forwarding of wages withheld. The state must take steps to determine the date of withholding to fulfill its statutory obligation to pass-through $50 of child support where withholding occurs in the month in which the support is due.

Defendants' obligation to monitor payments of support includes enforcement of the employer's obligation to forward wage-withheld support within ten days of payment. There are no procedures for identifying employers who fail to forward wage-withheld child support on time, nor for dealing with such delinquent employers. While defendants are not guarantors of obligors' payments nor of employers' prompt turnover of withheld wages, they are obliged to adhere to a minimum standard designed to maximize collection and prompt turnover of such withholding to entitled beneficiaries. The foregoing failures of defendants constitute violation of 42 U.S.C. §666(b)(5).

Defendants also contend that plaintiffs suffer no harm from employer delay in forwarding wage garnishments, since eligibility for a pass-through is determined by the date of withholding and not the date of receipt. To the extent AFDC recipients actually receive supplemental pass-through payments for late forwarded withholding (but note prior discussion regarding failures to credit late forwarded withholding to recipients) they are harmed by the delay in receiving such money. Such delays, of no consequence to defendants, could be extremely serious for recipients who are on a tight budget. By not enforcing the timeliness requirement, defendants are tolerating an employer's delay and by inaction, are delaying recipients' receipt of payments to which they are entitled.

D. Notice

Plaintiffs further allege that defendants' failure to provide monthly notice of the amounts of child support received on plaintiffs' behalf, the dates such payments were received, and whether a pass-through payment will be made, and their failure to provide an opportunity for a fair hearing to challenge the amount of the pass-through payment or the failure to make such a payment violates the statute and deprives the plaintiffs of their property without due process of law in violation of the Fourteenth Amendment. Since this suit was filed, defendants began to grant hearings regarding pass-through determinations to AFDC recipients who request them. The remaining issue is whether the notice to AFDC beneficiaries regarding child support collection and pass-through determinations is statutorily and constitutionally sufficient.

1. Statutory Claim

42 U.S.C. §602(a)(4) gives AFDC recipients a right to notice of any reduction or termination

of benefits. However, 42 U.S.C. §654(5) requires the state to provide, at least annually, a notice of the amount of support payments collected during the past year. Since DHS provides this notice, defendants are in compliance with statutory notice requirements.

2. Due Process Claim

Plaintiffs allege that they and the class are entitled under the due process clause of the Fourteenth Amendment to monthly written notice of the dates and amounts of child support received on their behalf, the amount of any pass-through payments to be made, or the reasons why a pass-through will not be made, together with notice of the procedures for requesting a hearing to challenge either the failure to make or amount of a pass-through payment. Plaintiffs clearly have a property interest in the pass-through payment which could not be extinguished absent procedural due process. The form of that process depends on circumstances such as the interest at stake, the risk of erroneous deprivation, the value of different types of safeguards, and administrative cost.

Pass-through payments are dependent on collection of support from an obligor, a factual situation which can vary from month to month. Plaintiffs' entitlement may range from no entitlement to multiple pass-throughs in a given month, such as when support payments with held properly for several months are paid to the state at one time. Thus, an AFDC family must be notified of the underlying facts in order to know if there is a basis for the recipient to challenge the pass-through provided by the state. Each recipient is now left to his or her own devices to ascertain the information necessary to evaluate any state error. Because that system does not reasonably apprise recipients of the information they need to enforce their right to pass-throughs, it fails to meet the requirements of due process. Each plaintiff and class member is entitled to monthly notice of a) the dates and amounts of child support collected by the state; b) the month to which each payment is allocated; c) the month in which the pass-through will be made and the amount of the pass-through; d) a statement of the reasons) why a pass-through will not be made in relation to amounts collected; and e) the availability of and procedures for requesting a hearing.

The parties shall, on or before October 23, 1989, propose orders as to the form and schedule for providing notice consistent with the requirements of this opinion.

Kenyon v. Sullivan

United States District Court for the District of Rhode Island (1991)

Plaintiffs filed this action against the Director of the Rhode Island Department of Health and Human Services ("DHS") challenging the state's method of distributing "pass-through" payments. from child support received by the state on behalf of the plaintiffs.

As a condition to receiving AFDC benefits, a parent is required to assign the state his or her right to child support payments. The state is required to enforce the absent parent's support obligations. Support payments collected by the state are distributed pursuant to 42 U.S.C. §657. In some circumstances (exactly what circumstances is at issue here), the first $50 of a monthly support payment is passed through to the family.

The Family Support Act of 1988 provided that the $50 pass-through payment applied both to the support payment for the then-current month and to each payment for prior months collected during the current month, provided the support payment for a prior month was paid when due.

There are at least four goals of the pass-through program: (1) to provide an incentive for AFDC recipients to cooperate with support enforcement (2) to provide an incentive for absent parents to make regular and timely support payments (3) to provide supplemental income to needy families and (4) to reduce governmental spending and the federal deficit.

Plaintiffs bring this action under 42 U.S.C. § 1983, asserting two basic claims: (1) that DHS has failed to properly pass through the first $50 of child support collected, in violation of plaintiffs' rights under 42 U.S.C. and 657(b)(1); and (2) that DHS' failure to provide notice of the amount of support collected and the determination regarding a pass-through, and the failure to provide an opportunity for a hearing on the determination deprives plaintiffs of property without due process of law in violation of the Fifth and Fourteenth Amendments. Plaintiffs seek declaratory and injunctive relief.

As set out below, I find that the material facts are not in dispute and that plaintiffs have demonstrated that they are entitled to judgment as a matter of law. Summary judgment is, therefore, granted in their favor.

I. Entitlement to Pass Through Payments

Rhode Island's Family Support Program is administered by the DHS. DHS has the responsibility of determining whether a pass-through payment is due to families receiving AFDC benefits and for distributing such payment to AFDC families.

DHS has issued no written instructions, policies, memoranda or other written material specifying the circumstances under which a recipient will receive a pass-through payment for a month in which DHS received no child support.. DHS has no system for distinguishing the date payment is "made" by the parent from the date it is received by DHS. Although it has a computerized system for recording child support collections, that system records only the date child support is received and contains no space for entry of other dates, including the payment date. DHS neither monitors nor records the date of wage-withholding or the postmark dates.

A. Wage Withholding

DHS admits that it uses the date of withholding only if it is supplied by the employer; otherwise it uses the date of receipt. DHS' forms to employers do not request the date of withholding; it has no method for determining the date of withholding; it has no enforcement mechanism for dealing with employers who do not supply the date; and its computerized system does not even provide space to indicate the date of withholding. This court finds that because DHS has failed to live up to its obligation to determine the date of withholding, its policies and practices violate plaintiffs' rights under 42 U.S.C. §657(b?(11.

B. Interstate Collection

As in the wage withholding -cases, DHS considers an interstate child support payment which is collected by another state to be "made" when DHS receives the payment unless the date payment was made is supplied. It has no method for determining or recording the date payment was made to the collecting state. I thus find that in interstate cases DHS is violating plaintiffs' statutory rights by failing to live up to its affirmative duty to obtain the date of payment in the collecting agency.

C. Payments Made by Mail

When support payments are made by mail, it has always been DHS policy to disregard the date of postmark when determining whether a pass-through payment is due. DHS has instead relied upon the date of receipt and argues that there is no federal "date of postmark" rule and whether to adopt such a rule is left to each state. The federal Secretary has not promulgated regulations regarding the date to credit payments made by mail. On this basis the Fifth Circuit ruled that state agencies may use the date of receipt for mailed payments. That court, in Reed v. Swank, said:

> Plaintiffs' arguments support the reasonableness of a rule interpreting "made" in section 657(b)(1) to include mailing, but they fall short of demonstrating the state's interpretation that a payment sent by mail is not "made" until actually received is inconsistent with the statute. Neither the statute nor the legislative history suggests Congress considered this specific question. The state's interpretation is a permissible one absent federal regulation to the contrary.

Unlike the Fifth Circuit, however, I believe that the statute dictates use of a postmark rule when payment is accepted by mail.

As is clear from the discussion of wage withholding and interstate collection, section 657(b>(1) indicates that agencies should not use the date of receipt when calculating pass-through payments. The Act is not framed in terms of a payment as "received" or "collected" in the month when due, but in terms of a payment when "made" which suggests an irrevocable transfer of the funds into the possession or control of the agency obliged to make the pass-through. Once an absent parent posts the payment he can do no more to complete the act of "making" a payment. It would not be fair to deprive the AFDC family of a $50 pass-through when support was mailed in the month when due but, due to postal delays, the payment is not received by DHS until the following month. If the statute mandates the date payment is "made" rather than the date it is "received" be used in other contexts, it is only rational to interpret the statute to reject the use of the date of receipt in payments involving the mails. A date of postmark rule is also in keeping with the common law rule that "payment is made when a letter containing the remittance properly addressed and with postage prepaid is deposited in the mail." I, therefore, hold that, if payment by mail is accepted, section 657(b)(1) requires that DHS credit the payment as of the date it is postmarked.

II. Notice

Plaintiffs argue that they are deprived of property without due process of law in violation of their Fifth and Fourteenth Amendment rights because they are not provided with adequate notice and an opportunity to be heard. DHS contends that the yearly notice plaintiffs receive is adequate and that a hearing is available under Rhode Island Law. The yearly notice informs plaintiffs of the total amount of support collected and the total amount of pass-through payments made.

