California Bar Examination

Performance Tests and Selected Answers

February 2000

THE STATE BAR OF CALIFORNIA
OFFICE OF ADMISSIONS

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PERFORMANCE TESTS AND SELECTED ANSWERS

FEBRUARY 2000 CALIFORNIA BAR EXAMINATION

This publication contains two performance tests from the FEBRUARY 2000 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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FEBRUARY 22, 2000

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INSTRUCTIONS

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

2. The problem is set in the fictional state of Columbia, one of the United States. Columbia is located within the fictional United States Court of Appeals for the Fifteenth Circuit.

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

4. The Libra contains the legal authorities needed to complete the tasks. Any cases may be real, modified, or written solely for the purpose of this examination. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read them thoroughly, as if all were new to you. You should assume that the cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit citations.

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

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

7. This performance test will be graded on your responsiveness to instructions and on the content, thoroughness, and organization of your response.

Boyd, Martin & Ricks
Counselors at Law
1209 St. James Place
Patillo, Columbia

MEMORANDUM

TO: Applicant

FROM : Carnell Boyd, Partner

RE: Romero v. Carlsbad Pizza Company and Romero v. Romero

DATE: February 22, 2000

Cruz Romero is a new client of the firm. He is one of three co-owners of the Carlsbad Pizza Company, a Columbia limited liability company (CPC), and he has consulted us about two related problems. First, he is considering withdrawing from CPC and wants our advice on his rights and obligations should he do so.

Second, Romero wants us to represent him in a marital dissolution proceeding. His wife moved out and filed the dissolution action. Her lawyer has sent Romero a proposed marital settlement agreement and the portion which concerns CPC is in the file.

Excerpts from my first interview with Romero are in the file. I have asked Romero to come in for a second interview next week, and need you to analyze these documents in light of the Columbia cases and help me prepare to counsel him. For purposes of your analysis, there is no distinction between a limited liability company and a corporation.

Write a memorandum to me in which you:

1) Analyze what the client can expect to receive if he withdraws from the company at this point;

2) Analyze his wife's interest in the business to which she will be entitled upon dissolution of the marriage, and whether his immediate withdrawal would affect her share;

3) Give me your suggestions about what the client can do at this point that will accomplish his goals and maximize his ability to pursue his business.

Excerpts of Interview with Cruz Romero

Mr. Boyd: (Q): Let me sum up my understanding of the two problems you're here about, and see if you and I are on the same wavelength, OK?

Mr. Romero (A): Yes. I think that's a good idea. I know it's kind of hard to follow . . .

(Q): Well, it's a lot for anybody to deal with. Let me start with your problems with the business. You said you began to have concerns about a year ago that your partners weren't appreciating the extent to which the success of the business was attributable to your efforts - your recipes and reputation and so forth - is that right?

(A): Yes, maybe a little over a year ago.

(Q): OK. And in your mind, the only real recognition that would mean something is for them to increase your share in the company, up from 25% to at least a third and maybe more than that?

(A): Right. I mean, they are always telling me what a great cook I am, but that doesn't mean a lot.

(Q): So you approached them about increasing your share - when? Was that also about a year ago?

(A): Yeah, about that. We had been operating in West Taos for a few years, and it was clear that location was going to be profitable for us - not so much as our original Chama restaurant - but solid. I talked to them about what the Carlsbad Pizza name meant, how much of it was me.

(Q): And they essentially said, "a deal is a deal," or something like that, and took the position that their contributions were just as significant as yours?

(A): Yes. More significant, the way it's divided. They each get 37'/2 % to my 25%. They think it's fair for them to get 75% of all the profits.

(Q): Right. This isn't an uncommon problem when you have partners who make capital contributions. They like to think they are vital, and the talent or know-how contributed by the remaining partners is so much more difficult to value. It's all too easy to discount those contributions of knowledge or skill. That's why a business appraisal like the one you brought in is so valuable.

(A): And that says at least half of our success is because of me.

(Q): It does, in a way, but you understand that the operating agreement has a bearing on that, don't you?

(A): Yes, I see that.

(Q) Anyway, at this point you've had several discussions with your partners, and you feel you aren't getting anywhere, so you've decided it may be time to get out and do something on your own. Is that accurate?

(A): Yes, I'm tired of working so hard to make other people rich. I mean, we're still talking to each other, and Jerry and Annette have worked hard, too, but it's no fun anymore. I think I'd do better on my own, or with a different partner, maybe. 1 wouldn't have this resentment building up like it is.

(Q): OK, so I think I know where you are on the business aspect of this. You'd like to continue as owner or part owner of Carlsbad Pizza if you can, but no matter what you want to get out of the present arrangement, whether by withdrawing from the company, or buying the other members out. . .

(A): Well, there's no way I can buy them out, unless maybe a new backer came in. Or maybe I could buy them out over time, a little a month. There's no way I can come up with cash at this point, by myself.

(Q): Especially when you're about to go through a divorce.

(A): Yeah. I don't know what that's going to involve, but it's certainly not going to be inexpensive. Am I going to have to come up with cash for that, too?

(Q): Not necessarily, but it will be awhile before we know exactly what your financial obligations are going to be. Let me make sure I understand what you want to do on that, if you don't mind a few more questions.

(A): No, that's fine. I'm here because I need help with this; her attorney's already filing papers in court, like I said, when I thought we were just going to be able to agree.

(Q): As I said, somebody has to file those papers; that starts the formal dissolution action with the court. But in the great majority of cases everything is worked out through a voluntary agreement, and what the parties decide is simply adopted by the court.

(A): So what they sent me is, like, an opening offer and I can accept it or not, and maybe offer something different?

(Q): Well, it's not completely open-ended. Your wife's lawyer won't let her agree to anything that's not in accord with the law that governs dissolution, which in Columbia is community property law. That's why I said I'd have to do some legal research on the interest she might have in your business. But issues like timing and whether you sell

your principal residence and divide the money, or one of you buys the other out - things like that - are up to you, as long as they approximate an equal division of the community property.

(A): I want her to get what she's entitled to, but it would be good if it could be spread out or something. I don't see how I can start a new business and pay her off at the same time.

(Q): Exactly. That's why I want to set up another meeting next week, so that I can research both the break-up of the business and the impact community property law will have on the interest you take out of the business. There are bound to be some financial consequences, and you need to know what they are before you decide what to do.

(A): Well, that sounds good. I can come in almost any day next week, as long as it's before 4 o'clock.

(Q) That's fine. My secretary will set that up.

BUSINESS APPRAISERS, INC.
110 MOUNTAIN Blvd.
SUITE 1111
CHAMA, COLUMBIA

January 21, 2000

Cruz Romero
c/o Carlsbad Pizza Co.
Chama, Columbia

RE: Personal and Confidential
via Hand Delivery

Dear Mr. Boyd:

I have been asked to appraise the value of the business and the goodwill of the Carlsbad Pizza Company. Accordingly, I have reviewed the financial books and records, including documents of title to assets, of Carlsbad Pizza Company, L.L.C., that you have provided.

Business Description. The Carlsbad Pizza Company was established as a partnership on May 4, 1995 by Jerry Walden, Annette Bingham and Cruz Romero. Walden and Bingham each invested $100,000. Cruz brought in his culinary skills and creativity for which he received a 25 percent interest in the company. The Company found a niche in the Rio Chama area as a pizzeria specializing in Mexican style pizzas. The Company was an overnight success so much so that the Company opened a second restaurant in nearby West Taos about three years ago.

The Chama restaurant is located at the corner of Stanford and Mountain Boulevards. The intersection is on the outskirts of town, but is across the street from a ten screen Wonderman Theater Complex. It is the closest eating establishment to the theater. Moreover, it is approximately one mile from Chama County Junior College and has become a favorite hangout for students. Despite the high marks for location, the restaurant primarily owes its success to Romero' s culinary skills. A copy of a restaurant review is attached. The Pepperoni de la Casa and the Chile El Caliente are quite popular. The importance of Romero's talent is reflected in the fortunes of the Company's immediate predecessor at that location. The franchisee for a national pizza chain failed. The second restaurant was opened three years ago. Its location is favorable but not as strong as the Chama location. It is located at Tesuque and Avenida de Cesar

Chavez in a shopping plaza. West Taos does not have a post secondary education institution. Nevertheless, the newer restaurant has been a success.

After the opening of the second restaurant, the Company converted to a limited liability company. The owners retained their relative ownership interests as they switched from partner to member status. However, the conversion served as the catalyst for a reexamination of the relative interests. The relationship among the owners appears to have soured. The word in the community is that Romero believes that his talent has become a more important factor in the success of the business than the initial capital contributions and has sought an increase in his interest. Apparently, Walden and Bingham refuse to renegotiate.

Management. The Company is member managed. Each owner brings complementary skills. Jerry Walden is a certified public accountant. He practiced for ten years with Baca & King, one of the largest accounting and management consulting firms in the country. He tired of big city life and moved to Chama about six years ago. Annette Bingham entered the venture with over ten years of experience in the pizza business. She was a liberal arts major in college. She joined the Pizza Parlor chain after graduation. She rose through the managerial ranks to become the district manager for Columbia. Romero is the chef of the group. He graduated from the Culinary Institute of America. He grew up on a chile farm in southern Columbia where his grandmother taught him how to cook numerous chile dishes. The combination of the three provides an extremely strong management team.

Valuation. I valued the business using asset value, that is, the value of the business is the aggregate of the value of all of its assets less liabilities. In determining asset value, I used the market value of its noncash assets, including the furniture, kitchen equipment, office equipment, business signs and inventory. In my opinion, the company is worth $400,000. I determined this value as follows:

Cash	$50,000
Other Assets(Not including goodwill)	550,000
Goodwill	-0
Liabilities	(200,000)
Net Worth	$400,000

The value of each owner's interest accordingly is:

Annette Bingham	$150,000

Jerry Walden	$150,000
Cruz Romero	$100,000

My conclusion that goodwill is worthless is based on the terms of the Company's Operating Agreement. But for the Operating Agreement, the goodwill would be $400,000. I determined that amount by computing the going concern value of the Company using a multiple of earnings approach. This value is attributable to the synergy of the three owners and the talents of Romero. In my opinion, at least half of the goodwill is attributable to Romero.

Sincerely yours,

Robert Frederick

Robert Frederick
Appraiser

THE CHAMA TRIBUNE

September 11, 1998

Cruz Romero's Mexican Pizzas

The Carlsbad Pizza Company is a must stop place before or after seeing a movie at Wonderman Theaters. You do not go there because of its ambience or special charm. When you enter, you walk into what is unmistakably a pizzeria. The tables and chairs resemble the chain restaurant of its predecessor. The appearance serves only to mask the dining experience in store for you.

I visited the Carlsbad Pizza Company last Wednesday night after seeing the espionage thriller Windsong starring Gregory Chan and Ellen Cane. The adventure continued at the restaurant. I realized the restaurant was no ordinary pizzeria when I heard the Mariachi music pouring out of the stereo system. The dining area was full and several people were waiting to be seated. A waitress at the wait station told me the wait was about twenty minutes, but she had a table for one available now.

The table was next to the salad bar. The waitress handed me the menu and asked for my drink order before I could sit down. I ordered a large cola and began perusing the menu.

The menu offered a selection of Italian and Mexican Pizzas. I decided to experiment with the novelty. Should I have the Pepperoni de la Casa, or the Tomato y Salsa? I chose a small Chile El Caliente. I heard the woman at the next table order something called the "North and South of the Border Pizza" (ham, Canadian bacon, ground beef and green chile toppings).

Without question, the pizza was the best I have had in years. My opinion seemed to resonate in the murmuring of the collection of moviegoers and college students around me. Cruz Romero was in the kitchen that night. He came out and visited each table in the restaurant. I heard him decline the request of a young pizza aficionado for a recipe. You cannot find Romero's pizzas in a supermarket or make them at home. If you want to taste them go on down.

ARTICLE XI
Dissociation of a Member

11.1 **Dissociation**. A person shall cease to be a member upon the happening of any of the following events:

(a) the withdrawal of a member with the consent of a majority of the remaining members prior to March 1, 2001 or at any time thereafter without such consent; (b the bankruptcy of a member; or

(b) in the case of a member who is a natural person, the death of the member or the entry of an order by a court of competent jurisdiction adjudicating the member incompetent to manage the member's estate.

11.2 Rights of a Dissociating Member. In the event any member dissociates prior to December 31 , 2016.

(a) If the dissociation causes a dissolution and winding up of this Limited Liability Company under Article XII, the member shall be entitled to participate in the winding up of the Company to the same extent as any other member except that any distributions to which the member would have been entitled shall be reduced by the damages sustained by the Company as a result of the dissolution and winding up;

(b) If the dissociation does not cause a dissolution and winding up of the Company under Article XII, the member shall be entitled to an amount equal to the fair value of the member's membership interest in the Company, provided that goodwill shall not be taken into account if the dissociation occurs within five years of the date of formation of the Company. The amount due to a dissociating member hereunder shall be paid within six months of dissociation.

ARTICLE XII
Liquidation and Winding Up

12.1 **Dissolution.** The Company shall be dissolved and its affairs wound up upon the occurrence of any of the following events:

(a) December 31, 2016;

(b) the unanimous written consent of the members;

(c) upon the withdrawal of a member, unless the business of the Company is continued by the consent of all the remaining members within 90 days after the withdrawal;

(d) the occurrence of any event that makes it unlawful for the business of the Company to be carried on or for the members to carry on that business in the Company; or

(e) the sale or other disposition of all or substantially all of the Company's assets.

12.2 **Liquidation.** Upon the dissolution of the Company, the business and affairs of the Company shall be wound up and liquidated as rapidly as circumstances permit, the assets of the Company shall be sold, and the proceeds thereof shall be paid in the following order:

(a) First, to creditors, including members that are creditors, in the order of priority as required by applicable law;

(b) Second, to the members in accordance with Section 4.2.

12.3 **Reasonable Time for Winding Up.** A reasonable time shall be allowed for the orderly winding up of the business and affairs of the Company and the liquidation of its assets pursuant to Section 1 2.2 in order to minimize any losses otherwise related to that winding up. A reasonable time shall include the time necessary to sell the assets.

12.4 **Deficit Capital Account.** Upon liquidation, each member shall look solely to the assets of the Company for the return of that member's capital contribution. No member shall be personally liable for a deficit capital account balance of that member (except to the extent that a deficit balance exists as the result of an interim distribution), it being expressly understood that the distribution of liquidation proceeds shall be made

solely from existing Company assets.

12.5 **Articles of Dissolution.** When all debts, liabilities and obligations have been paid and discharged or adequate provisions have been made therefore and all of the remaining property and assets have been distributed to members, Articles of Dissolution shall be executed and filed with the Columbia Secretary of State as required by the Act.

* * *

DRAFT February 8, 2000

MARITAL SETTLEMENT AGREEMENT

This Marital Settlement Agreement dated is between CRUZ ROMERO (Husband), and ANGELA ROMERO (Wife). The parties stipulate that they have separated and are incompatible, that they have considered all their rights and duties with respect to support, property, debts, and other matters, and that this Agreement is a complete and fair settlement of all rights and obligations arising out of their marriage.

The parties further stipulate that all representations in this Agreement are true and accurate statements and that the Court may enter a decree adopting all of the terms of this Agreement as a final judgment. Each party signs this Agreement with full knowledge of its contents and without coercion, duress or undue influence of any kind.

I. THE MARRIAGE

A. Wife has been a resident and domiciliary of Belger County for more than six months before the Petition was filed in this case.

B. Husband was properly served with the Petition and Summons. There is personal jurisdiction over Husband.

C. Husband and Wife were married on March 15, 1 993 in Jensen City, Columbia, and have been husband and wife since that date.

D. Husband and Wife separated on or about November 1 , 1999.

E. Husband and Wife are incompatible because of discord and conflict of personalities. The legitimate ends of the marriage relationship have been destroyed and there is no reasonable expectation of reconciliation.

F. There are no minor children of the marriage and none is expected.

II. PROPERTY

The parties have agreed upon the following division of their community and separate property:

A. To Husband, as his sole and separate property:

1: an undivided 25% membership interest in Carlsbad Pizza Company, L. L. C.,

B. To Wife, as her sole and separate property:

1 : an amount equal to half of the value of Husband's membership interest in Carlsbad Pizza Company, L.L.C., including goodwill.

* * * *

Carlsbad Pizza Company

LIBRARY

In re Marriage of Bailey (1991) 1

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Salinas v. Rafati (1999) 9

In re Marriage of Bailey

(Columbia Supreme Court, 1991)

Per curiam. This case involves the dissolution of a 1 5-year marriage. Husband was an attorney who had practiced law for over four years before the marriage. His practice grew and prospered up to the time of trial. Apparently based on husband's testimony that he withdrew "every penny of his income from the practice and used it for the benefit of the community," the trial court found the value of the law practice was the husband's separate property. The appellate court reversed stating, "The value of the practice at the time of dissolution of the community is community property." This value, the court went on, should be determined by examining the "existence and value of the following: (a) fixed assets, which we deem to include cash, furniture, equipment, supplies and law library; (b) other assets, including properly aged accounts receivable, costs advanced with due regard for their collectability; work in progress but not billed as a receivable, and work completed but not billed; (c) goodwill of the practitioner in his law business as a going concern; and (d) liabilities of the practitioner related to his business."

We agree with and adopt the conclusion of the appellate court.

TUESDAY AFTERNOON
FEBRUARY 22, 2000

California Bar Examination

Performance Test A

LIBRARY

Fraser v. Bogucki

(Columbia Supreme Court, 1990)

In 1960 Fraser and defendant Raymond Bogucki formed a law partnership. Fraser had a 60 percent interest and Bogucki a 40 percent interest in the partnership. As the years went by, defendants John Scherlacher, Louis Mok, and Gregory Roth were made partners of Fraser & Bogucki and enjoyed the profits and success of the partnership without making any initial capital contribution.

According to the complaint, Fraser eventually divested himself of his relationships with all of his clients, save one, and his attention to the needs of that client required him to be absent from the state for long periods of time. Accordingly, he became increasingly dependent on the defendants' fiduciary duty to act in his best interests. Instead, it is alleged, forsaking their fiduciary duty and breaching the implied covenant of good faith and fair dealing, his ungrateful partners conspired to remove him from the partnership and "take over the enterprise including the firm name, leasehold, office facilities, staff and general client relations which had been entrusted to them."

The complaint further alleges that the defendants exploited Fraser's vulnerability as a man who has already expended his most productive years and who would be practically and emotionally disabled from competing with them by starting a new enterprise, if he were ousted and deprived of the support of the organization structure of the law firm. The complaint also alleges that the defendants accomplished this exploitation of Fraser by dissolving the partnership, instead of simply withdrawing from it, and by seizing control of the enterprise through a purported purchase of its tangible assets and an appropriation of the intangible relationships and values of the enterprise for their own benefit. Plaintiff also alleges that, as an extension of their conspiracy, the individual defendants formed the partnership of Bogucki, Scherlscher, Mok & Roth.

Fraser estimates that he has suffered "a loss to his career investment and the certain future returns from this investment having a value in excess of $1,000,000."

Fraser's complaint scrupulously avoids the word "goodwill." In his appellate brief, however, he makes it clear that compensation for his loss for a share of goodwill is precisely what he is seeking to recover. Because the Lyon case, discussed below, prohibits such a recovery, Fraser attempts to persuade us to establish a new precedent. He asserts that good will is now recognized as a valuable asset in a service enterprise, and that Lyon misconceives the nature of current law firm practice.

In Lyon, (Columbia S.C., 1982) the plaintiff, a patent lawyer, sought the dissolution of a law partnership and an accounting. His former partners had ousted him from an earlier partnership by dissolving it and forming a new partnership under the same name. Five of the former partners were named Lyon. As a part of the dissolution, the former partners had prepared an inventory and appraisal of the tangible assets of the partnership. Plaintiff was given his proportionate share of the value of the physical assets and the accounts receivable. He also received all documents connected with the business of those of the firm's clients who indicated that they wished to have plaintiff continue as their attorney. Because the firm's partnership agreement had expressly provided that the partners were the joint owners of the good will acquired by the partnership, plaintiff claimed that he was entitled to receive his share of the value of the goodwill upon dissolution, as reflected by the expectation of future business of the new partnership formed by his former partners.

The court rejected Lyon's claim. Writing for the court, Justice Lillie observed that "The nature of a professional partnership for the practice of law, the reputation of which depends on the skill, training and experience of each individual member, and the personal and confidential relationship existing between each such member and the client distinguishes a professional service firm from other businesses." The court concluded that the goodwill claimed by plaintiff--his expectation of future business--was confidential and personal to each partner and could therefore not be assigned a monetary value or distributed as an asset upon dissolution of the partnership.

Fraser cites authorities holding that good will is a valuable and divisible marital property asset in support of his contention that newer cases, unlike the Lyon case, recognize the value of good will in a personal service enterprise. He fails to note, however, that many of these newer cases expressly distinguish the concept of goodwill in a marriage dissolution setting-which involves an ongoing professional practice--from a setting such as this, where the professional practice is itself dissolving. For example, this court, in In re Marriage of Fortier (Columbia App. 1973), while agreeing that the goodwill of a spouse's medical practice accumulated during marriage was community property which was divisible upon the dissolution of the marriage, also made the following observation: "Where, as in Lyon, the firm is being dissolved, it is understandable that a court cannot determine what, if any, of the goodwill of the firm will go to either partner. But in a matrimonial matter, the practice of the sole practitioner husband will continue, with the same intangible value as it had during the marriage. Under principles of community property law, the wife, by virtue of her position of

wife, made to that value the same contribution as does a wife to any of the husband's earnings and accumulations during the marriage. She is as much entitled to be recompensed for that contribution as if it were represented by the increased value of stock in a family business."

We fail to see why a lawyer such as Fraser should be permitted to share in expected future profits from clients who have elected not to retain his services. Nor do we savor the prospect of innumerable lawyers from defunct law firms suing each other because some of them were more successful than others in attracting new business from old clients following the dissolution of a partnership.

In re Marriage of Nichols

(Columbia Supreme Court, 1996)

These appeals center on a dispute over the value of a community asset, husband's shareholder interest in his law firm. Wife's expert valued the interest by determining the book value of the law firm's net assets--its fixed assets such as furniture plus its accounts receivable and work in progress, minus liabilities--and multiplying that figure by husband's percentage interest in the firm. Using this method, wife's expert concluded the interest was $142,000.

Husband's expert valued the interest in accordance with a stock purchase agreement which husband signed when he became a shareholder. The agreement provides that shareholders joining the firm shall pay, and those leaving the firm shall be paid, for their interest in the firm's net assets with the exception of accounts receivable, goodwill and work in progress. According to this expert, the stock purchase agreement fairly represents husband's interests in the firm for the following reasons: In becoming a shareholder, husband has no ability to change the agreement unilaterally. Husband's earnings are not based upon his proportional shareholder interest; rather, his compensation is based upon an employment contract which provides for remuneration based upon productivity and longevity with the firm. Hence, the only way husband, as a shareholder, potentially can benefit from the firm's account's receivable and work in progress is if the firm liquidates, a prospect that is not probable and would likely yield a minimal return, if any, to each shareholder due to the firm's long-term debts. Applying the agreement's formulation, the expert valued the interest at $1 1,347.

Except for the agreement's exclusion of goodwill, the trial court held "that the stock purchase agreement should control" in valuing husband's shareholder interest in the law firm. Accordingly, it accepted the value proffered by the husband's expert.

Upon becoming a shareholder of the firm, each attorney signs a stock purchase and sale agreement. Pursuant to this agreement, the price of the attorney's stock is determined by a formula which is based on the book value of all the firm's assets except its accounts receivable, goodwill and work in progress. When a shareholder dies, becomes disabled or otherwise unable to practice, or withdraws from the firm, the agreement requires that his or her stock shall be sold back to the firm at the formula price. Husband signed the stock purchase agreement when he became a shareholder.

Each of the firm's shareholders owns essentially the same number of shares

(approximately a 2.677 percent interest), and each has an equal voice in the firm management. Shareholder compensation does not depend on the number of shares held. Rather an employment contract provides that each shareholder draws a salary based on "units" of seniority, multiplied by an amount of annual salary per unit. Upon becoming a shareholder, an employee is given a minimum of 12 units of seniority and a unit is added each year thereafter, up to a maximum of 24 units. No evidence was introduced demonstrating that the amount of annual salary per unit fluctuates each year based upon the firm's income. Instead, the amount of annual salary per unit is a set figure that does not change until a sufficient number of shareholders lobby for an increase. Compensation also includes a bonus which is calculated pursuant to a formula based on billable hours and dollars brought in. A bonus is given to all of the firm's attorneys, not just shareholders. A committee awards up to ten shareholders an additional bonus for "subjective factors," such as "rainmaking [the ability to bring in work]".