Section 657(b)(1) creates a property interest for plaintiffs in the pass-through payments. In accordance with the Constitution, plaintiffs cannot be deprived of that property interest without due process of law. In order to determine what process is due, this Court must balance three factors: first, the private interest that will be affected by the official action, second, the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards, and third, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. Plaintiffs' interest in the pass-through payments, while not as great as their interest in their primary AFDC benefits, is significant. An additional $50 a month can be very important to a low-income family. Due process requires that the recipients be given sufficient notice to permit them to determine whether they are receiving the support to which they are entitled. The notice plaintiffs currently receive, which does not include the date child support payments were made or the date pass-through payments were made, in no way apprises plaintiffs of the information necessary for them to determine if DHS has mistakenly deprived them of payments.

This Court must also weigh the burden on the government of supplying more detailed and frequent notice. I find that monthly notice would be too burdensome for DHS. Quarterly notice is sufficient.

Plaintiffs shall submit the proposed form of this notice within 20 days of this order.

ANSWER 1 TO PERFORMANCE TEST A

Statement of the Facts

Denise Walsh is a single mother, living here in the state of Columbia. She is currently enrolled in a job training program in her effort to improve her earnings and better provide for her children.

Denise has been receiving AFDC payments monthly, along with $50 "pass-through" payments. She has not received this pass-through money due to her for December 1996 and January and February 1997 despite the fact that Lawrence Kress, the noncustodial parent of Denise Walsh's children, made a payment in November (which should have been received in December 1996) and made proper notification to the court in December 1996 (which should have made the January and February 1997 payments to Ms. Walsh effective).

A) Arguments for three months "pass-through" payments

Denise Walsh is entitled to payments of the $50 "pass-through" based upon both statutory and constitutional grounds. Had the state of Columbia, and specifically the Department of Human Services (DHS), complied with these requirements Denise Walsh would have received the payments due to her.

I. Sections 666 lblf3) and (bl5) require that payments made by! Lawrence Kress by check dated November 29. 1996 should have resulted in a $50 oass-though nalrment to Denise Walsh in December 1996.

Chapter 7, Title 42 of the United States Code Sections 666(b)(3) and (b)(5) require that the state agency make the necessary withholdings and expeditiously distribute appropriate payments.

Lawrence Kress, who is responsible for payments to the state for child support, changed jobs in November 1996. Because his employer at his new job did not make any withholdings Kress himself mailed a payment dated November 29, 1996 for $100. This payment should be credited as the November payment, and the mandatory $50 pass-through to Denise Walsh should have been made in December 1996.

The court in J Kenyon held that for a mailed payment the postmark is the applicable date rather than the date of receipt by the DHS. Here, the payment was received on December 2, 1996, and the DHS classified it as the December payment. Although the court in Kenyon made reference to Reed, in which the 5th circuit held that the date of receipt was the proper date payment was "made" the more appropriate rule is that followed by the Rhode Island court in Kenyon.

Also, the court in Beasley, in a similar situation, held that the state has an affirmative duty to determine when a payment was made. When a check says one date, and a payment is received via the mail only a few days thereafter, it is more appropriate to require the state to use the earlier date, or the postmark if available, unless the state can show otherwise.

II. Section 666(b)(5) requires that the state implement procedures to track and monitor payments to assure prompt payment, failure of which resulted in Ms. Walsh not receiving her payments.

Any state which decides to take on a state AFDC reimbursement and "passthrough" program must comply with statutory requirements that require the tracking and monitoring to assure "expeditious distribution."

Here Lawrence Kress left employment with his former employer in either late October or early November. Despite the fact that his former employer, Buswell and Bennett, had been withholding pay in accordance with procedures, the "Notice that Respondent has Terminated Employment" form has not been completed. The state apparently has no means either to track the payments made and indicate when payments lapse - as a potential indication of change in employment - nor does it enforce the current system.

In Beasley the noncustodial spouse also changed jobs and no proper notice was made to the state. The court held that the state must have procedures to identify employers who fail to forward timely payments. Such a system should also be required in Columbia. Secondly, Lawrence Kress appeared in court December 26, 1996 to file a wage withholding form for his new employer. This form was not received by his new employer until January 15, 1997 - making withholdings for December past due. Because the current system failed to provide expeditious notice to Kress' employer, Ms. Walsh did not received the January payment due to her.

For these reasons it is apparent that the current Columbia State system does not meet the statutory requirements for expeditious payment or tracking and monitoring of payments. As such Denise Walsh should be granted not only the
November payment, but also December and January payments (receivable in the following months).

III. Denise Walsh is entitled to the November 96-January 97 payment, to be received by her in December 96-February 97 under section 666(b)(6) because an employer liable for amounts not withheld after proper notice.

Section 666(b)(6)(a) and (c) require that the state give notice to the employer to withhold wages, and that the employer is thus liable for failing to withhold the appropriate amount. Here, had Columbia had an adequate system to track employer payments, and, had it enforced its current system, which requires the submission of the "Notice that Respondent has Terminated Employment" form, Lawrence Kress' new employer would have known immediately of the need to garnish Kress' wages.

As a result Kress' new employer did not find out until January 15, 1997. Even still the new employer did not withhold January wages as required by the statute. Therefore, Denise Walsh should be entitled to three months "pass-through" payments that were not made as a result of the state's failure to follow statutory requirements. At the very least, this requirement that the employer be liable for payments following notice must be applied as of Kress' December 26, 1996 court appearance. This would require two monthly payments to be made by Kress' current employer

IV. The inadequacies in the state program specifically lack of record keeping. tracking and notice of payments. deprived Denise Walsh of her payments without due process of law.

The court in both Beasley and Kenyon found that the recipients of passthrough payments had a property right expectancy in receiving such payments. As a result the payments cannot be taken away without due process of law. To determine if the procedure was adequate the court must weigh three factors: 1) the importance of the right to the individual, 2) the risk of erroneous deprivation without the procedures, and 3) the administrative burden on the government.

Private Interest

Clearly, for a single mother who is currently in unpaid job training the expectancy of this pass-through payment is compelling. Without this money Ms. Walsh must struggle to make ends meet. The AFDC payment she receives has not been adjusted for inflation in the last 5 years, reflecting the importance of every dollar to Ms. Walsh.

Risk of Erroneous Deprivation without Procedures

Clearly, with the state program as it currently exists it is not only likely, but actually has, resulted in missed payments. A payment made in November was never paid to Denise, and no subsequent payments have been made. This resulted from the inadequate procedures now in place to assure pass-through payments are made.

Administrative Burden

Although there is obvious need for improvements in the system these are needed to bring the system into compliance with the statutory guidelines and with the constitutional requirements. Other states have made similar improvements in their systems. Therefore, any burden on the Columbia DHS is clearly outweighed by the first two factors.

Conclusion

As a result, Denise Walsh should be given three $50 payments that resulted from failures in the Columbia system to meet statutory and constitutional requirements.

B) Specific Corrections to the underlying policies and practices hat cause the problems

We would also like to request that you, in your role as administrative law judge and in accordance with section 3-5 of Title 3, Subchapter X of the Columbia Code, make specific corrections to solve the problems similar to those encountered by Denise Walsh.

I. Require, re DHS to improve their tracking capabilities and to improve efforts to enforce the completion of termination notifications.

In order for the pass-through system to work in accordance with statutory

and constitutional requirements the DHS must develop better tracking and record keeping. If the DHS computer system was able to flag late or missed payments and subsequently mail notices to the person obligated to pay, their employer and the custodial parent, then the system would undoubtedly run more smoothly.

Also, it would alert employers of either their obligation to pay, or if an employee was no longer working for them it could be used to remind them to complete the termination form. This would help prevent lapses in payments when non-custodial parents changed employers.

These tracking and record keeping upgrades should also set up specific procedures for handling payments mailed near the end of the month, keeping in mind the state's duty to determine the proper payment date. These procedures should be available to recipients, non-custodial parents and employers alike.

II. To melt the due process notice requirements to custodial oarents the state should be required to give monthly or quarterly statements to the custodial parent.

The court in both Beaslv and Kenyon found that the annual notice issued by a state is inadequate for constitutional due process requirements. A monthly notice, containing the a) dates and amounts of child support collected by the state, b) the month to which each payment is allocated, c) the month in which the pass-through will be made and the amount of the pass-through, d) a statement as to why a passthrough will not be made, it applicable, and e) the availability of and procedures for requesting a hearing.

Although the court in Kenyon felt that a quarterly statement was adequate, based upon the current state of record keeping and enforcement in Columbia, it is necessary to require monthly statements. If, in the future, DHS can show that its record keeping system is more adequate, consistent with the recommendation in (b)(I) above, then the court can consider going to a quarterly report. But until such time, monthly statements should be required.

Ill, To assist future AFDC recipients who encounter problems the DHS should establish procedures for persons with complaints or missed payments.

Because receipt of the pass-through is extremely important to a vast majority of the recipients the DHS should clarify the procedure for complaints. Oftentimes persons receiving these benefits do not have legal advice easily available to them. In many cases they may not even be aware of the rights. Even for persons educated in the legal profession getting assistance from government agencies like the DHS can lead to roadblocks and obstacles.

For these reasons the DHS should be required to prepare, print, distribute and train their staff on procedures for handling complaints of missed payments. If possible a "hotline" phone number should also be established so that those with immediate concerns know who to call. Persons assigned to the hotline would then be responsible for seeing that all incoming callers get their problems solved or get directed to someone who can further assist them.

ANSWER 2 TO PERFORMANCE TEST A

Statement of the Facts

Denise Walsh is a recipient of a monthly grant through the Aid to Families with Dependent Children program administered by the State of Columbia Department of Human Services. The father of Denise Walsh's child Maria, Lawrence Kress, has been paying $260 per month for support between May of 1992 and October of 1996 as part of a voluntary garnishment of wages through his employer. These payments have been made to the Family Division of the Columbia Superior Court and are forwarded to the Columbia Department of Human Services. Of these amounts, Denise Walsh receives a pass through payment of $50.00 per month.

These pass-through payments have not been made since Mr. Kress changed employers on or about November 1, 1996. His employer failed, as required by law, to notify the Family Division of his last known address and new employer. Mr. Kress made a payment of $100 to the Family Division by personal check which was dated November 29, 1997. This payment was credited on December 2, 1996. Mr. Kress returned to court on December 26, 1996 to execute a new Voluntary Notice and Order to Withhold for his new employer. The new employer, Forrest Creek Apartments, made no withholdings until February 23, 1997 although the Order for Withholding was sent on January 15, 1997.

Thus, Denise Walsh has failed to receive three pass-though payments to which she was entitled. These payments are for December, 1996, reflecting the withholding from Mr. Kress for November 1996, January, 1997, reflecting December 1996, and February, 1997, reflecting January 1997 withholding.

The Defendants have violated 42 USC §657(b)(1) by improperly determining when pass though payments should be made.

The AFDC program was enacted by congress to "(1) encourage the care of dependent children in their own home or that of relatives and (2) to ensure that parents or guardians are financially able to provide for these children (Beasley. et. al. v. Ginsberg, 1989). This program requires under 42 USC §657 (b) that where child support is withheld by the absent parent's employer in the month when due, even if forwarded late by the employer, the AFDC family is entitled to a pass-through of $50. Similarly, as in the instant case, where a payment irrevocably leaves the hands of the obligor, as did a payment on November 29, 1997, the recipient family must not be penalized by removal of the passthrough. As the court in Beasley stated, "No rational purpose is served by denying child support to a needy family because the state itself has not received nor promptly entered the money into its books (Beasley).

The state of Columbia had received the payment to the Family Court though it was not forwarded to the Department of Human Services. The failure of the agency designated by the state pursuant to 42 USC §666(b)(5) to adequately perform this mandated function must not penalize a family in poverty. The timing of this payment is in dispute but, as the court in Kenyon vs. Sullivan has noted, "the act is not framed in terms of a payment as received or collected" in the month when due, but in terms of a payment when made which suggests an irrevocable transfer of funds into the possession or control of the agency obliged to make the pass-through. Thus, the better view is that Denise Walsh should receive the pass-through payment for the month of December.

Defendants have violated 42 USC§666(a)(1), 666(b)(5), 666(b)6(a), and 666(b)(6)(a) by failing to enforce and comply with the wage-withholding provisions of the Social Security Act Title IV-D.

Denise Walsh has been directly harmed by the failure of the state of Columbia to enforce these provisions. Lawrence Kress gave notice to his previous employer which failed to properly report his change. No current program exists to prevent such inaction through enforcement. Thus Lawrence Kress had not returned to court to process the Order of Withholding. Inaction by the state delayed this order a further three weeks. Further still, his new employer Forrest Creek failed to provide withholding until February 23, 1997.

This combination highlights the state's failure to enforce the wage-withholding provisions of 421 USC 666. To penalize a family in poverty for such bureaucratic machinations is unconscionable. Ms. Walsh had no opportunity to remedy these mistakes. She took prompt action to resolve the problem but was unable to. These payments for January 1996 and February 1997 should be credited to her account as the backpayments are made by Mr. Kress. The harm to the state caused by its own inaction is considerably less than the harm to a family in poverty.

Defendants have violated 42 USC §657(b) and the due process guarantees of the US Constitution by not providing Ms. Walsh with notice as to the amounts of child support received on their behalf, the date of receipt, whether a pass-through will be made and the procedures for requesting a hearing.

The failure to withhold Mr. Kress' support payments would have been avoided had proper notice been given. Although the court in Kinsley held quarterly notice to be sufficient, the better view of Beasley of monthly notice is preferred. Ms. Walsh clearly has a property interest at stake and is entitled to due process protection. The quarterly notice envisioned in Kinsley would not have remedied this problem. When balancing the interests of families receiving AFDC, the risk of erroneously depriving them of benefits, and the administrative cost of monthly notices, the demand is for monthly notice.

The administrative judge pursuant to Title 3 Subchapter X of the Columbia Code §35 should order the following changes to protect similarly situated recipients. The Department of Human Services should be ordered to provide monthly notices to recipients as to the dates and amounts of child support collected; the month to which each payment is allocated; the month is which the pass-through will be made and amount; the statement of reasons why a pass-through will not be made; and notice of right to hearing. This change supports the basic goal of AFDC to provide for children and protects the constitutional rights of recipients at limited cost to the government.

A further change should be increased enforcement of the wage withholding provisions. In the instant case, Mr. Kress' previous employer had never returned the interrogatories and was never questioned. Increased .enforcement of existing sanctions would prevent such mistakes-as in Ms. Walsh's case, would support the goals of AFDC generally, and 42 USC §657(b)(1) specifically.

Finally, the Department of Human Services should change the system from date

received to date of postmark. The property interests of recipients mandate that the state determine the date of payment. By not enforcing the timeliness requirement, the defendant tolerates employer delays and inaction and reduces pass-through payments to needy families, as was the case for Ms. Walsh's December pass-through.

The Court must weigh these interests and balance the competing needs within the context of regulating a program to help families. These three steps go a great way towards limiting improper failure to pay badly needed benefits to families in need.

THURSDAY AFTERNOON
FEBRUARY 27, 1997

California Bar Examination

Performance Test B
INSTRUCTIONS AND FILE

DSI, Inc.

DSI, 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. Madison is located within the jurisdiction of the fictional United States District Court for the Eastern District of Columbia and the United States Circuit Court of Appeals for the 15th Circuit.

3. You will have two sets of materials with which to work: A File and a Library. The File contains the factual information about your case. The first document is a memorandum containing instructions for the task you are to complete.

4. The Library contains the legal authorities needed to complete the task. The case reports 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 cases were decided in the jurisdictions and on the dates shown. In citing from the Library, you may use abbreviations and omit volume and page citations.

5. Your response 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.

Montoya & Lopez
Attorneys at Law
1006 Chaco Canyon Road
Madison, Columbia

MEMORANDUM

TO : Applicant

FROM : Jane Walker

RE : DSI, Inc.

DATE : February 27, 1997

Our firm has been very excited about serving our new client DSI, Inc. (DSI), a Columbia corporation. DSI is the brainchild of Robby Lewis and Chris Herndon. DSI is a sports agency specializing in the representation of women athletes. More specifically, DSI proposes to assist women in entering and competing in the sports marketplace. DSI expects to open its doors for business in about two weeks.

The attached excerpt from DSI's business plan contains background information and a description of its proposed activities. DSI recently received from the Columbia Sports Agent Regulatory Commission, which is responsible for administering the Columbia Sports Agent Regulatory Act (CSARA), a letter requiring a $10,000 registration fee to avoid sanctions. DSI wants to know what the legal consequences are if it proceeds with the proposed activities. To a start-up business, the $10,000 registration fee to the Columbia Sports Agent Regulatory Commission could inhibit some of DSI's proposed activities, and DSI could face the prohibitive prospect of having to pay registration fees in each state where it contacts or represents clients.

In addition to the excerpts from the business plan, I have also attached (a) the forms of agency agreement, (b) a letter agreement DSI proposes to use in connection with its high school athlete advisory services and (c) the letter from the Columbia Sports Agent Regulatory Commission.

Write me a memo that analyzes DSI's proposed activities. Address each of these

points:

1) whether each activity is subject to the CSARA;

2) whether DSI's right to receive compensation under its proposed standard form agency agreement and high school advisory services letter agreement is enforceable;

3) If you conclude that any activity could be subject to the CSARA or be unenforceable, recommend modifications to DSI's activities or agreements which may avoid those consequences. Remember, DSI wants to pursue as many of its proposed activities as possible, and our job is to help them find ways to do this.

Be sure to discuss why you make the recommendations you do and how they do or do not meet the client's goals. For example, obtaining a license may solve some problems but it does not meet the client's goal to avoid paying the $10,000.

STATE OF COLUMBIA
Sports Agent Regulatory Commission
1 State Office Plaza
Suite 1700
Capital City, Columbia

Roxanne Foster
Commissioner

February 17, 1997

DSI, Inc.
3710 Taos Drive
Madison, Columbia

Dear DSI, Inc.:

The Sports Agent Regulatory Commission is responsible for administering the Columbia Sports Agent Regulatory Act. This Act prohibits professional sports agents from entering into sports contracts with, or contacting, recruiting or soliciting, student athletes in Columbia without a license.