The firm's finances are structured so that shareholders do not build wealth through the value of their stock, but through separate pension and profit-sharing plans and through other vehicles such as an equipment leasing partnership in which a shareholder may choose to participate. The firm's policy is that the cost to a shareholder to buy into the firm, or the cost to the firm to buy out a shareholder, should be kept relatively low; the actual figures have ranged between $5,000 and $20,000. A low buy-in price benefits the firm by making it easy to attract good attorneys; a low buy-out price benefits the firm by minimizing the burden on shareholders when attorneys die, become unable to practice or leave.

In deciding to value husband's shareholder interest in the firm in accordance with its stock purchase agreement (with the exception of goodwill), the trial court cited evidence that the agreement had controlled in every case in which a shareholder had left the firm over a 36 year period.

On the issue of goodwill, the trial court held that "a spouse's interest in goodwill is not determined by a stock purchase agreement." In light of husband's status as a senior member of the largest and one of the oldest law firms in the city, the court found that he had professional goodwill, and accepted the wife's expert's valuation of $142,000.

establish the value of assets between partners may be only minimally relevant to valuation of a partner's interest when a partner's business continues but the partner's marriage ends.

Thus, we conclude the trial court's valuation was correct.

Dawson v. White & Case

Columbia Supreme Court, 1978

In 1970, the law firm of White & Case dissolved and then re-formed without one of its partners, Evan R. Dawson. This appeal presents the question of whether the law firm possesses goodwill that can be distributed in an accounting proceeding.

When applied to law firms, the term "goodwill" refers to the ability to attract clients as a result of the firm's name, location, or the reputation of its lawyers. It is an elusive concept, but is broadly defined as the advantage or benefit, which is acquired by an establishment, beyond the mere value of the capital, stock, funds, or property employed therein, in consequence of the general public patronage and encouragement, which it receives from constant or habitual customers, on account of its local position, or common celebrity, or reputation for skill or affluence, or punctuality, or from other accidental circumstances. We conclude that the lower court erred in including goodwill as an asset of White & Case in the partnership accounting.

By statute, the partners are free to exclude particular items from the class of distributable partnership property, and such agreement will be enforced in an accounting proceeding. Thus, even if a given partnership might be said to possess goodwill, the courts will honor the agreement among partners--whether express or implied--that goodwill not be considered an asset of the firm.

The trier of fact might infer from the course of dealing between the partners when new members came in and old ones went out that by tacit understanding there was to be no accounting for goodwill. In this case, White & Case partners never paid anything for goodwill; departing partners never received a payment for goodwill; and goodwill was not listed in the firm's financial statements.

We note that the holding in this case is based on the specific facts presented. This case should not be construed as a prohibition against the valuation in the appropriate case of law firm goodwill, such as for purposes of an equitable distribution award.

Reversed.

Salinas v. Rafati
(Columbia Supreme Court, 1999)

At the trial below, $1,428,000 was awarded to a radiologist for his interest in a dissolved professional partnership, based on his share of assets, including goodwill. We conclude that goodwill attributable to the individual earning capacities of the former partners is not an asset subject to an award on dissolution.

Radiologists Drs. Rafati, Salinas, and Salazar were the general partners of Radiology Associates (RA). Overtime RA enjoyed considerable financial success, but relations between the three partners deteriorated. Dr. Rafati's voluntary withdrawal was discussed, but agreement could not be reached. Eventually Dr. Salinas notified Rafati that he and Dr. Salazar were dissolving RA.

At dissolution, RA's tangible assets consisted of cash, accounts receivable, office furniture and equipment, and leased office space used on for bookkeeping and billing. RA received funds through a contract between Salinas and Mercy Hospital under which Salinas served as director of the Hospital's radiology department, and RA's partners and staff were permitted to perform the work of the department. The Hospital owned all the radiology equipment used by the partners in their practices, and they saw their patients there. The partners disputed whether this contact was personal to Salinas, or a partnership asset.

After the partners agreed to a division of RA's cash and accounts receivable, Drs. Salinas and Salazar formed a new professional partnership without Rafati, with Salinas's contract with Mercy Hospital still in effect, continuing their same radiology practice with RA's former staff members, and using the same leased office space for billing.

Dr. Rafati sued Drs. Salinas and Salazar for wrongful dissolution of RA and for an accounting, claiming that the assets of RA included intangibles such as goodwill. The trial court's award to Rafati included a valuation of goodwill based on the ability of RA's partners to produce future income: although Rafati's expert witness purported to exclude any personal "goodwill" in his valuation of RA, he testified unequivocally that his opinion on value was based on what Salinas and Salazar could earn over time, by continuing their radiology practice in the same manner as with RA.

Appellants argue that while Rafati treated RA upon its dissolution as if it were a salable, going concern, by definition that partnership ceased to exist after its winding up. We agree. To the extent that the valuation of RA was based on goodwill attributable to the personal skills and talents of its former partners, that valuation was incorrect.

We considered partners' rights on dissolution in Rice v. Angell (1 991), including in partnership "goodwill" where one or more of the partners continue to engage in the same type of business. The dispute in Rice was between partners in a clothing business. The court recognized that a significant distinction exists between goodwill attaching to the skill and ability of an individual partner, and that of a trade or business arising from its name, reputation, or business location. In the latter case, one or more of the original partners may secure the right to continue the business "at the old stand." The realistic possibility that customers will continue to come to the old place of business can then be deemed a valuable, measurable right.

However, in Rice we noted that the goodwill recognized there was attributed to one partner's unique clothing designs manufactured by the partnership, similar to the Court of Appeal's holding in Raser v. Boguchi (1990) that goodwill in a professional law partnership arises from the skill, training, and experience of the individual lawyer.

Subsequently, by our holding in the Nail case (1992), we recognized that although goodwill can exist as "an incident of a continuing business having a particular locality or name", the distinction has been made that "professional goodwill is not so much fixed or as localized as the goodwill of a trade or business, and attaches to the person of the professional as a result of confidence in his or her ability." Nevertheless, there may be goodwill in a professional partnership separate from the skills or other attributes of individual members.

This point is illustrated by the Court of Appeals' decision in Green v. Green (1980), dealing with the valuation in a marriage dissolution of shares owned by the husband as a physician in a professional corporation which employed between 50 to 100 doctors part-time and 10 full-time, to perform contracts with several hospitals. Green held that the corporation had goodwill separate from and in addition to that of the shareholder physician as an individual which could be considered in dividing the community property of the marriage, because if the corporation had been sold, its right to do business as that corporation under its hospital contracts would continue, as would the goodwill attributable thereto.

In the present case, however, by contrast RA was not an ongoing enterprise. The issue is whether there was goodwill attributable to RA separate from the skills and attributes of the professional members themselves, which survived RA's dissolution. In that regard, Rafati claims that there was such goodwill, which has been appropriated by his former partners in the continuation of the radiology practice in their new partnership under the same contract with Mercy Hospital. But, the evidence at trial was that Salinas and Salazar performed all their

ANSWER 1 TO PERFORMANCE TEST A

MEMORANDUM

TO: Carnell Boyd, Partner

FROM: Applicant

RE: Romero v. Carlsbad Pizza Company
Romero v. Romero

You asked me to draft a memorandum for use during your interview with Cruz Romero next week which analyzes: 1) what Mr. Romero can hope to receive if he withdraws from Carlsbad Pizza Company, LLC (CPC); 2) what his wife's interest in the business will be upon dissolution of their marriage and the effect, if any, of Mr. Romero's immediate withdrawal; and 3) suggestions about what Mr. Romero can do to accomplish his goals and maximize his ability to pursue his business.

Romero's Interest in CPC Upon Withdrawal

The primary issue concerning what Romero can expect to receive if he withdraws from CPC is whether or not he will obtain an interest in the company's goodwill. The Operating Agreement of CPC sets forth the rights of a member who dissociates before December 31, 2016. If the dissociation causes a dissolution of CPC, the member participates in any distribution to which the member would have been entitled, less the damages sustained by the company as a result of the dissolution. If the dissociation does not cause a dissolution and winding up of CPC, the member is entitled to the fair value of the member's interest in the company. However, goodwill is not taken into account if the dissociation occurs within five years of formation of the company. Thus, according to the terms of the Operating Agreement, if Romero withdraws prior to March 1, 2003, he will not be entitled to a share of the goodwill if he withdraws and CPC continues in operation after his withdrawal.

The appraisal performed by Robert Frederick valued the business at $400,000, with Romero's share being $100,000. However, based upon the above-described provisions of the Operating Agreement, Frederick did not include goodwill in the valuation. He did, however, indicate that if goodwill were valued he places its value at $400,000 and, of this amount, opines half is attributable to Romero's talents.

Relevant case law analyzing whether goodwill is an asset that should be valued upon withdrawal of a partner or dissolution of a partnership draws a distinction where goodwill arises from the name, reputation or business location, on the one hand, and where it is primarily due to the skill, training and experience of a particular individual. A distinction is also drawn between a situation where the business continues in operation and where it ceases to operate. These elements will be discussed in turn below.

At the outset, a general understanding of what is encompassed within the meaning of "goodwill" is useful. Goodwill is an elusive concept broadly defined as "the advantage or benefit, which is acquired by an establishment, beyond the mere value of the capital, stock, funds, or property employed therein, in consequence of the general public patronage and encouragement, which it receives from constant or habitual customers, on account of its local position, or common celebrity, or reputation for skill or affluence, or punctuality, or from other accidental circumstances." Dawson v. White & Case.

Effect of Limitation in Operating Agreement

The Operating Agreement clearly purports to eliminate a consideration of good will if there is a withdrawal of a member within 5 years which does not result in dissolution of CPC. In Dawson, the Supreme Court a partnership agreement excluded goodwill from the class of distributable partnership property. The agreement was upheld in an action for an accounting by one partner where the partnership was dissolved then re-formed without him. Thus, such provisions may be upheld. However, this case is not dispositive here because the provision in the CPC agreement applies where the withdrawal of a partner does not cause the dissolution of the company. Therefore, other considerations may dictate whether the provision in the CPC Operating Agreement will be upheld.

Effect of Unique Contribution

Generally, case law indicates that where goodwill is attributable to the unique skill of a particular individual it is not a property interest of the business that may be divisible. In Fraser v. Bogucki, the court considered the claim of a law partner to what was essentially a goodwill interest in the future earnings of the partnership. The court held that where goodwill is personal to each partner, a monetary value could not be assigned to it or distributed as an asset upon dissolution of the partnership.

By contrast, in Salinas v. Rafati, the court noted earlier decisions allowing an interest in goodwill where one or more of the partners continue to engage in the same type of business "at the old stand." In that case, the realistic possibility that customers will continue to come to the old place of business can be deemed a valuable, measurable right.

Effect of Continuing in Operation

Whether the business continues in operation is also significant in determining whether goodwill should be valued. Clearly, where a business ceases to operate, goodwill cannot be valued because its only value is its effect on a business as a going concern. Thus, if CPC dissolves as a result of Romero's withdrawal, goodwill will not be a distributable asset.

Analysis

Based on the foregoing, it is clear that Romero will be entitled to the interests provided for in the Operating Agreement. Thus, if he withdraws and it causes CPC to dissolve, he will be entitled to any distributions he would normally receive less damages caused by his withdrawal. If he withdraws before

March 1, 2003, and CPC does not dissolve, he will be entitled to the fair value of his interest excluding goodwill unless a court invalidates this provision.

It appears from the appraisal by Mr. Frederick and the favorable review in the Chama Tribune that Romero's skill is a significant and perhaps primary cause of CPC's success. Thus, if he leaves and the business continues in operation, it will be because of reasons such as continuation of the business "at the old stand" and not due to the unique contributions of the remaining partners. Thus, he may successfully argue for a portion of goodwill upon withdrawal provided CPC continues in operation.