To obtain a license, you must apply to the Commission and pay the fee of $10,000. If you plan on operating a sports agent business in Columbia, please apply to foe Commission before you engage in regulated activities here. The failure to comply is a criminal offense, which can result in imprisonment, a fine or both.

Good luck in operating your business. Remember the Commission will vigorously exercise its powers to protect our athletes.

Sincerely,

Roxanne Foster

Roxanne Foster

Commissioner

(Excerpt from Business Plan)

Description of Business

The firm will be a sports agency with a concentration on women. The agency will have two divisions: professional and amateur.

Professional Division

The professional division will concentrate on representing women in golf and tennis. Both of these sports primarily involve individual competition against individuals at the professional level. Professional athletes in these sports derive income from sponsors, endorsements, personal appearances.

Sponsors are companies and wealthy individuals who finance training, competition and living expenses in exchange for a share of earnings: Athletes derive income by endorsing products and appearing in advertisements and commercials in exchange for compensation. Athletes may license the use of their names and images. Income may also be earned by personal appearances at malls and sporting goods stores, and public speaking engagements. In addition, tennis players may earn appearance fees for participating in exhibition matches. The firm will represent these athletes in procuring and negotiating sponsorship contracts, endorsement contracts, personal appearances and exhibitions.

The firm will also devote efforts to the representation of American women volleyball and basketball players. These sports involve team competition. The firm will represent such athletes in finding professional opportunities, negotiating professional player contracts with professional teams in the United States and abroad. Athletes abroad often find themselves isolated in foreign cultures and unable to speak the local language. Accordingly, the firm will assist with living arrangements and cultural adjustments. The professional division will also represent athletes in Olympic sports such as track and field. At the professional level, these involve individual competition. The firm will provide traditional agent representation principally to women athletes in negotiating appearances at competitions and endorsement contracts

The firm will aggressively seek post-collegiate professional opportunities for women athletes in other sports. However, the firm will not represent athletes who are still participating in intercollegiate athletics.

Amateur Division

The heart and soul of the amateur division will be the high school advisory services to high school students and their families in selecting a college and the career counseling services to college student athletes. High school girls do not have the benefit of an informal network of advisors, comparable to those available for boys, to provide information on prospective collegiate programs or to provide colleges with information about high school athletes. As a part of the firm's effort, the firm will evaluate and rate collegiate athletic programs for women. Moreover, the firm will use this information to match athletes with colleges and universities that meet their needs. If requested, the firm will also contact colleges and universities to apprise them of the athlete's interest and to provide academic and athletic performance information to universities about the athlete. The firm will advertise these services in local newspapers and through direct mail solicitations.

The firm will devote resources to career counseling at tie collegiate level. This work will consist of personal counseling and workshops. The firm will seek to negotiate with colleges and universities to hold workshops on campuses. The firm expects to conduct a significant number of off-campus workshops. The firm will publicize these workshops in local and campus newspapers and direct mail solicitations. Of course, information about the firm's representation of professional athletes will be made available at these workshops. The firm hopes that the goodwill generated will lead to clients in its sports agency business.

It is our belief that agents can and should play a major role in furthering gender equity at the collegiate level. The firm believes that its aggressive efforts to assist women athletes in finding professional opportunities, its career counseling services and its high school student advisory services will have a tremendous impact. Although the firm expects the representation

of women athletes to be its primary business, it will not exclude men.

Revenues

The firm expects to derive the lion's share of its revenue from commissions on its work with professional and Olympic athletes. The firm will negotiate commissions but expects them to range from 10 to 20 percent. The firm will charge fees ranging from $500 to $1000 for advisory services to high school athletes and their families. Career counseling services will also be priced at affordable flat rates. At the present time, the firm does not expect high school advisory and career counseling services to account for more than 5. percent of revenue.

AGENCY AGREEMENT

THIS AGENCY AGREEMENT dated _____, between _____on behalf of _____, of _____, Columbia (Client), and DSI, Inc., a Columbia corporation, at 3710 Taos Drive, Madison, Columbia (Agent).

Client and Agent agree as follows:

1. Agent Services. Agent will advise and represent Client (a) in procuring and negotiating sponsorships and endorsement contracts, and licensing agreements for the right to use Client's name, reputation and image, and (b) procuring and negotiating personal appearance opportunities and exhibitions. Agent shall have the exclusive right to negotiate the contracts and transactions described in this paragraph on behalf of Client.

2. Compensation. Client will pay Agent an amount equal to 20 percent of all compensation paid to Client pursuant to all endorsement or performance contracts entered into by Client during the term of this Agreement, whether or not assisted by Agent. The amounts payable to Agent shall be paid to Agent within ten days after receipt by Client. Agent may negotiate to require contract payments to be remitted to Agent -payable to Agent, in which case Agent may deduct its commission and remit the balance to Client within ten days after it has received such payments.

3. Reimbursement. Client shall reimburse Agent for all reasonable expenses for travel and related lodging and meals incurred by Agent in the performance of its services under this Agreement. Client shall pay Agent within ten days of receipt of an itemized list of such expenses with receipts.

4. Term. The term of this Agreement shall be two years beginning on the date of this Agreement.

5. Notices and Payments. All notices and payments required to be given or made under this Agreement shall be given or made to the appropriate party at the addresses set forth in the

introductory paragraph of this Agreement unless prior notice of a change in address has been given in writing. Such notices and payments may be personally delivered or delivered by mail. If notice is delivered by mail, it shall be deemed given when placed in the mail, properly stamped and addressed.

6. Arbitration. All disputes under this Agreement shall be submitted to arbitration in accordance with the rules of the American Arbitration Association. Each party shall bear his, her or its own costs of arbitration.

7. Entire Agreement. This Agreement is the entire agreement of the parties and supersedes all prior agreements between the parties over the subject matter hereof. This Agreement may not be modified, altered or amended except in a writing signed by both parties.

AGENT:	CLIENT:
DSI, Inc.	
a Columbia corporation	
By: _____	_____

DSI, Inc.
3710 Taos Drive
Madison, Columbia

____, __

Dear :

Thank you for choosing DSI to assist you with finding the right college or university. Our staff will use its best efforts to provide you with quality service. They will:

(i) meet with you and your parents to determine your needs;

(ii) use our database on the academic and athletic programs of over 1000 colleges and universities to try to match you with at least 10 institutions that best fit your needs;

(iii) if you request, contact colleges and universities so identified on your behalf and provide them with information on your academic background, your athletic skills and experience (including a video);

(iv) evaluate a maximum of 10 colleges and universities that you choose for compliance with federal laws requiring gender equity in sports; and

(v) obtain information about graduation rates, academic advisory services, faculty support, current funding and strategic plans for your sport at a maximum of 10 colleges and universities you choose.

Our fee for these services is the reasonable amount of $500. If you want to enhance your career path, please sign in the space provided below and return the letter to us in the

stamped self-addressed envelope enclosed. Do = send any money now. After we receive your letter, a member of our staff will contact you. Upon the payment of the $500, we will begin our work for you.

DSI, Inc. also has a staff of highly qualified professional agents devoted to finding professional sports opportunities for young women after they graduate from college.

Sincerely yours,

Chris Herndon
President

THURSDAY AFTERNOON
FEBRUARY 27, 1997

California Bar Examination

Performance Test B

LIBRARY

DSI, Inc.

LIBRARY

COLUMBIA SPORTS AGENT REGULATORY ACT

99-101 Definitions

The following definitions apply to this Article:

(a) "License" means a license issued by the Columbia Sports Agent Regulatory Commission to act as a sports agent.

(b) "Athlete" means an individual who

(1) resides in this State;

(2) seeks to be employed as a professional athlete under a professional sport services contract with a professional sports team; and

(3) has never signed a contract for employment with a professional sports team.

***

(d) "Sports agent" means a person who, for a fee, directly or indirectly, tries to get employment for an athlete with a professional sports team.

(e) "Sports agent contract" means an agreement under which an athlete authorizes a sports agent to negotiate with one or more professional sports teams to employ the athlete.

(f) "Person" includes an individual, corporation, partnership, limited partnership, limited liability partnership, limited liability company and any other organization or association.

99-102 Scope of Article

This Article applies only to a sports agent contract that a sports agent makes with an athlete:

(1) before the end of the athlete's last high school or intercollegiate athletic event, including any postseason game; or

(2) within 12 months after the end of the athlete's last high school or intercollegiate event, including any postseason game.

99-103 License required

(a) A person may not act as a sports agent in the State unless the person has a license.

(b) A sports agent may not contact, recruit or solicit, directly or indirectly, an athlete while the athlete is in the State unless the sports agent has a license.

99-104 Prohibited contracts

A sports agent may not make a sports agent contract with an athlete before the athlete's last intercollegiate or high school athletic event, including any postseason game, that purports to take effect after the end of that athletic event.

99-105 Void sports agent contracts

A sports agent contract made by a sports agent who violates this Article is void.

99-106 Civil Penalties

A sports agent who violates this Article is subject to:

(a) payment of:

(1) a refund of any consideration paid to the sports agent by an athlete;

(2) reasonable attorneys' fees and court costs incurred by an athlete who recovers against a sports agent for violation of this Article; and

(3) forfeiture of any right of repayment for anything of value that a local athlete receives as an inducement to enter a sports agent contract before completion of the local athlete's last intercollegiate or high school event, including any postseason game.

99-107 Criminal Penalties

Any person, or agent or officer thereof, who violates any provision of this Article shall be guilty of a felony, punishable by a fine of not more than $20,000 or imprisonment for a period of not less than one year nor more than 10 years, or both.

American College and University Athletic Association

Selected Bylaws

1.0.01. Voluntary Association. The American College and University Athletic Association (ACUAA) is a private nonprofit association.

1.0.02. Membership. Membership is open to all junior colleges and universities accredited by a recognized regional accrediting organization.

1.0.03. Purpose. The ACUAA shall

- promulgate bylaws creating rules and regulations governing the conduct of athletic programs run by member schools.

* * *

- in appropriate circumstances conduct interscholastic athletic competitions and championship series.

* * *

300.0.27 Penalties. Violation of rules and regulations in the bylaws may result in

(b) suspension of a college or university from membership;

(b) suspension of college or university from participation in ACUAA competitions;

* * *

12.02.1 Amateur Student-Athlete. An amateur student-athlete is one who engages in a particular sport for the educational, physical, mental and social benefits derived therefrom and for whom participation in that sport is an avocation.

12.02.3 Pay. Pay is the receipt of funds, awards or benefits not permitted by the governing legislation of the Association for participation in athletics.

12.1.1 Amateur Status. An individual loses amateur status and thus shall not be eligible for intercollegiate competition in a particular sport if the individual:

(a) uses his or her athletic skill, directly or indirectly, for pay in any form in that sport;

(b) accepts a promise of pay even if such pay is to be received following completion of intercollegiate athletics participation; or

(c) enters into an agreement with an agent or other entity to negotiate a professional contract.

12.3.1. General Rule. An individual shall be ineligible for participation in an intercollegiate sport if he or she ever has agreed (orally or in writing) to be represented by an agent for the purpose of marketing his or her athletic ability or reputation in that sport.

12.3.2 Advice. Securing advice concerning a proposed professional sports contract or a scholarship grant-in-aid shall not be considered contracting for representation by an agent under this rule, unless the advisor also represents the student-athlete in negotiations for such a contract.

12.3.3 Athletic Scholarship Agent. Any individual, agency or organization that represents

a prospective student-athlete for compensation in placing the prospect in a collegiate institution as a recipient of institutional financial aid shall be considered an agent marketing the individual's athletic ability or reputation.

Abernethy v. State

Court of Criminal Appeals (Ala. 1988)

Jim Abernethy was indicted for tampering with a sports contest in violation of Alabama Code 1975, § 13A-1 1-143. A jury found him guilty. Sentence was one year imprisonment and a $2,000 fine. This is an appeal from that conviction and is a case of first impression.

The facts of this case show that Kevin Porter was attending Auburn University on a football scholarship. In 1987, Porter was an outstanding football player and was ranked the number one cornerback in the nation.

On August 3, 1987, just before the beginning of Porter's senior year at Auburn, Porter signed a three-year contract with sports agent Jim Abernethy at Abernethy's office in Atlanta, Georgia. In the contract, Abernethy agreed to "represent [Porter] in the negotiation of professional sporting contracts and commercial endorsement contracts." Under the terms of the contract, Porter was to pay Abernethy 5 % of his base salary for each contract negotiated and 10% of the endorsement fees negotiated by Abernethy. Porter testified that he needed money because his mother was in serious financial trouble. In return for representation by Abernethy, Porter agreed to "play ball."

Upon signing the contract, Abernethy gave Porter $2000 and was to give Porter $900 each month, plus $400 for Thanksgiving and $500 for Christmas. Porter received $900 in September and that same amount in October of 1987, but did not receive any additional funds or payments from Abernethy because Abernethy went out of the sports agent business.

At all times in question, Auburn was a member of the American College and University Athletic Association and was governed by its rules and regulations. Those rules prohibited the "professionalization" of a student athlete and provided that a player was not eligible to participate in a sport if that player had "ever taken pay, or the promise of pay for competing in that sport" or if the player had ever "agreed to have an agent market . . . [that player's]

athletic ability or reputation in that sport." The contract between Abernethy and Porter was in violation of ACUAA rules and rendered Porter ineligible to play football for Auburn. Porter testified to the effect that "you're supposed to be declared ineligible" but you remain eligible after signing an agent contract "pending that the university doesn't find out." Porter stated that Abernethy told him "never to tell anyone [about their relationship] because it would destroy his own reputation."

Abernethy dissolved his sports agency, Jim Abernethy Sports, Inc., in November of 1987. On December 15, 1987, an article appeared in The Atlanta Constitution concerning a sports agent investigation conducted by reporter Chris Mortenson. The article publicized Abernethy's activities involving Porter and several other college athletes. At trial, Mortenson testified that one of the reasons Abernethy divulged his activities was because Abernethy said he had had a "religious experience."

Even though technically ineligible, Porter played in all eleven of Auburn's 1987-88 season football games. However, after publication of the newspaper article, he was declared ineligible because of his dealings with Abernethy and was not permitted to play in the Sugar Bowl.

This Court has thoroughly and repeatedly reviewed and scrutinized the evidence the State presented against Abernethy for any fact, circumstance, or inference of criminal intent. Not only have we found none, but we are convinced that the State's evidence proved that Abernethy did not have the requisite criminal intent in his association with Porter.

Abernethy was convicted of tampering with a sports contest. Alabama Code 1975, § 13A-1 1-143, defines the crime of tampering with a sports contest. It provides:

> (a) A person commits the crime of tampering with a sports contest if, with intent to influence the outcome of a sports contest, he tampers with any sports participant or sports official, or with any animal, equipment or other thing involved in the conduct or operation of a sports contest, in a manner contrary to the rules and usages purporting to govern the sports contest in question.

A statute defining a crime must be strictly construed and "one cannot commit an

offense under a statute except in the circumstances it specifies." The crime of tampering with a sports contest requires proof that the tampering was done "with the intent to influence the outcome of a sports contest." A person acts intentionally with respect to a result or to conduct described by a statute defining an offense, when his purpose is to "cause that result or to engage in that conduct." In the context of this case, a violation of the ACUAA rules and regulations does not constitute the criminal offense of tampering with a sports contest unless that violation was done "with the intent to influence the outcome of a sports contest." Mere tampering with a player's eligibility in violation of ACUAA rules is not a criminal offense unless done with the specific intent to influence the outcome of a sports contest.

The State argues that the prosecution sufficiently proved Abernethy's criminal intent. It maintains that evidence of intent was supplied by the fact of Abernethy's knowledge of the ACUAA rules prohibiting the professionalization of athletes. The argument is that Abernethy intended for Porter to play even though ineligible and thereby intended that Auburn play an ineligible player in every game of the season which would result in a forfeiture of those games under ACUAA rules. The unreasonableness of this theory is apparent in its very statement. Pursuant to the law under which Abernethy was prosecuted, it was not a criminal offense to intend for Auburn to play an ineligible player unless there existed an intent to thereby influence the final score of the game. Without the specific criminal intent of the statute, even an intentional violation of ACUAA rules resulting in a player being declared ineligible does not constitute the offense of tampering with a sports contest.

The fundamental reason why Abernethy's conviction must be reversed is because the crime of tampering with a sports contest was obviously not intended to and does not, embrace the agent contract type of situation involved in this case. It's obvious to us that this statute has been stretched to the breaking point in order to embrace the Defendant's conduct within the four corners of this statute.

By remarkable coincidence, on August 3, 1987, the same day Porter signed the contract

with Abernethy, the Alabama Athlete Agents Regulatory Act became effective. Although this act was designed to control and regulate the activities of sports agents, it does not specifically prohibit or make criminal the making of a sports contract with a student-athlete.

Under the provisions of the act, the Alabama Athlete Agents Regulatory Commission may refuse to grant, revoke, or suspend the registration of any athlete agent applicant who "[h]as engaged in conduct which violates or causes a student-athlete to violate any rule or regulation promulgated by the ACUAA governing student-athletes and their relationship with athlete agents." A violation of any provision of the act constitutes a felony "punishable by a fine of not more than $5000.00 or imprisonment for a period of not less than one year nor more than 10 years, or both."

We are not called upon to decide, and we make no indication of, whether Abernethy was guilty of violating any of the provisions of the Alabama Athlete Agents Regulatory Act. We do hold that the State utterly and completely failed to prove that Abernethy tampered with a sports contest with the criminal intent to influence its outcome. Because this reversal is the result of an insufficiency of evidence, the Double Jeopardy Clause prevents Abernethy's retrial.

United States v. Waiters

United State Court of Appeals (7th Circuit, 1990)

Norby Waiters and Lloyd Bloom were sports agents who specialized in representing college football players. Waiters and Bloom would recruit young players still in college and secretly sign them to exclusive representation contracts. The players would then lie about the existence of their contracts on the amateur athletic eligibility forms they submitted to their universities. The athletes would then continue to receive scholarships from these universities and play football on the schools' teams. Waiters and Bloom were convicted of mail fraud, RICO violations and conspiracy for their participation in this scheme. Waiters now appeals to this court, contending that several errors were committed during their trial that should render his conviction invalid. We believe that fundamental errors occurred at trial which prejudiced the defendants' ability to receive a fair trial. We, therefore, reverse and remand with instructions for a new trial.