Alternatively, Romero may decide it would be better to continue with CPC for three more years. According to the Operating Agreement, goodwill will not be taken into account for purposes of withdrawal only if it occurs within five years of formation.

Wife's Interest in CPC

The proposed settlement agreement entitles Wife to an amount equal to half the value of Romero's membership interest in CPC. This appears to be a reasonable distribution under governing law.

The Supreme Court, in In re Marriage of Bailey, examined the interest wife had in husband's law practice which was carried on during marriage upon dissolution. The court held the value of husband's interest at the time of dissolution was community property. The value is to be determined by examining the value of fixed assets, including cash, furniture, equipment, and supplies; other assets including accounts receivable, work in progress, and costs advanced; and goodwill of the husband in his law practice as a going concern. While this case concerned a law practice, the general principal is that wife is entitled to half of husband's interest.

Therefore, the discussion above as to Romero's potential interest upon withdrawal is significant in determining wife's interest. Wife is entitled to half of what he has at dissolution. In the case of marital dissolution, whether or not Romero continues as a member of CPC and whether or not CPC continues in business is significant. As the court noted in Fraser v. Bogucki, a wife's entitlement to a share of goodwill derives from the fact that after the marriage has dissolved the business of the husband will continue with the same tangible value it had during the marriage. Thus, since the husband will continue to benefit, the wife must be given her share at dissolution. Thus, the principles set forth in Fraser v. Bogucki will only be applicable here if Romero does, in fact, continue at CPC and CPC continues in operation as of the dissolution. Otherwise the principle that wife is entitled to good will because husband will continue to enjoy the community interest in the business as a going concern does not apply.

Interestingly, the CPC Operating Agreement may not be dispositive as to wife's interest. In re Marriage of Nichols, the Supreme Court stated that on the issue of goodwill, a spouse's interest was not

determined by a stock purchase agreement of husband's firm which did not provide for the building of wealth through stock ownership and did not provide for goodwill. The court reasserted earlier precedent which stated "we believe the better approach is to consider the terms of the partnership agreement as one factor in the determination of value of the community interest in goodwill without treating the agreement as conclusive." Thus, just because the CPC Operating Agreement does not provide for goodwill to husband, this is not conclusive as to wife's interest.

In this regard, the apparently significant contribution of Romero's culinary skill in the success of CPC may work against him unfortunately. Since wife will likely to be able to demonstrate that his unique contributions made CPC successful, she will successfully argue she should have an interest in the form of some value for goodwill irrespective of whether he stays with the business. Indeed, the appraisal by Mr. Frederick supports this position. He indicated husband's goodwill contribution should be valued at $200,000. However, the business will need to be a going concern with Romero's participation for this to be a viable argument for wife.

Effect of Romero's Immediate Withdrawal

As set forth just above, wife's argument that she is entitled to a goodwill interest irrespective of the Operating Agreement provisions is a position supported by case law. (In re. Marriage of Nichols) However, if Romero withdraws from CPC right away this position will be undermined. As both the Nichols court and the Bailey court recognized, the rationale for wife's receipt of a goodwill award is that husband will continue in the business as a going concern after marriage. If Romero withdraws immediately, this rationale is defeated.

In conclusion, wife is entitled to one-half of the community property. Since Romero worked at CPC during marriage, his interest in CPC is a community interest. According to the Operating Agreement, if he withdraws now he is not entitled to goodwill. Thus, his interest will be the $100,000 value set forth in Frederick's appraisal. However, as set forth above, the terms of the Operating Agreement may not be conclusive as to wife if he continues with CPC.

Suggestion About How to Proceed

Romero identified several goals all centered around his desire to leave CPC because he does not believe he is getting a fair share due to the significant contribution of his talent to the success of the business. His options are to withdraw, to buy out his partners with a financial backer, or to buy out his partners over time. Moreover, he wants to give his wife what she is entitled to, but he cannot afford to start a new business and pay her off at the same time.

and establish a restaurant elsewhere. As discussed above, if Romero continues in operation at the CPC restaurants, wife's argument that she is entitled to goodwill will be strengthened. Thus, by the same token. buying out his CPC partners is not the best course of action. Continuation of the business would promote a goodwill interest by wife. Therefore, Romero should obtain a financial backer and start anew.

ANSWER 2 TO PERFORMANCE TEST A

Memorandum

To: Carnell Boyd
From: Applicant
Re: Romero v. CBC/Romero v. Romero

1. Romero's Expectations if Withdraw from CPC today.

A. Romero's Current Ownership Interest

Currently Romero owns 25% of the CPC. His two other partners own the remaining 75%. His current withdrawal from CPC will accordingly take with it 25% of whatever value is attached to CPC.

B. Goodwill in Valuing CPC

According to Robert Frederick's appraisal, CPC, excluding any value attributable to goodwill is worth $400,000, taking into consideration its assets and liabilities.

Mr. Frederick attaches an overall value of $400,000 to goodwill in his appraisal and further attributes more than half of the goodwill value to Romero for his culinary efforts. Mr. Frederick does not, however, include the $400,000 attributable to goodwill in his overall valuation of the company because the terms of the Operating Agreement do not contemplate goodwill as a distributable asset of the Company.

The issue, therefore, is whether Romero can successfully argue that he is entitled to be reimbursed for a portion of the goodwill attributable to CPC.

1. Dissolution of CPC upon withdrawal of Romero.

A related question to what value Romero should be entitled to upon withdrawing is what will happen to CPC.

According to Provision 12.2 of Operating Agreement, CPC will dissolve upon a withdrawal of a member unless the remaining members agree to continue business within 90 days.

From reading through file. it appears unlikely that the other partners would vote to continue the business. Jerry Walden's background is in accounting business. Annette Bingham's background is in the pizza business but is management-related.

Jerry and Annette would be forced to hire new chef if Romero quit. Because Romero will not give out recipes, it is likely that a regular pizza restaurant, without Romero's cooking. will succeed in light of the fact that a past pizza establishment in the same location failed.

Thus, it is likely that CPC will cease operations and dissolve if Romero decides to withdraw.

2. Availability of Goodwill distribution when Business dissolves

In Dawson v. White, the Supreme Court of Columbia defined goodwill as "the ability to attract client's as a result of firm's name, location or reputation of its lawyers." The court expanded by stating that good was an advantage or benefit, acquired by an establishment beyond the mere value of the capital, stock, funds or property employed therein, in consequence of general public patronage and encouragement, which it receives from constant and habitual customers on account of its local position, common celebrity, or reputation for skill and affluence…"

In our case, the appraiser points out in his valuation, that goodwill attributable to CPC to the synergy of 3 owners and the talents of Romero. The fact that a portion of CPC's goodwill is attributable to Romero himself is confirmed by the newspaper review in which the Reporter points out that Romero's cooking can only be sampled at CPC and the fact that another pizza establishment failed.

However, in Dawson, despite the potential for goodwill, the court looked to the course of conduct of the parties and any operating agreements to determine whether goodwill could be valued and distributed.

The Dawson court pointed out that by statute partners in a partnership are free to exclude particular items from a class of distributable property and the court's will enforce the agreement.

This deference to an agreement was tacitly confirmed in Re Marriage of Nichols where the Court did not disagree that a stock purchase agreement could control the value of a shareholder's interest when he left the firm, but would not control the determination of goodwill as an equitable distribution asset in a divorce proceeding.

3. Effect of Operating Agreement

While Dawson involved a partnership, it is likely that the idea of deferring to the parties written agreement will carry over to a limited liability context. Therefore, because the members of CPC initially agreed in their operating agreement (per Provision 12.4) to look solely to the assets of the company upon dissolution, it is likely that a Court will not disturb the agreement that goodwill not be taken into account if dissociation occurs within five years of date of formation. Here CPC began on May 4, 1995. If Romero were to withdraw today, it is likely that a Court would follow agreement and not include goodwill in valuing Romero's interest.

4. If CPC continues after Romero withdraws

Under the decisions of Salinas and Rice, if Jerry and Annette continue to operate CPC after Romero has left, and any goodwill can be attributed to the name and location of CPC (although amount is likely minimum given past business failures). Romero may be able to argue that a portion of that goodwill in ongoing business should be awarded to him.

However, in light of the operating agreement, this argument is not very strong and would also fail if Jerry and Annette decided to dissolve.

Conclusion

If Romero were to withdraw today, it is likely that he would only be reimbursed for tangible assets, per the operating agreement, with no value attributed to goodwill.

It should also be noted that Romero could lose a portion of his $100,000 share by attributing it to damages as a result of withdrawal and dissolution. See Provision 11.2 in Agreement.

II. W's Interest in CPC upon dissolution of Marriage

A. Business is Community Property

Under Bailey, a business in which one spouse materially participates in its operations is a community property asset (CP asset) entitled to equitable distribution on divorce. This is true even if business began before marriage or if spouse took all income from business and contributed it to community

B. Will Goodwill be considered in valuing business for equitable distribution?

partnership was controlled by the partnership agreement. which didn't assign any value to goodwill. The Supreme Court of Columbia disagreed with the husband concluding that a spouse's interest in goodwill is not controlled by operating agreement. The Nichols court went on to hold that because husband was a senior member in an old and established law firm, he had professional goodwill that was subject to equitable distribution.

Here, Romero's wife could argue that Romero participation in CPC is analogous to the senior attorney. Romero is key to the success of the business. This is confirmed by the statements in Mr. Frederick's appraisal that more than half goodwill is attributed to Romero himself.

Moreover, under Green v. Green, W may be able to reach the goodwill attached to the synergy of the partners, separate and apart from goodwill attributed to Romero alone.

Conclusion

Under the current case law, it is likely that W will be able to attach a value to the goodwill of CPC and make it an asset of the marriage subject to equitable distribution. This is true despite the terms of the operating agreement.

C. Effect of Romero's Immediate Withdrawal on W's Share of CPC

The cases are unclear on this point. In Fraser, the court did point out that the value of W's interest in the goodwill of her husband's business was attributed to the fact that the business was ongoing. The court pointed out that the W was entitled to her share of a business that would continue to thrive. The Fraser court distinguished this from the situation in which a business is dissolving.

If CPC dissolves as a result of Romero's withdrawal, he may be able to argue that since the business has ceased, any goodwill which could be subject to equitable distribution is measured by the a mount of goodwill distributed upon dissolution.

This would seem logical because if Romero withdraws and does not receive any goodwill, a court may find that no goodwill existed to be valued upon divorce. However, if Romero withdraws and does not receive a distribution for goodwill because of the Operating Agreement, it seems probable that a court will ignore the operating agreement in deciding whether Romero's wife is entitled to value goodwill.

Conclusion

The case law is unclear on the effect of a withdrawing partner's goodwill in equitable dissolution. However, it seems likely that since Operating Agreement is reason why Romero himself would not receive anything, a court, per Marriage of Nichols, will not bind W to the terms of the agreement and award W goodwill as valued in Nichols' valuation.

III. Suggestions for Romero

It is clear from Romero's interview that he would like to stay in pizza business but not under the current terms of his agreement with Jerry and Annette. It is also clear that Romero feels that he should be compensated for the value of his services and culinary skills to CPC. Finally, while Romero wants to continue business and give his wife "what she's entitled to," he is clearly concerned about cash flow.

Suggestion #1 - Remain with CPC until expiration of Five-Year Limitation on Goodwill Distribution.

Under terms of Operating Agreement, once a member disassociates, he will be entitled to fair value, if disassociation does not cause dissolution. If within 5 years, fair value will not include goodwill. See Provision 11.2.

Here CPC was established on May 4, 1995. It is now January of 2000. If Romero can hold on through May, the Operating Agreement will no longer be a blockade to his receipt of value for goodwill and Frederick's appraisal should provide further proof.

This will only work however, if CPC does not dissolve. In the event of dissolution, members are to look solely at the assets of Company, and it is inferred that goodwill will not be included, although Romero may argue that goodwill is an asset per Nichols' valuation.

Suggestion #2 - Make deal with Wife to forego goodwill now.

If Romero doesn't want to continue until May or believes that dissolution would prevent obtaining goodwill in any event, Romero may want to withdraw now and settle for $100,000. If W entitled to goodwill which Romero did not get, Romero may want to approach W with option of taking a percent of proceeds from pizza business that Romero could start with $100,000. The agreement should provide a limit on W's withdrawal of proceeds which could equal what she would have been entitled to with CPC goodwill plus an interest percent to compensate her for time waiting to establish new business.