Norby Waiters, a former nightclub owner, and Lloyd Bloom, a 25-year old, self-described salesman, together formed World Sports & Entertainment ("WS&E") in August, 1984. In the past, Waiters had represented entertainers such as the Jackson Five, Dionne Warwick and The New Edition. With their new enterprise, Bloom and Waiters hoped to make the transition from managing musical entertainers to representing professional athletes.

Waiters and Bloom would entice talented college football players to sign exclusive representation contracts with WS&E by providing signing bonuses in cash, no-interest loans, sports cars and other incentives. As it was in the interest of both the agents and their clients for the players to retain their college eligibility, the contracts were post-dated and the agreements were kept secret by both sides.

The American College and University Athletic Association ("ACUAA") forbids players from signing with an agent or receiving compensation for athletics before the expiration of

collegiate eligibility. An athlete who violates these rules is considered to have waived his eligibility in return for payment, and can no longer compete in college athletics. Schools who are members of the ACUAA require their players to submit forms testifying to the lack of such restrictions on their eligibility. The forms are then filed with the ACUAA. Thus, the players who had signed agreements with Waiters and Bloom would lie to their colleges on these eligibility forms in order to continue to receive scholarships and to play for their school teams.

Prior to beginning their enterprise, Waiters and Bloom consulted with attorneys at the law firm of Shea & Gould in New York concerning the possible legal ramifications of these agreements. Shea & Gould informed the agents that while they were violating ACUAA rules by signing athletes who then continued to play for their college teams, they were not violating any laws. Shea & Gould admits that it was aware that athletes would probably have to conceal this arrangement from their universities. They contend, however, that they were not aware that the athletes would lie openly on their ACUAA eligibility forms.

Waiters and Bloom were much more successful recruiters than agents or negotiators. In all, 58 college football players entered into representation agreements with WS&E. Only two players, however, continued the relationship after graduation from college. The vast majority felt cheated by Waiters' and Bloom's clandestine tactics and signed with other agents prior to the NFL draft. Waiters and Bloom again consulted with Shea & Gould to consider enforcement of the contracts. The agents were out not only their anticipated representation fees, but the loans they had made to the players up front. Their attorneys believed that the contracts were enforceable, but recommended against litigation. The government alleges, and several former clients testified, that Waiters and Bloom personally threatened them in an attempt to enforce those contracts.

On appeal, Waiters challenges the refusal by the trial court to tender an instruction that their actions may have been predicated on the advice of counsel. The linchpin of their defense was that their actions were taken in good faith upon the advice of their attorneys. If the jury

accepted this characterization of the events, Waiters could not have been considered to have formed the specific intent necessary to commit fraud upon the universities. This court has often stated, "the defendant in a criminal case is entitled to have the jury consider any theory of the defense which is supported by the law and which has some foundation in the evidence, however tenuous."

In January of 1985, Waiters met with attorneys at Shea & Gould. In March of that year, he began signing his first clients. Waiters' discussions with counsel, therefore, predated the actions taken in violation of the ACUAA rules. The government vigorously contends that Waiters did not reveal to his attorneys that his clients would lie on eligibility forms. By not revealing this material fact, the prosecution argues, Waiters cannot now raise the advice-of-counsel defense. Waiters, however, stresses that he was not aware of these forms.

Both sides admit that Waiters' counsel informed him that although he would be violating ACUAA rules by concealing the early recruiting of these athletes, he would not break the law by signing these concealed arrangements. It is reasonable to assume that the sports law experts at Shea & Gould would be aware of the eligibility forms required of athletes by universities and the ACUAA. It would also have been reasonable for those attorneys to have considered how these forms might be addressed by Waiters' technically ineligible clients. The lack of discussion could signal that Waiters was unaware of the forms or that Shea & Gould attorneys tacitly considered these forms in issuing their legal opinion.

The one possibility accepted by the court--that Waiters simply chose to lie to his attorneys about his plans--seems patently unreasonable. Waiters, by all accounts, was a rather unethical and unsavory businessman. He frequently operated outside the boundaries of truth and honesty. Yet, this does not persuade us that he would conceal material information from his attorney. Waiters apparently sought out Shea & Gould because he feared that his actions might be illegal. Such a client is more likely to reveal all relevant information than one unconcerned by the consequences of his acts.

The trial court's failure to provide an instruction on Waiters' theory of defense infected the fairness of his trial. Waiters established the basis for such a defense and deserved such an instruction. The refusal to provide an advice-of-counsel instruction was therefore reversible error.

Walters v. Fullwood

United States District Court (S.D.N.Y. 1987)

This civil action is brought by sport agents against Brent Fullwood who was an outstanding running back with the University of Auburn football team in Alabama. His success in the competitive Southeastern Athletic Conference marked him as a top professional prospect. At an unspecified time during his senior year at Auburn, Fullwood entered into an agreement with W.S. & E., a New York corporation. The agreement was dated January 2, 1987, the day after the last game of Fullwood's college football career, and the first day he could sign such a contract without forfeiting his amateur status under sec. 12.1.1 of the ACUAA Bylaws quoted infra. The contract was arranged and signed for the corporation by plaintiff Bloom, and granted W.S. & E. the exclusive right to represent Fullwood as agent to negotiate with professional football teams after the spring draft of the National Football League ("NFL"1. Waiters and Bloom were the corporate officers and sole shareholders of W.S. & E.

On August 20, 1986, W.S. & E. paid $4000 to Fullwood, who then executed a promissory note in plaintiffs' favor for that amount. The-note was secured by a pledge of:

> a security interest in all of the players rights to receive payments under any existing and or future contract or other agreement ("Player Contract") to which the Player may become a party relating to the Players services to or on behalf of any professional football team, if, as, and when such payments shall become due, including any insurance proceeds to which player may become entitled.

At various times throughout the 1986 season, plaintiffs sent to Fullwood or his family further payments that totaled $4,038.

While neither plaintiffs nor defendants have specifically admitted that the W.S. & E. agency agreement was post dated, they have conspicuously avoided identifying the actual date it was signed. There is a powerful inference that the agreement was actually signed before or during the college football season, perhaps contemporaneously with the August 20 promissory note, and unethically postdated as in other cases involving these plaintiffs. No argument or

evidence has been presented to dispel this inference, and the Court believes the parties deliberately postdated the contract January 2. Even if this likelihood is not accepted, it is conceded by all parties and proven by documentary evidence that a security interest was granted on Fullwood's future earnings from professional football, by the express terms of the promissory note of August 20, 1986.

At some point, Fullwood repudiated his agreement with W.S. & E., and chose to be represented by defendant George Kickliter. In March, 1987, Waiters and Bloom brought suit alleging (1) that Fullwood breached the W.S. & E. agency agreement, and (2) that Fullwood owed them $8038 as repayment for the funds he received during the autumn of 1986, which are now characterized as loans.

This Court concludes that the August 1986 loan security agreement and the W.S. & E. agency agreement between Fullwood and the plaintiffs violated sections 12.1.1 and 12.3.3 of the ACUAA Bylaws, the observance of which is in the public interest of the citizens of New York State, and that the parties to those agreements knowingly betrayed an important, if perhaps naive, public trust. Viewing the parties as in pari delicto, we decline to serve as "paymaster of the wages of crime, or referee between thieves." A court should not lend its aid to a corrupt or evil design. We consider both defendant Fullwood's arbitration rights under the National Football League Players' Association Agents' Regulations, and plaintiffs' rights on their contract and promissory note with Fullwood, unenforceable as contrary to the public policy of New York. "The law will not extend its aid to either of the parties or listen to their complaints against each other, but will leave them where their own acts have placed them."

Absent these overriding policy concerns, the parties would be subject to the arbitration provisions set forth in section seven of the NFLPA Agents' Regulations, and plaintiffs' rights under the contract and promissory note with Fullwood also would be arbitrable. However, under the "public policy" exception to the duty to enforce otherwise-valid agreements, we should and do leave the parties where we find them.

In the case before us, no party retains enforceable rights. To the extent plaintiffs seek to recover on the contract or promissory note signed by Fullwood, their wrongful conduct prevents recovery; to the extent Fullwood seeks to compel arbitration, as provided for in the National Football League Player Association's Agents' Regulations, his own wrongs preclude resort to this Court.

All parties to this action should recognize that they are beneficiaries of a system built on the trust of millions of people who, with stubborn innocence, adhere to the Olympic ideal, viewing amateur sports as a commitment to competition for its own sake. Historically, amateur athletes have been perceived as pursuing excellence and perfection of their sport as a form of self-realization, indeed, originally, as a form of religious worship, with the ancient games presented as offerings to the gods. By demanding the most from themselves, athletes were believed to approach the divine essence. Through athletic success, the Greeks believed humans could experience a kind of immortality.

There also is a modern, secular purpose served by secs. 12.1.1 and 12.3.3 of the ACUAA Bylaws. Since the advent of intercollegiate sports in the late 19th century, American colleges have struggled, with varying degrees of vigor, to protect the integrity of higher education from sports related evils such as gambling, recruitment violations, and the employment of mercenaries whose presence in college athletic programs will tend to preclude the participation of legitimate scholar-athletes.