Otherwise Romero may be stuck with only receiving $100,000 and having to pay W for goodwill that he did not get compensated for.

TUESDAY AFTERNOON
FEBRUARY 24, 2000

California Bar Examination

Performance Test B

INSTRUCTION AND FILE

In re: Sunrise Galleria Mall

INSTRUCTIONS i

FILE 1

Letter from Leslie Kelleher to Anthony Chase 3

Parent Escort Policy 6

Memorandum from Christina Cassels to Anthony Chase..... 7

Letter from John Ripka 9

Memorandum on plaintiffs affected by curfew 13

In re: Sunrise Galleria Mall Curfew

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 clients.

2. The problem is set in the fictional state of Columbia, one of the United States. Your firm has been retained by a group of parents and their teenage children to represent them in connection with a curfew policy a shopping mall plans to implement.

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 draft an alternative to the proposed curfew and prepare a persuasive letter to opposing counsel.

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

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

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

7. In citing cases from the Library, you may use abbreviations and delete citations.

BURRIS, CHASE, KALEVITCH & ROHR

Attorneys and Counselors
Sunrise Professional Centre - Suite 500
Sunrise, Columbia 55551

TO: Applicant
FROM: Tony Chase
RE: Sunrise Galleria Mall Curfew
DATE: February 24, 2000

As you may know, the management of the Sunrise Galleria Mall recently announced that it will impose a 6:00 p.m. curfew on minors under the age of seventeen who are not accompanied by a parent or guardian. We represent a group of teenagers and parents who object to the proposed curfew because it will interfere with a variety of activities in which the young people are engaged with the knowledge and permission of their parents.

After the Mall's intentions were made public, I telephoned Leslie Kelleher, counsel for Sunrise Galleria, to express the concerns of our clients and to ask for a copy of the text of the curfew. In a letter that accompanied the copy of the rule she forwarded to us, Leslie explained that the Galleria's exclusionary policy is similar to curfews adopted by several other mega-malls. She pointedly noted that those shopping centers have successfully resisted challenges to nighttime bans on unaccompanied teenagers.

Our Supreme Court has held that the Columbia Constitution provides access to private shopping centers to persons exercising free speech rights. Nonetheless, I'm not confident we would ultimately prevail in an action that seeks to completely eliminate all elements of a curfew. Moreover, the high cost of litigating the matter is a factor we must consider in counseling our clients, none of whom has significant resources.

I want to present Leslie Kelleher with an alternative to the Mall's absolute ban on unaccompanied teens while permitting our clients to pursue their legitimate objectives.

Here's what I'd like you to do:

1. Draft an alternative to the complete curfew contained in the Mall's Parent Escort Policy that allows our clients to continue their present evening activities and engage in other appropriate endeavors, and meets the Mall's needs as we understand them. Write only the actual language you propose for the alternative Parent Escort Policy; don't write how you would do it or why.

2. Prepare a letter to Leslie Kelleher for my signature designed to persuade her:

a) that the Mall's proposed absolute ban on unaccompanied teenagers is unconstitutional,

b) that our proposed curfew alternative will pass constitutional scrutiny, and

c) that our alternative formulation meets the Mall's needs as we understand them.

We will, of course, enclose in the letter to Leslie Kelleher our draft of the Parent Escort Policy.

Thanks for your help.

Al Hibri, Hodges & Kelleher
100 S.W. 3rd Avenue
Davie, Columbia 55515

February 9, 2000

Anthony Chase, Esq.
Burris, Chase, Kalevitch & Rohr
Sunrise Professional Centre - Suite 500
Sunrise, Columbia 55551

Dear Tony:

Thanks for informing me that you represent a group of parents and teens concerned about the Parent Escort Policy the Sunrise Galleria Mall will implement on April 1, 20 I must say, I was surprised to learn there is opposition to the Mall's plan to curtail teenager access to the facility during evening hours unless they are accompanied by a parent or guardian. Since we announced several weeks ago that the Mall will exclude unescorted teens, Sunrise Galleria management has received strong support from local government, school and religious leaders as well as many shoppers, including a number of teenagers.

As you can appreciate, Mall management is taking this action reluctantly because we do not wish to alienate customers. Teenage spending in the United States, now estimated to be over $100 billion annually, is steadily increasing. Last year at Sunrise Galleria, almost 20 percent of the 25 million annual shoppers at our 445 retail stores were in the 17-and-under age group. A recent Mall survey suggests, however, that teens focus their spending on video games, movies, the food courts, and purchases under $20.

While we want to preserve our customer base, the approximately 3,000 teenagers who gather at the Mall on many weekend evenings pose a serious challenge to security and order. Although some come with the primary intention to shop, many teens have adopted the Mall as a hangout. They cruise the corridors in packs as large as 20, walking five and six abreast, colliding with and otherwise intimidating shoppers. Sometimes these groups engage in impromptu scavenger hunts, racing through the Mall trying to collect specific items, threatening customers and disrupting business people. Very large groups, numbering a hundred or more, often congregate in the atriums of our three-story facility. Loud and unruly conduct is commonplace, including spitting and

dropping items from the higher tiers of the Mall on patrons below. it is not unusual for fist fights and scuffles to occur on weekend nights.

In the past, management has dealt with these teenager issues in a low-key fashion. From time to time, Mall staff distribute "conduct code" flyers to teens indicating, among other things, that loud and abusive behavior, profanity, alcoholic beverages, and blocking aisles are prohibited. In addition to our full-time security staff of 75, the Mall employs the "Mighty Moms," a cadre of a dozen women who cruise the facility on selected weekend nights defusing confrontations between youngsters and breaking up groups larger than five. We also use a "quick response team" of specially trained security officers and several "youth liaison officers," mature teens who utilize peer communication techniques, to calm tense situations.

A serious incident occurred a few months ago that forced Sunrise Galleria management to reconsider its approach. A melee erupted in one of the food courts and two small children were injured when they were struck by a thrown chair or table as they dove for cover. A third child was traumatized when he witnessed a teenager point a gun at another teen. Though the culprits were prosecuted, the resulting negative publicity damaged the Mall's well-developed image as a family friendly facility. For a period of weeks, the Mall experienced a sharp decline in customer traffic.

This event led Sunrise Galleria to emulate other mega-malls that have adopted teenage curfews. Led by the Mall of America, the nation's largest shopping facility, shopping centers in North Carolina, Minnesota, New York, Virginia, Michigan, Florida, New Jersey, Illinois, Texas, and elsewhere have adopted various forms of teenage curfews. While some of these exclusionary policies have prompted mild opposition, all have survived the test of community acceptance. According to the National Institute of Shopping Centers, the industry's research group, the curfews have not been the subject of litigation. So long as a private property owner's exclusion of individuals is not based on race, religion, gender or any other unconstitutional ground, it will be upheld.

I have attached a copy of the Mall's Parent Escort Policy. As you can see, the ban applies to *all unaccompanied* teenagers. Please note that teens are not excluded from shopping and enjoying the Mall's facilities so long as they are in the company of a parent or guardian. Indeed, as part of its family friendly theme, Sunrise Galleria will

sponsor social activities, including dances and theme parties, for teens who are brought to the Mall by parents or guardians and who remain in the immediate area of the event. Moreover, the policy does not apply to the magnet stores associated with the Mall, such as WalMart, Saks Fifth Avenue, Sears, the Rain Forest Restaurant, the Galleria Promenade Hotel, and the other ten facilities that maintain their own entrances to the parking areas. The Mall is in the process of recruiting and training an additional 20 security officers to ensure the curfew will be uniformly and effectively enforced.

Mall management is convinced its new policy is in the best interests of its customers, including teenagers, and its many merchants. I hope you will pass this information on to your clients. If they want further explanation of the program, please ask them to contact Marge Fusco, Director of Customer Service.

Sincerely,

Leslie Kelleher

Leslie Kelleher, Esq.

SUNRISE GALLERIA MALL

Parent Escort Policy

(Effective April 1, 2000)

To better serve patrons and other visitors, protect property, maintain order, and insure personal safety at the Sunrise Galleria Mall, the following Parent Escort Policy is adopted.

1. Persons under 17 years of age will be denied admission to the Mall after 6:00 p.m. unless they are accompanied by a parent or guardian.

2. Persons who appear to be under 17 years of age will be approached by Mall employees, at one of the 24 direct access entrances to the facility or in any other portion of the Mall, and be requested to document their age.

3. Persons under 17 years of age will be requested to immediately leave Mall property. Failure to respond to such a request will be considered trespassing on the private property of Sunrise Galleria Mall, subjecting the individual to immediate arrest and subsequent prosecution.

4. If a person under 17 years of age appears unable to arrange transportation to his or her home or to another place of safety, Mall employees will attempt to contact the individual's parent or guardian. If no other transportation is available, a Mall Security Officer will escort the individual to a safe location.

5. This policy will not apply to the several magnet stores, restaurants and other retail establishments associated with the Mall and which maintain separate entrances to their facilities. However, the policy will be enforced at entrances from those facilities into the Mall proper.

BURRIS, CHASE, KALEVITCH & ROHR

Memorandum

TO: Tony Chase
FROM: Christina Cassels, Law Clerk
RE: The Sunrise Galleria Curfew
DATE: February 16, 2000

In response to your request for information concerning the growth of suburban shopping malls and the decline of downtown business districts, I searched widely on the Internet and consulted a variety of other sources. The results of my research are set out in summary fashion below. If you require additional data, please let me know.

In 1950, privately-owned shopping centers of any size numbered fewer than 100 across the country. By 1967, 105 large regional malls existed (above 400,000 square feet of gross leasable space [GLS]). By 1997, there were more than 2,000. *Shopping Center Census: 1998.* In Columbia the number of malls greater than 400,000 square feet has increased from 30 in 1975 to 137 in 1998. Id. The number of "mega-malls" in the U.S. (those above 1,000,000 square feet GLS) is 29, led by the Mall of America, Bloomington, MN (4.2 million GLS), which ranks second to Canada's West Edmonton Mall (5.2 million GLS) as the largest retail space in the world. *American Shopping Center Directory 1998.* The Sunrise Galleria Mall, at 3.1 million GLS, is Columbia's largest mega-mail.

The share of retail sales attributable to shopping malls has demonstrated a similar pattern. Nationally, malls' market share of "shopper goods sales" was 13% in 1967 and 31 % in 1979. In 1997 retail sales in shopping centers accounted for 56% of total retail sales in the United States and 54% in Columbia, excluding sales by automotive dealers and gasoline service stations. *International Council of Shopping Centers, The Economic Impact of the Shopping Center Industry in the United States, 1998-1999.*

Seventy percent of the national adult population shop at regional malls and do so an average of 3.9 times a month, about once a week. *Shopping Center Research Reports (1998).* Assuming Columbia follows this pattern, more than four million of the six million residents of the State shop at our regional malls every week.

The converse, the decline of downtown business districts, is not so easily documented. Several courts, however, have acknowledged the shriveling of the downtown shopping areas and the dominant role of the suburban mall.

> "This Court takes judicial notice of the fact that in every major city of this state and around the nation, there has been a substantial decline of downtown business districts. Moreover, this decline has been accompanied and caused by the combination of the move of residents from the city to the suburbs and the construction of large, enclosed shopping centers in those suburbs." *New Jersey Coalition Against War v. J.M.B. Realty (NJ 1994).*

> "Both statistics and common experience show that downtown business districts, particularly in small and medium sized communities, have suffered a marked decline. At the same time, suburban shopping malls, replete with creature comforts, have boomed." *Western Pa. Socialist Workers 1982 Campaign v. Connecticut Gen. Life Ins. Co.* (PA *1993)*

> "The suburban victory in the regional retail war is epitomized by the enclosed regional shopping mall. It serves as the new 'Main Street' of America and is an integral part of the economic and social fabric of America." *International Council of Shopping Centers v. The Scope, Inc. (TX 1992).*

> "The privately held shopping center is more than the public trading area for much of metropolitan America, having evolved beyond the strictly retail stage to become a public square where people gather. For much of the nation, including our state, the shopping center is often the only large contained place in a suburb and it provides a place for exhibitions and activities that no other space can offer. Thus, privately-owned shopping centers have supplanted the traditional downtown public business districts where free speech once flourished." *Robins v. Pruneyard Shopping Center* (Columbia Supreme Court *1989).*

Ripka Investigations

John P. Ripka
Central Arcade, Suite 150
Capital City, Columbia 55123
February 1 5, 2000

TO: Anthony Chase, Esq.
Burris, Chase, Kalevitch & Rohr

FROM: John P. Ripka

RE: Sunrise Galleria Mall Security; Facilities; Events and Activities

Security System

Security at the Sunrise Galleria Mall is the most sophisticated of any private facility in this part of Columbia. Directed by a respected law enforcement leader who served as the chief of a major metropolitan police department for eleven years, the Security Department has almost 100 officers, including more than a dozen recently employed in light of the new teenage curfew policy.