Sections 12.1.1 and 12.3.3 of the ACUAA Bylaws were instituted to prevent college athletes from signing professional contracts while they are stilt playing for their schools. The provisions are rationally related to the commendable objective of protecting academic integrity of ACUAA member institutions. A college student already receiving payments from his agent, or with a large professional contract signed and ready to take effect upon his graduation, might well be less inclined to observe his academic obligations than a student, athlete or not, with uncertainties about his future career.

The agreement reached by the parties here, whether or not unusual, represented not only a betrayal of the high ideals that sustain amateur athletic competition as a part of our national educational commitment; it also constituted a calculated fraud on the entire spectator public.

The first and second claims against Fullwood are dismissed with prejudice, and Fullwood's requests to stay this action and compel arbitration are denied, as the underlying agreements violate the public policy of New York, and the parties are in pari delicto.

SO ORDERED.

ANSWER 1 TO PERFORMANCE TEST B

MEMORANDUM

TO: Jane Walker
FROM: Applicant
RE: DSI, Inc./Your Memo of February 27, 1997
DATE: February 27, 1997

As you asked, I have reviewed materials from our new client, DSI, Inc. to provide advice regarding certain aspects of its proposed business, and I have reviewed its proposed Agency Agreement and its proposed Letter Agreement for high school athlete advisory services.

I. INTRODUCTION

DSI, Inc. proposes to provide several levels of service to amateur and professional athletes, concentrating in services to women athletes. DSI has asked Montoya & Lopez to provide advice regarding the application of the Columbia Sports Agent Regulatory Act ("CSARA") to its proposed activities to determine if CSARA's licensing requirements will be mandatory, and to review its proposed agreements to determine if they are enforceable.

As an initial matter, DSI should understand some of the risks that may be involved should it choose to undertake pursuits that are not outlined in its Business Plan. In actions in other states, prosecutors have pursued criminal charges against sports agents who attempted. to circumvent rules of the American College and University Athletic Association ("ACUAA"). United States v. Waiters (7th Cir. 1990) (reversing RICO, mail fraud and conspiracy for failure to allow defendants to assert an advice of counsel defense); cf. Abernethy v. State (Ala. Ct. Crim. App. 1988) (reversing conviction for tampering with a sporting contest for inducing a player to sign a sports agency contract in violation of ACUAA rules). While these prosecutions were unsuccessful, and the appellate court ruled in one case that the defendants were entitled to rely on advice of counsel in defense to criminal charges, they are an indication that the risks are high for some conduct -- in particular, for paying collegiate players as an inducement to sign. Furthermore, inducing a player to violate ACUAA rules could have serious repercussions for the player -- a loss of eligibility.

All of these risks, of course, are in addition to the penalties provided by **CSARA** for a violation: possible $20,000 fine and 10-years' imprisonment. As the clients are also aware, violations can nullify contracts that they sign with their athletes. In Waiters v. Fullwood (S.D.N.Y. 1987), the court refused to enforce a promissory note or an arbitration clause where the sports agents (the same agents prosecuted in Walters) signed a player and made secret payments to him in violation of ACUAA bylaws. As the court concluded:

> (T)he parties to those agreements knowingly betrayed an important, if perhaps naive, public trust. Viewing the parties in pari delicto, we decline to serve as "paymaster of the wages of crime, or referee between thieves." A court should not lend its aid to a corrupt or evil design. We consider both defendant Fullwood's arbitration rights under the National Football League Players' Association Agents' Regulations, and plaintiffs' rights on their contract and promissory note with Fullwood, unenforceable

as contrary to the public policy of New York. Fullwood at 15.

While this is not binding precedent in Columbia, it should serve as a sober reminder of the risks if DSI varies from its plans, particularly into areas where student athletes must misrepresent their status or where DSI pays students as an incentive to gain their future business.

We should urge DSI, therefore, to consult with us about any changes that it intends to make in its operation and remind them that, pursuant to U.S. V. Waiters, reliance on our advice may provide a defense if DSI has problems in the future.

II. DISCUSSION

A. Application Of CSARA To DSI's Planned Activities.

DSI has proposed a number of severable activities, only some of which will be subject to CSARA. I will discuss each in turn, as it is discussed in the Business Plan.

1. Professional Division

Individual Sports: Golf, Tennis, Track & Field

CSARA does not require a license for all sports agency activities. First, it applies only to individuals residing in Columbia. See 99-101(b). Second, and most importantly for the above-referenced activities, CSARA applies only to an agent's attempts to secure employment for the professional athlete with a "professional sports team." See 99-101(d). Third, it applies only to contracts made with an athlete:

> before the end of the athlete's last high school or intercollegiate athletic event, including any postseason game; or
>
> within 12 months after the end of the athlete's last high school or intercollegiate event, including any postseason game (99-102).

Therefore, so long as DSI is trying to make contact with professional athletes who are more than one year after their last high school or collegiate game, DSI will not need the license described in CSARA.

CSARA will not require a sports agent license of DSI so long as it only seeks to sign an athlete who is involved in an individual sport, and the purpose is to arrange sponsorships, endorsements, personal appearances or even individual sporting events. DSI must be careful not to use this exemption, however, to approach student athletes involved in individual events. Even in individual sports, an athlete will lose amateur status under ACUAA by-laws, and will need to misrepresent her status if she "accepts a promise of pay even if such pay is to be received following completion of intercollegiate athletics participation" or "enters into an agreement to negotiate a professional contract." As noted above, criminal prosecutions have been largely unsuccessful so far, but the courts have not rejected the possibility of criminal liability for placing a student athlete in this position. Thus, DSI should carefully monitor its activities to ensure that it does not

information on your academic background, your athletic skills and experience (including a video)." This comes dangerously close to the ACUAA prohibitions where any financial aid could be involved (as it will in many instances) and represents a risky area of involvement.

Finally, with regard to amateur activities, DSI proposes to provide "information about the firm's representation of professional athletes" at certain career counseling, off-campus workshops. This also is a risky area under CSARA because of its prohibitions against contact(ing), recruiting) or soliciting) directly or indirectly, an athlete while the athlete is in the state unless the sports agent has a license." CSARA 99-103(b).

I recommend that DSI delete its plans to represent students with colleges and universities to avoid any difficulties with the ACUAA. And I recommend that it avoid promoting its professional representation activities at career counseling workshops unless it intends to obtain a CSARA license (perhaps it could simply delay these activities until it is well enough established that the $10,000 cost is not as serious a burden, thereby lessening the burdens it will have complying with my concerns in Section II(A)(1) above).

B. EnforceabilitY,9f Dy51 Agreements

1) Agency Agreement

As noted in the Introduction's discussion of Walters v. Fullwood, certain violations of even ACUAA Bylaws could render the Agency Agreement and its arbitration clauses unenforceable. Furthermore, when a contract violates CSARA, the contract is void. See CSARA 99-105 ("A sports agent contract made by a sports agent who violates this Article is void."). By carefully controlling its activities as discussed in Section II(A)(1), and by religiously avoiding any attempt to sign a student athlete, DSI's Agency Agreement will be acceptable. However, some improvements are possible.

To avoid the prospect of innocent mistakes, I recommend that DSI add discussion of prohibited contracts, e.g.:

Agent cannot represent and cannot agree to represent in the future any athlete who is currently subject to eligibility rules and other Bylaws of ACUAA. Agent cannot represent and cannot agree to represent any athlete who has completed her student athletic eligibility at anytime within the past year of the signing of this Agreement. Client's signature hereto shall constitute her representation that she understands these limitations, and that is neither (i) subject to eligibility rules and other Bylaws of the ACUAA, and that (ii) she has not competed in any high school or college athletic event in the past year and has no intention of competing in any future high school or college athletic event.

Secondly, I am a bit concerned by the addition of a reimbursement for "all reasonable expenses" without some limitation. While this is arguably beyond the scope of the assigned memo, we should consider whether this could be an unconscionable and unenforceable provision, particularly when expenses are incurred for athletes who have no realistic prospects of professional compensation, or when compensation will be far less than possible expenses.

Finally, note that the Agreement actually makes no provision for "finding professional opportunities, (or) negotiating professional player contracts" as anticipated by the Business Plan (and, so long as such efforts are not undertaken it ameliorates some of the concerns that caused me to suggest the added language, above). Presuming, however, that DSI hopes to use this Agreement for those purposes, it will need to add appropriate language. As written, the Agreement seems to go no further than providing for sponsorship, endorsement and personal appearance opportunities. Because the Agreement is for two years, does not include provisions for professional player contracts, the statute of frauds could bar the contract's enforcement when used for such purposes (note also that, as the drafter of the Agreement, contract principles will construe ambiguities against DSI).

2. Letter Agreement

In discussion above, I have already addressed the concern in the letter agreement: item iii ("if you request, (DSI will) contact colleges and universities so identified on your behalf..."). To avoid possible conflict with ACUAA Bylaws, we should recommend that DSI re-write this section to provide services, rather than representation, e.g.:

if you request, we will forward information on your academic background, your athletic skills and experience (including a video) to colleges and universities that you have designated.