Sunrise Galleria Security relies heavily on state of the art monitoring and response technology:

* Central Dispatch, located near the center of the Mall's more than 75 acres of space, operates 24 hours a day year round and is staffed by trained Communications Officers who oversee all security systems, answer emergency calls, and relay information to response personnel.

* Computer Security Systems electronically monitor more than 450 security points throughout the Mall, controlling door locks, card access systems, guard tours and alarms.

* Closed Circuit Television System monitors more than 80 locations in the Mall simultaneously, recording activities, storing them on tape, and printing a picture of an event on demand.

* Computerized Dispatch and Communication controls all radio and telephone links with security personnel; officers carry a 1 2-channel LCD radio-telephone that links them centrally, with each other, and with police, fire and rescue agencies.

* Security Bike Patrol monitors exterior entrances and parking areas, providing a quick response force that can be moved to an incident location despite vehicular traffic problems.

* Help Phones, located at 60 sites throughout the Mall and marked with bright yellow lights, augment the "Mall Security" button that is installed on all pay phones in the Mall; these 100+ phones are linked directly to Central Dispatch.

I could not obtain permission to review the Mall's Central Security internal incident reports. I did, however, review the Metropolitan Police Department records involving incidents at the Mall. For a facility that draws 25 million visitors a year -- more than the Grand Canyon and Yellowstone Park -- it has a remarkably low crime rate, one that has fallen 15% in the last two years (740 reports in 1998 and 630 in 1999). Incidents involving juveniles (those below 18 under Columbia law) accounted for 30% of the individuals involved in reported incidents at the Mall last year. More than 75% of the incidents involving juveniles are theft-related, primarily shoplifting. The remainder range from trespassing to disorderly conduct to simple assault. Serious crimes against the person involving juveniles at the Mall were less than 2% of the young people accused of criminal activity last year.

Mall Facilities

The Mall, a community unto itself, is open from 7:00 a.m. (for registered "Mall Walkers") until 1:00 a.m. (when the last restaurants, clubs and theaters close). The 445 retail outlets (plus dozens of vendors who operate kiosks in Mall corridors) are broken down into 35 categories, from Audio Visual to Unisex. The Mall boasts six major department stores, 82 shops for women and 22 for men, 33 shoe stores and 21 jewelry shops. There are more than 60 locations that serve food. They range from several fast food "courts" with common seating areas for hundreds who purchase from a number of vendors to romantic fine dining for two along the Mall's famous "Restaurant Row International."

The Mall has several attractions that draw patrons from near and far to the climate perfect environment:

* The *Racquet Club,* a four-court indoor tennis facility hosts the Sunrise Invitational, Columbia's premier pro-am event, and is open for players and students 14 hours per day.

* The *Waterpark,* an aquatic center with wave pool and competitive swimming and diving facilities used for high school and swim club competitions.

* *World Virtual* Golf, a state of the art indoor facility that can accommodate 18 "foursomes" who can "play" seven world famous courses on a computerized interactive video scanner.

* *Galleria Promenade Hotel,* an upscale all-suite inn with 64 lodging/living units serving visitors and business people.

Events and Activities

Keeping with its theme, "Playing a part in *your* family's life," Sunrise Galleria sponsors a full range of activities for the public. I describe below a few of the favorite recurring Mall events and list a large selection of sanctioned activities among those that were offered free of charge to patrons during the past year.

* Family Weekend Festival: A carnival of events throughout the Mall -- Clowns, face painters, balloon artists, magic shows, arts and crafts, beach music and DJs at the Waterpark, a closest-to-the-hole golf tournament, door prizes, live entertainment and more!

* The Forum Series: Featured from time to time at the "Town Center Pavilion," an amphitheater seating 250, are speakers on political, social, newsworthy and cultural topics ranging from statements by elected officials and candidates for elected office, to comments by newsmakers, authors, journalists and others. A question and answer period follows each individual or panel presentation.

* Seniors' Days: Informational displays, seminars, live entertainment, medical services and more for patrons 55 years and older who are invited to join the Seniors' Club and qualify for special discounts and sales.

The following events and activities were among those held at the Mall in 1998:

Bel Canto Opera Competition; Spring Fashion Show; Easter Bunny Arrival; Global ReLeaf Tree Seedling Giveaway; Fall Fashion Show; Safe Halloween Parade; Trick or Treat at the Mall; Senior Citizen Thanksgiving Dinner; Holiday Musical Performers; Mall Walkers Blood Pressure Screening; Mall Walkers 10th Anniversary Salute; Hadassah Holiday Gift Wrap; Singing Santa for the Hearing Impaired; Grand Re-Opening with the Columbia Pops Orchestra; Concert by the Columbia Youth Symphony; Voter Registration Campaign; Boat and Leisure Living Show; St. Elizabeth's Hospital Cholesterol Screening; Mademoiselle Fashion Show; Vacation Show; Muppet Traffic Safety Show; Children's Fashion Show; Modern Art Museum Workshop; Santa's Arrival; Holiday Community Entertainment; Annual U.S. Marine Corps Toys for Tots; Hand Made in America Craft Show; Antique Show; Annual Bridal Festival; Prom Fashion Show; Walk-a-Thon for Cancer; German Band Performance; Back to School Fashions; Crime Prevention Day; Brenton County Census Bureau Display; Dental Health Promotion Day; World Gym Aerobics Presentation; Summer Sidewalk Sale; 4H-Seeing Eye Dog Mall Walk; St. Patrick's Day 5k Run at the Mall; Prosecutor's Victim and Witness Information Program; Selvins Recreation Department Art Display; County Medical Center Health Fair; March of Dimes Event; Deborah Hospital Foundation Gift Wrap.

Please let me know what additional information you will need.

BURRIS, CHASE, KALEVITCH & ROHR

Memorandum

T0: The Sunrise Galleria Curfew File
FROM: Tony Chase
RE: Plaintiffs' Evening Activities Affected by Curfew
DATE: February 18, 2000

If we are forced to litigate this matter, we will have to identify specific activities of the teenage clients that the curfew will disrupt. Based on my interview notes, clients are presently engaged in the following endeavors approved by their parents that appear to be in jeopardy if the Sunrise Galleria Mall implements the ban on unaccompanied teens.

Amanda Blake (age 14): Studying modeling with the John Casablanca Agency located in the Mall. All classes are in the evening to accommodate the bulk of the students who are men and women over 17 years of age who work or go to high school or college during the day. Amanda has modeled at the Sunrise Galleria's Children's & Mademoiselle Fashion Show. If forced to drop out of the class, she will have to abandon a promising career as a model.

Michael Stanton (age 15): Employed from 5:00 p.m. to 1 1:00 p.m. five nights per week by the Galleria Pet Center as a kennel attendant. Michael wants to be a veterinarian and has learned that his chances of being accepted to veterinary school are increased if he can demonstrate extensive experience with and significant commitment to the care of animals.

Keisha Malowe (age 13): A musical prodigy with a significant talent, she has studied piano with Gino Pisterella, owner of Giovanni Steinway Music located in the Mall, for the past eight years. She serves as a volunteer tutor to intermediate piano students during evening hours. She also practices approximately 14 hours per week in the evening on a special Steinway grand piano, an instrument her family could not possibly afford.

Jessica Levi-Strauss (age 16): A volunteer for the Columbia Environmental Action Party, a small but growing political organization in Columbia. For the past 16 months, Jessica has spent one evening per week distributing political information to patrons of the Mall and

trying to get them to register to vote or to switch their party allegiance to the "Green Party."

Stanley Fink (age 12): A member of the Waterpark swim team, he regularly practices five hours per day (two hours in the morning between 6:00 and 8:00 a.m. and three in the evening between 5:00 p.m. and 8:00 p.m.)

Marin Dale (age 16): Often delivers completed work for her mother, a single parent of four children of whom Marin is the oldest, to her mother's employer, the Cantrell Associates office in the Mall. Because of childcare responsibilities, her mother works at home. Marin works after school until 6:00 p.m. to earn money to contribute to the family and cannot deliver her mother's work product until after that time.

THURSDAY AFTERNOON
FEBRUARY 22, 2000

California Bar Examination

Performance Test B

LIBRARY

In re: Sunrise Galleria Mall

LIBRARY

Columbia Constitution, Article 1 …… 1

Savage v. Trammell Crow Company, Inc (1992) ……2

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COLUMBIA CONSTITUTION

Article I. Declaration of Rights

Section 1 . Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.

Section 2. The people have the right freely to assemble together, to consult for the common good, to make known their opinions to their fellow citizens and their representatives, and to petition for redress of grievances.

* * *

Section 10. Private property shall not be taken for public use without just compensation. Individuals or private corporations shall not be authorized to take private property for public use without just compensation first made to the owners.

SAVAGE v. TRAMMELL CROW COMPANY, INC.
Columbia Court of Appeals, 1992

The plaintiff, Herbert C. Savage, went to the Del Norte Plaza Shopping Center and attempted to place gospel leaflets on cars in the parking lot. Savage was stopped by a security guard who told him the parking lot was private and that he had no business putting the leaflets on cars in the shopping center. On the following day, Savage spoke with Ron Burns, a partner in the defendant Trammell Crow Company, Inc., the management firm operating the shopping center. Burns informed Savage that the Del Norte Plaza "Rules and Regulations Relating to Use of Shopping Center Property" prohibited the distribution of leaflets, flyers and handbills in the parking lot. Burns later wrote Savage utilizing a form response provided to tenants and others in defendant's efforts to enforce the parking lot prohibition:

> A primary reason why distribution in the parking lot has been prohibited is because of the litter which inevitably results when hundreds of flyers are distributed by groups. This prohibition has been uniformly enforced regardless of the nature or content of the leaflets. The parking facilities of the Del Norte Plaza are typical of other shopping centers. While trash containers are located in the Plaza's common area walkways adjacent to stores, we do not have trash containers placed in our parking facilities. The placement of leaflets or flyers on unoccupied automobiles (or handing such flyers to individuals in the parking lot) would substantially increase the litter problem because handbills can be dislodged from unoccupied cars by wind and a patron finding an unwanted leaflet on his automobile may be inclined to simply throw the leaflet on the ground. Moreover, the distribution of such handbills within our parking facilities will unduly hamper ingress and egress patterns within the parking facilities, particularly if there are several individuals distributing in the parking lot. This would not only annoy and inconvenience our patrons but potentially increase the occurrence of traffic accidents.

The trial court granted summary judgment to Trammell, denying Savage's request for a preliminary injunction to permit him to leaflet the shopping center's parking lot. This appeal ensued.

In *Robins v. Pruneyard Shopping Center (1989),* our Supreme Court held that unlike the First Amendment to the United States Constitution, Columbia's Constitution protects the free speech and petition rights of Columbia citizens even when those rights are exercised in a privately owned shopping center. Relying on Article I, Section 1 of the Columbia Constitution, the Court in *Robins* found a shopping center could not prevent a group of high school students from soliciting signatures on a petition opposed to a United Nations resolution on "Zionism."

In extending the liberty of speech clause to private shopping centers, however, the Court in *Robins* stated:

> By no means do we imply that those who wish to disseminate ideas have free rein. We recognize important substantive rights of owners; those rights we identify as freedom from disruption of normal business operations and freedom from interference with customer convenience. Property owners may regulate the time, place and manner of expressive activity. Thus, any intrusion on private property rights can be limited. A handful of additional orderly persons soliciting signatures and distributing handbills, under reasonable regulations adopted by the property owner to assure that these activities do not interfere with normal business operations, should not, however, markedly dilute the owner's property rights.