I also recommend deletion of the statement in the penultimate paragraph that these services are undertaken to "enhance your career path . . ." While this may be a less important point than the one above, 1 recommend this change to avoid any conflict with CSARA's prohibitions on contacting, recruiting or soliciting student athletes (99-103(b)) and ACUAA Bylaws prohibitions on an individual being "represented by an agent for the purpose of marketing his or her athletic ability or reputation in that sport" (ACUAA Bylaws 12.3.1). Instead, the statement, "to enhance your athletic experience," may be more acceptable and more consistent with ACUAA's aspirational goals that a student athlete is involved in sport "for the educational, physical, mental and social benefits derived therefrom and for whom participation in that sport is an avocation." ACUAA Bylaws 12.02.1.

These changes will help ensure that the Letter Agreement is fully enforceable and does not conflict with provisions of CSARA that may invalidate it **(CSARA 99-105),** or the public policy arguments that could invalidate a contract where it conflicts with ACUAA Bylaws (see Walters v. Fullwood).

CONCLUSION

I have addressed your third point, recommending modifications to DSI's activities or agreements, at the point where I discussed each of the possible problems, thus avoiding the need for excessive cross-referencing. In short, DSI's Business Plan will provide few difficulties with CSARA so long as it does not vary from its plans, and its Agreements will be enforceable as written so long as DSI carefully controls how it uses those Agreements. The changes that I have suggested, however, will make the Agreements more immune to attack and avoid potential problems that could occur if the Agreements are misused. But because of the potentially heavy penalties, DSI must be scrupulous in its observation of the advice discussed herein.

ANSWER 2 TO PERFORMANCE TEST B

MEMORANDUM

TO: Jane Walker
FROM: Bar Applicant
RE: DSI, Inc.
DATE: February 27, 1997

This is in response to your request to analyze DSI's proposed activities in light of the Columbia Sports Agent Regulatory Act. I will address each proposed activity separately and will conclude with any relevant recommendations with explanations as to how it will meet DSI's, goals.

I. Are the proposed activities subject to CSARA:

DSI proposes two divisions within the agency:

Professional Division - under this division DSI proposed the following activities:

A. Concentrate on representing women in golf and tennis at the professional level; represent them in procuring and negotiating sponsorship contracts, endorsement contracts, personal appearances and exhibitions.

This first proposal would not implicate the provisions of CSARA because of the following reasons:

The golf and tennis players do not fall within the definition of "athlete" under §99101(b) of the act if they are already employed as a professional athlete, under a professional sport service contract with a professional sport team or as individuals, not part of a team.

DSI will not be classified as a "sports agent" for purposes of the act unless they are procuring employment of the athlete with a professional team.

The agency agreement which DSI proposed is not a "sports agent contract" under §99-1011e) because it does not authorize DSI to negotiate for employment with a professional team. The act does not apply to DSI's proposed agreement to merely represent and procure sponsorships, endorsements, and licensing agreements, personal appearances and exhibitions of a professional tennis or golf player.

Tennis and golf players generally are not part of a team. They are individual players and as such are not subject to CSARA.

B. Represent American woman volleyball and basketball players in finding professional opportunities; negotiate professional player contracts on their behalf with professional teams in the U.S. and abroad.

This second proposal involves team sports and under this proposal, DSI seeks to act as a "sports agent" as they're negotiating employment contracts with professional

sports teams for athletes. This is subject to CSARA. However, the proposed agency agreement does not include this activity and will need to be changed for this activity. I will discuss my recommendations below.

C. DSI proposes to assist with living arrangements and cultural adjustments for their volleyball and basketball clients who find employment in foreign countries.

This proposal does not implicate CSARA and appears fine as is.

D. DSI's professional division also proposes to represent athletes in Olympic sports such as track and field at the professional level. The representation will include negotiating appearances at competitions and endorsement contacts.

As discussed above, these activities for non-team players, individual professional players, which do not involve procuring of professional employment, do not implicate CSARA. It will not apply here.

E. DSI will seek post-collegiate professional opportunities for women athletes in other sports.

Even though DSI will not represent athletes who are still participating in intercollegiate athletics, if they represent an athlete within 12 months after the end of the athletes last intercollegiate event, including post-season games, it will implicate CSARA.

To summarize in the professional division proposals B and E will be subject to CSARA and will require a license as presently proposed.

Amateur Division

A. DSI will provide high school advisory services to high school students and their families in selecting a college;

B. to evaluate and rate collegiate athletic programs for women

C. use this information to match athletes with colleges and universities.

D. contact colleges and universities to apprise them of the athlete's interest and to provide academic and athletic performance information about the athlete, to the schools.

None of these proposals implicate CSARA. DSI is not acting as a "sports agent"; they are not seeking employment for an athlete with a professional sports team. They are merely offering services to match high school athletes with appropriate schools. However, these activities may implicate the ACUAA bylaws. These high school students are "amateur student-athletes" under § 12.02.1 - they engage in a sport for the educational, physical, mental, and social benefits. As such, these students would lose their amateur status and be ineligible for intercollegiate competition if they received pay for their athletic skill, accept a promise of pay, or enter into an agreement with an agent to negotiate a professional contract. I will

discuss how to avoid this below.

E. Finally, DSI proposes to negotiate with colleges and universities to hold workshops on campuses and will hold off campus workshops as a manner of career counseling at the collegiate level. The workshops will be advertised in local and campus newspapers and in direct mail solicitations. The workshops will provide information about the firm's representation of professional athletes.

This could implicate CSARA because this could be construed as soliciting or recruiting student athletes who seek to be employed by a professional team prior to the end of the athletes intercollegiate athletic event or within 12 months after the end. I believe this will be subject to CSARA as proposed.

DSI hopes this will lead to clients for their agency, and because these college athletes will be seeking professional employment, DSI is violating CSARA without a license. I will discuss recommendations below.

II. Is compensation scheme enforce,

A. Under proposed agency agreement

DS! requests 20% of all compensation paid to the client based upon endorsement or performance contracts under this agreement. This appears enforceable as pertaining to proposals A & D of the professional division. However, this agreement does not refer to the services to be offered under proposals B, C, and E.

DSI needs to include another agency agreement that deals with procuring employment opportunities with professional teams and making living arrangements in other countries. It will not be enforceable in its current form for this.

B. Under high school advisory services ,agreement

This agreement only covers proposals a-d under the amateur division. It contains no provisions for compensation for the college workshops. These appear to be free to those who attend and an expense to be borne by DSI. If DSI tries to collect a fee from those attending the workshop and the attendees are seeking employment representation, it will not be enforceable under CSARA.

The ACUAA bylaws allow amateur student athletes to secure advice concerning a proposed professional sports contract so charging a fee for this appears enforceable.

III. ,Suggested modifications to avoid consequences under CSARA and the ACUAA bylaws.

Affected Proposals:

A. Under the professional division are B and E. Proposal B could be modified bye

Get the license - but this does not allow DSI to avoid paying $10,000.

Do not enter into any contracts to negotiate for professional employment or recruit or solicit athletes for this purpose within 12 months after the end of the athletes last high school or intercollegiate event, including post-season games.

The court in Walter v. Fullwood explained that the courts are concerned with protecting academic integrity of ACUAA member institutions and protecting against "sport related evils such as gambling, recruitment violations and the employment of mercenaries . . . in college athletic programs."

This will allow DSI to still achieve its objective without needing a license.

B. Proposal E could be modified bye

Again, this objective can easily be met if DSI avoids entering into these contracts or soliciting athletes for these contracts until 12 months after the end of the athletes college career. It again lets them accomplish this on a professional level without obtaining a license and without being subject to fines and criminal penalties.

They intended to seek post-collegiate professional opportunities, they must merely wait until 12 months after the college athletic career to begin to seek the professional employment for the athlete or

They may pay $10,000 to get the license to be able to procure the contracts sooner.

Amateur Division

Under the amateur division, proposals a-d may involve violations with the ACUAA bylaws. If during this high school counseling agreement, where DSI is representing a prospective student athlete for compensation in placing the student in a collegiate institution, if the student is a recipient of financial aid from the institution, the agreement shall be considered an agent marketing the individual's athletic ability or reputation under § 12.3.3. Under § 12.3.1 the general rule is that an individual shall be ineligible for participation in an intercollegiate sport if he agrees to be represented by an agent for purposes of marketing his athletic ability or reputation.

Many high school athletes receive athletic scholarships, a form of financial aid. Since it is DSI's objective to assist women athletes and to advise high school girls on prospective collegiate programs, not to make them ineligible, thereby furthering the gender gap, DSI should avoid any activity which appears to be "placing a high school prospect in a collegiate institution for compensation."

DSI should avoid proposal d - contacting colleges and universities for the student athlete. This activity places them in a position of risking the athletes eligibility if DSI receives any compensation. Or, DSI may conduct activities a - d for free as part of the proposed workshop.

Proposal a runs the risk of being deemed solicitation for purposes of procuring

employment contracts with professional teams. DSI can:

pay the $10,000 for the license so they can conduct the workshops as proposed without risking 820,000 fines and/or imprisonment for a period of 1 - 10 years, or

do not provide any information about DSI's professional athletes and do not indicate they seek to represent the students for that purpose. If fact, DSI would have to make it clear their purpose is merely to provide information.

DSI should avoid the newspaper ads and direct mail solicitation as it furthers the risk of violation.

I hope this has been helpful. Please do not hesitate to contact me if you have any questions or concerns. Thank you.