In giving private property owners the right to establish "time, place and manner" rules, the Court invoked the power government possesses with respect to public forums and conduct of the protected by the Article I, Section 1. .In *Dulaney v. Municipal Court* (Columbia Supreme Court, *1971),* the court explained that the guidelines for fashioning "time, place and manner" rules were "developed in a long line of United States Supreme Court cases" involving the First Amendment to the U.S. Constitution. Thus, although Savage's right to engage in expressive activity at private shopping centers is found solely in the broader protection provided by Columbia's Constitution, a shopping center's power to impose time, place, and manner restrictions on such activity is nonetheless measured by federal constitutional standards.

Accordingly, even in a public forum, the government may impose reasonable restrictions on the time, place or manner of protected speech and related activities, provided the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information. Clark v. Community *for Creative Non-Violence (U.S.* Supreme Court, *1984).* Trammell Crow's parking lot restriction meets each of these requirements.

The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. *Ward v. Rock Against Racism (U.S.* Supreme Court, 1989). In this case the ban on leafleting in the parking lot is based on Burns's concerns about littering and interference with ingress and egress from the center. Plainly these concerns are unrelated to the message any particular leafleter is attempting to convey.

We recognize that a regulation which is not explicitly content-related may nonetheless be invalid if the regulation provides officials with unbridled discretion in enforcing it. *Ward v. Rock Against Racism, supra.* Here, however, the parking lot ban provides no discretion -- leafletting is prohibited even, as Burns's use of the language in letters to tenants demonstrates, when the leafletting is directly related to the shopping center's business.

In addition to being content-neutral, the parking lot ban is also narrowly tailored to meet a significant interest of the shopping center. Our courts have consistently recognized a property owner's interest in controlling litter and regulating traffic. *See H-CHH Associates v. Citizens for Representative Government* (Columbia Supreme Court, 1987) (litter problem may justify limitation as to place); *In re: Hoffman* (Columbia Supreme Court, 1967) ("Persons can be excluded entirely from areas where their presence would threaten personal danger or block the flow of passenger or carrier traffic, such as doorways and loading areas.")

In determining whether a regulation is narrowly drawn, the United States Supreme Court has held we must give some deference to the means chosen by responsible decision makers. "Lest any confusion on the point remain, we reaffirm that a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate content-neutral interests but that it need not be the least-restrictive or least-intrusive means of doing so. Rather, the requirement of narrow tailoring is satisfied so long as the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Ward v. Rock Against Racism, supra. This* standard does not mean that a time, place, or manner regulation may

burden substantially more speech than is necessary to further the government's legitimate interests. Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals. A complete ban can be narrowly tailored but only if each activity within the proscription's scope is an appropriately targeted evil. So long as the means chosen are not substantially broader than necessary to achieve the government's interest, however, the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less speech-restrictive alternative. "The validity of time, place, or manner regulations does not turn on a judge's agreement with the responsible decision maker concerning the most appropriate method for promoting significant government interests or the degree to which those interests should be promoted." *United States v. Albertini* (U.S. Supreme Court, 1985). Thus, a regulation must be judged by considering all the groups who would have access to a particular forum and the regulation is valid so long as the property owner could reasonably have determined that its interests overall would be served less effectively without the regulation.

Judged in light of these principles, Trammell Crow's parking lot ban is appropriately tailored to meet the center's interests. Burns, the responsible decision maker, reasonably concluded that, without the ban, the litter and traffic burden created not just by Savage, but by the center's merchants and other political or religious groups, would make the parking lot unsightly, inconvenient and unsafe for the center's patrons.

The parking lot ban on leafleting is especially appropriate in light of the fact Burns's policy does not prevent leafleting on the center's sidewalks. Thus, Savage and other leafleters are not prevented from reaching the center's patrons; rather, they are merely required to hand their leaflets out in person as opposed to placing them on cars. While we do not doubt access to the parking lot would allow greater and easier distribution of leaflets, the adequacy of alternative channels is not measured by the fondest hopes of those who wish to disseminate ideas. Rather, where, as here, an advocate is given a realistic opportunity to reach his intended audience, the alternative channels of communication are adequate.

In sum, Trammell Crow's parking lot ban is a reasonable restriction on the time, place or manner of activities protected by Article I, Section 1. The ban is content neutral, narrowly drawn to protect the center's legitimate interests and provides an adequate alternative forum for expression. Accordingly, the trial court appropriately granted

summary judgment to Trammel, denying Savage's application for a preliminary injunction permitting him to distribute his gospel leaflets in the parking lot.

HUTCHINS v. CITY OF WESTON

Columbia Court of Appeals (1999)

Plaintiffs, a group of minors, commenced this action against the City of Weston to challenge the constitutionality of the Juvenile Curfew Ordinance of 1996' which prohibits the free movement of individuals under the age of seventeen during late night and early morning hours. Plaintiffs sought to restrain Weston from enforcing the curfew on the ground that the curfew violates the minors' equal protection right to free movement under the U.S. and Columbia Constitutions. The plaintiffs filed declarations poignantly describing the educational, social, community, and other activities with which the curfew law interferes. The declarations filed by their parents set forth in equally compelling terms the manner in which the ordinance restricts them from allowing their minor children to attend a movie, participate in an athletic or artistic activity, or enjoy other educational events, even with their permission or even if the child is accompanied by a family friend or older sibling who is mature and responsible but has not reached the age of twenty-one. The trial court granted the defendant's motion for summary judgment; the plaintiffs appeal.

The plaintiffs' challenge to the constitutionality of Weston's curfew law on equal protection grounds requires that we first determine whether the curfew law "operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny." San *Antonio indep. Sch. Dist. v. Rodriguez (U.S.* Supreme Court, 1973). Plaintiffs argue that Weston, through the curfew law, fails to accord the same equal protection of the laws to minors under the age of seventeen as is accorded to those persons seventeen and older. Specifically, the plaintiffs contend that the curfew law deprives only members of the former group of their fundamental right to free movement to participate in legitimate nocturnal activities and, therefore, must be reviewed under the strict scrutiny standard. Although Weston maintains the curfew law would survive a strict scrutiny analysis, it

1 Pursuant to the curfew ordinance, persons under seventeen years of age commit an offense if they remain in any public place or on the premises of any establishment within the City of Weston after 11:01 p.m. on Sunday through Thursday nights, or after 12:01 a.m. on Saturday and Sunday. The curfew stays in effect until 6:00 a.m. every morning. A minor is exempted from the ordinance only if (s)he is accompanied by a parent or guardian.

argues that, because no fundamental rights are implicated, the law must be examined under the rational basis test. Thus, we begin our analysis with the determination whether the minor plaintiffs have a fundamental right to free movement and whether the fundamental rights of the minors' parents are implicated.

1. Fundamental Right to Free Movement

The United States Supreme Court has recognized that the freedom to move about is an important and protected liberty. *Papachristou v. City of Jacksonville (U.S.* Supreme Court, 1972). In *Papachristou,* the Supreme Court struck down a vagrancy ordinance and established that "nightwalking," "loafing," or "strolling," while "not mentioned in the Constitution or in the Bill of Rights," are "historically part of the amenities of life as we have known them." In another Supreme Court vagrancy law case, Justice Douglas eloquently stated: "Freedom of movement is the very essence of our free society, setting us apart. Like the right of assembly and the right of association, it often makes all other rights meaningful -- knowing, studying, arguing, exploring, conversing, observing and even thinking. Once the right to travel is curtailed, all other rights suffer, just as when curfew or home detention is placed on a person." *Aptheker v. Secretary of State (U.S.* Supreme Court, 1964) (Douglas, J., concurring); see also *Kolender v. Lawson (U.S.* Supreme Court, 1983) (holding that a California vagrancy statute "implicates consideration of the constitutional right to freedom of movement").

Significantly, the Columbia Supreme Court has also recognized that our State Constitution, particularly the free speech and assembly provisions of Article I, protects the freedom of movement on city streets, noting it is among the most cherished of our fundamental rights. In *Gomez v. Turner* (1982), the Court said: "Our citizens can walk the streets, without explanations or formal papers. This surely is among the cherished liberties that distinguish this nation and this State from so many others. The right to walk the streets, or to meet publicly with one's friends for a noble purpose or for no purpose at all -- and to do so whenever one pleases -- is an integral component of life in a free and ordered society."

2. Right of Free Movement by Minors

While it is well-settled that the right to free movement is fundamental with respect to adults, courts disagree on whether this fundamental right extends to minors. *Bykofsky v. Borough of Middletown* (3d Cir. 1976) was the first federal court to address the constitutionality of a juvenile curfew ordinance. While finding that "the rights of

locomotion, freedom of movement, to go where one pleases, and to use the public streets in a way that does not interfere with the personal liberty of others" are fundamental with respect to adults, the court concluded that these liberties were not "fundamental rights" with respect to minors. Having concluded that the town ordinance did not implicate the minor plaintiff's fundamental rights, the *Bykofsky* court proceeded to apply the rational basis test and upheld the law. Some state courts upholding curfew laws have likewise concluded that a minor's right to free movement does not constitute a fundamental right under the U.S. Constitution. See *In re J.M. (CO 1989); City of Panora v. Simmons* (Iowa *1989).*

Other courts have departed from the *Bykofsky* reasoning and held that the U.S. Constitution does afford to minors the fundamental right to freedom of movement. See, e.g., *Waters v. Berry* (D.C. Cir. *1989); City of Milwaukee v. K.F. (W I 1988); Allen v. City of Bordentown* (NJ Super. Ct. *1987);* see also *Qutb v. Strauss* (5th Cir. *1993)* (assuming, without deciding, "that the right to move about freely is a fundamental right" of minors). The issue is one of first impression in Columbia.

Early in this century, in stark contrast to the present, minors were presumed to possess no legal rights. A minor "was neither recognized philosophically nor legally as having a right to do anything about the vicissitudes of his life, but only to await the action of others on his behalf or in his best interests." *Patricia M. Wald, Making Sense Out of the Rights of Youth (1974).* More recently, however, the Supreme Court has rejected that arcane view of minors' rights. In *Planned Parenthood of Central Missouri v. Danforth (U.S.* Supreme Court *1976),* the Court maintained that, in general, "constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority," and that "minors, as well as adults, are protected by the Constitution and possess constitutional rights." While reluctant to define "the totality of the relationship of the juvenile and the state," the Court has made it clear that "whatever may be their precise import, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." *In re: Gault* (U.S. Supreme Court, *1967).* Thus, minors "are entitled to a significant measure of First Amendment protection." *Erznoznik v. City of Jacksonville* (U.S. Supreme Court, 1975).

The Supreme Court has recognized that the First Amendment rights of minors include the freedoms of speech, expression, and religion. We see no reason why juveniles should not also enjoy the rights to assemble, to petition the government for the redress of

grievances, and to associate with others. Whenever the exercise of a minor's rights to freedom *of* speech, religion, assembly and association require the minor to move about, freedom of movement must also be protected under the First Amendment. Restricting movement so that an individual cannot exercise these rights without violating the law is equivalent to a denial of them. This right is rooted in our federal and state constitutional protections of fundamental liberty interests under the doctrine *of* substantive due process. Thus, we conclude that the rights to freedom of movement, to assemble, and to associate extend to minors as well as adults.

3. Constitutional Scrutiny

While acknowledging these rights of minors, the Supreme Court has also recognized that the state has a great interest in protecting minors and regulating their activities. In a variety of contexts, the state's power to control the conduct of children reaches beyond the scope of its authority over adults and the state may properly adjust its legal system to account for the unique characteristics and needs of minors. In *Bellotti v. Baird, (U.S.* Supreme Court 1979), a case involving a challenge to a Massachusetts statute that required parental consent before a minor could obtain an abortion, the Supreme Court articulated three factors that, when applicable, warrant the differential treatment of minors' constitutional rights: "the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing." The state argues that all three *Bellotti* factors are present here and justify the infringement of the minors' fundamental rights. It asserts that youths at night are more vulnerable to crime and peer pressure than adults; that minors lack experience, perspective and judgment to recognize and avoid detrimental choices such as drugs, alcohol and crime; and, that the city's restriction on minors' movement after 1 1:00 p.m. reinforces parental authority and home life and encourages parents to actively supervise their children.

First, we note that the plague of crime and drugs at which the curfew is directed, while not peculiar to minors, is more damaging to them because they are more vulnerable. The second *Bellotti* factor -- minors' inability to make critical decisions -- also supports the curfew's restriction of minors' rights of freedom of movement. The Supreme Court has recognized that "the state has a strong and legitimate interest in the welfare of its young citizens, whose immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely." *Hodgson v.*

Minnesota, (U.S. Supreme Court, 1990). We recognize that certain temptations may arise during curfew hours which could end in serious consequences for a juvenile. The court's third concern in *Bellotti* -- the importance of the parental role in child-rearing -also supports the Columbia curfew ordinance. We agree that child-rearing is the role of parents, not of impersonal political institutions. Absent signs of abuse or neglect, the state generally permits parents to raise their children as the parents see fit. Parham v. J.R. (U.S. Supreme Court, 1979.) The curfew ordinance, however, rests on the implicit assumption that in many cases the traditional family unit, in which two parents exercise control over their children's activities, has dissolved. Courts like this one, given the overview of life seen in their caseloads, know that this is undeniably true for overwhelming numbers of children in Columbia. We agree that nocturnal curfew ordinances justify intrusion into minors' fundamental rights.

How does a court determine, however, whether the city's curfew ordinance appropriately balances the state's unique interest in minors' welfare against minors' fundamental rights? The Supreme Court has articulated the appropriate standard: Restrictions that inhibit the fundamental rights of minors are valid only if they serve significant state interests and are narrowly tailored to achieve these interests.[2] Here the city's interests, crime prevention and victimization, are significant. However, the ordinance is not narrowly tailored to achieve those interests.

Under the ordinance, the only way a juvenile may move about freely in Weston at night is if he or she is accompanied by a parent or guardian. However, it is not only conceivable but likely that unaccompanied juveniles will be engaged in legitimate activities that require them to be abroad during the hours covered by the curfew. For example, juveniles merely passing through the city en route to another destination would be in violation of the ordinance. A juvenile involved in an emergency, such as seeking medical help for an injured member of the family, would be in violation of the ordinance. A juvenile walking a dog in the immediate vicinity of his or her home would be in violation of the ordinance.

By failing to include exemptions for legitimate activities such as these, the ordinance does not go far enough to protect the fundamental rights of the affected minors.

[2]This is similar to other tests applied when balancing the constitutional rights of adults. Indeed, the First Amendment time, place or manner analysis used for adults is instructive in determining whether the ordinance is narrowly tailored as applied to minors. See Savage.

Thus, the city of Weston has created a nocturnal juvenile curfew that does not pass constitutional muster.

We hold that the Weston juvenile curfew ordinance violates constitutional guarantees and therefore reverse the trial court's grant of summary judgment to the City of Weston.

ANSWER 1 TO PERFORMANCE TEST B

PROPOSED CURFEW POLICY

SUNRISE GALLERIA MALL

Effective April 1, 2000

[preamble omitted]

1. Persons under 17 years of age will be denied admission to the Mall after 6:00 p.m., unless they are accompanied by a parent or guardian or another responsible adult.

2. Persons under 17 years of age will be admitted to the mall notwithstanding the provisions of section 1 if they can demonstrate that they are engaged in a specific, legitimate activity with the permission of a parent or guardian, including the following:

a. Activities relating to employment
b. Activities relating to school, education, volunteer work, or other specific extracurricular activities.
c. Activities relating to an emergency situation
d. Other legitimate activities related to the events at the mall.

3. Cruising, hanging out, congregating in large groups, scavenger hunts, and the like will not be considered to be legitimate activities under Section 2.

4. Persons who appear to be under 17 years of age will be approached by Mall employees, at one of the direct access entrances to the facility or any other portion of the mall, and be requested to document their age, and, if necessary, provide sufficient indication of a specific, legitimate activity as defined in Sections 2 and 3.

5. Persons under 17 years of age that are unable to provide such indication of a specific, legitimate activity will be requested to immediately leave Mall property. [the rest of former Section 3 is omitted]

6. [same as former Section 4]

7. [same as former Section 5]

BURRIS, CHASE, KALEVITCH & ROHR

Leslie Kelleher, Esq.
Al Hibri, Hodges & Kelleher
100 S. W. 3" Avenue
Davie, Columbia 55515

February 24, 2000

Dear Leslie,

Thank you for your letter of February 9 detailing your concerns regarding the congregating of teens at the Sunrise Galleria. Certainly the Galleria has a legitimate interest in providing a safe and friendly environment for its patrons. In fact, the Galleria has done so admirably in the past, with its combination of state-of-the-art security measures and a dedicated staff. I am sure you already know that the Galleria has a significantly lower crime rate than would ordinarily be expected in a facility that draws 25 million visitors each year, and that this crime rate has in fact fallen in the last two years.

I definitely understand that the Galleria wishes to maintain this stellar record, avoiding future incidents, and further lowering the crime rate. You indicated that the parent escort policy that the Galleria intends to implement later this year is a response to this desire, and also a response to a particular incident that occurred several months ago. The particular incident in question involved violence and disorderly behavior on the part of several teens present at the mall.

In addition to the incident, the Galleria management has become concerned about the number of teens that come to the Galleria to "hang out," "cruise," or otherwise use the Galleria as a sort of social gathering place, rather than as a place of business. This behavior, as I understand it, has caused problems for the businesses at the Galleria and for other patrons.

This is certainly a legitimate problem, and does warrant some action on the part of the Galleria.

However, I believe that the proposed Parent Escort Policy goes too far in its efforts to fulfill the Galleria's legitimate goals. Not only does the proposed policy ban the behavior that the Galleria wishes to eliminate, but it also bans a wide range of behaviors that are legitimate, and do not pose a threat to the security and order of the Galleria.

Not only does the proposed policy ban a wide variety of behavior, it also violates the constitutional rights of many of the teenaged patrons of the Galleria.

I believe that there is a better alternative that both satisfies the constitutional requirements. but also adequately addresses the Galleria's concerns.

1. Why the proposed absolute ban is unconstitutional

At the outset, it is important to understand that the Columbia State Constitution guarantees certain fundamental rights, such as the freedom of speech, and that this guarantee does not merely apply to government property. This guarantee applies, and will be enforced on the private property of an establishment such as the Galleria.

The Columbia Supreme Court held in Savage v. TCC that, "Columbia's constitution protects the free speech and petition rights of Columbia citizens even when those rights are exercised in a privately owned shopping center."

Although these rights may be regulated by "time, place, and manner" rules, the Galleria has no right to ignore the constitutionally guaranteed rights of Columbia citizens.

Not only may the Galleria not violate the right of free speech, the Galleria also may not violate the right to freedom of movement.

Article 1, Section 1 of the Columbia Constitution guarantees the freedom of speech and press. Section 2 of the same article guarantees the freedom of the people to freely assemble together. The Columbia court of appeals has held that these rights give rise to the right of freedom of movement. In Hutchins v. City of Weston, the court held that, "Freedom of movement is the very essence of our free society, setting us apart. Like the right of assembly and the right of association, it often makes all other rights meaningful . . . . Once the right to travel is curtailed, all other rights suffer, just as when curfew or home detention is placed on a person."

The Columbia Supreme court held specifically that the state constitution, particularly the free speech and assembly provisions of Article 1, protects the freedom of movement. Thus, this right as well applies, even on the Galleria's private property. The Galleria must not violate this right of the citizens of Columbia.

These constitutional freedoms do not apply just to adults. The Court of Appeals also held in Hutchins that minors also enjoy these constitutional rights. (Free speech, assembly, and movement)

"Constitutional rights do not mature and come magically into being only when one attains the state defined age of majority. Minors, as well as adults are protected by the Constitution, and possess

It is true that minor are subject to some regulation by the state (and by private entities such as the Galleria, when the minors are on private property). The state has a great interest in protecting minors, and in protecting others from the harmful activities of minors, However, some regulations are constitutionally appropriate, and others are not.

The court will apply a balancing rest to regulations that affect free speech, association, and movement rights. The restrictions will only be valid if they serve a significant governmental interest, and are narrowly tailored to achieve those interests. See Hutchins and Savage.

The important issue therefore is whether the proposed policy serves a significant governmental issue, and whether the policy is narrowly tailored to accomplish that interest.

We do not dispute that the Galleria seeks to accomplish a significant governmental interest. The Galleria wishes to avoid the annoyance of its patrons, the loss of order and control, and the violent and disruptive activities of certain teens. The Galleria is justified in attempting to do so. However, the proposed policy does not implement these goals in a narrowly tailored manner.

The proposed policy would not only ban the disruptive and inappropriate activities of teens, it would also ban all activities by teens that are not accompanied by parents. For example, one of our clients would lose his job at the Galleria and another would be forced to give up volunteer work. Still another would be unable to deliver completed work for her mother. Many others would not be able to participate in school or extracurricular activities at the mall. In addition, teens may not, under the proposed policy, come to the mall with a more distant relative, or with another responsible adult. This impermissibly burdens the right of freedom of movement.

The Hutchins case dealt with a very similar scenario. In that case, the City of Weston enacted a regulation very similar to the one that the Galleria proposes to implement. Minors were forbidden to move about after a certain time, unless accompanied by a parent.

The court held that this restriction was too broad, and therefore not narrowly tailored to the legitimate purposes of the curfew. The court found it significant that it was likely that the minors affected by the law may be engaged in legitimate activities that required them to be abroad during the time covered by the curfew. The same problem arises with the proposed policy. It is not only possible, but very likely (indeed certain, from what we have ascertained) that minors will be at the Galleria after the curfew as a result of legitimate activities. The proposed policy bans these activities as well as the problematic ones that the policy purports to target.

As you can see, the proposed policy does not pass constitutional muster. However, it is possible to craft a policy that would be constitutionally sufficient, and that would still address the concerns that the Galleria has. I believe that our proposed curfew policy will do just that.

2. Why the proposed Curfew Policy is constitutionally sufficient

The proposed curfew policy is similar to the Galleria's proposal. However, it adds some key exceptions to the absolute ban that the original proposal implemented.

First, the new proposal allows minors to come with any responsible adult, not merely a parent. That way, teens can car pool with others when attending mall activities. This would ease the burden on parents by allowing them to share the responsibility.

Second, the new proposal permits teens to be at the Galleria when they are engaged in legitimate activities. A teen may be employed at the Galleria, or may do volunteer work, or attend one of the Galleria's many community functions.

Third, the new proposal specifically excludes the inappropriate behavior from the list of "legitimate activities." Thus, the Galleria will not have to worry that teens will use the exceptions in a wrongful manner.

This new proposal will pass constitutional muster because it allows teens to exercise their freedom of speech and freedom of movement in a reasonable and legitimate manner. Teens will not be prevented from taking part in legitimate activities that cause no harm or annoyance to others. Instead of banning all activities, the new proposal merely bans the specific activities that have been causing problems at the Galleria. Thus, the new proposal is narrowly tailored to prevent the specific inappropriate activities that the Galleria legitimately seeks to prevent.

3. The proposed Curfew Police meets the Galleria's needs

The Galleria has stated that it needs to restrict the activities of teens to maintain security and order. In your letter, you detailed the behavior that causes the threat to such security and order. Teens are using the mall as a hangout, traveling in large packs, and engaging in unruly and loud conduct. A large number of teens apparently take part in these activities. As I understand it, the security at the mall is simply unable to cope with the problem since it is caused by so many and in such large groups.

There is no doubt that the mall does have a legitimate problem, and may legitimately seek to solve them.

I believe that the proposed Curfew Policy will address the Galleria's concerns just as thoroughly as the Galleria's original proposal.

First of all, the new proposal does not eliminate the ban on minors without parents after 6 p.m. Rather, it merely creates some exceptions that will allow teens that are not engaging in the inappropriate behavior complained of to continue to engage in specific, legitimate activities. The exceptions do not allow teens

intending to "cruise, hang out, or congregate" in the Galleria without a more specific purpose. Rather, each teen is required to demonstrate that they are engaging in a legitimate activity.

For example, a teen that is coming to the mall to meet with his or her friends is not engaging in a specific legitimate activity. However, a teen that is coming to participate in a job or practice swimming at the pool, or making a delivery, or doing volunteer work would be able to show that he or she is engaged in a legitimate activity.

Certainly, teens engaging in these specific activities would not cause any disruption to the mall or its patrons. These are not the hooligans that the Galleria is attempting to exclude. These are law abiding minors engaging in lawful activities with specific purposes in mind.

In contrast, those that the Galleria intends to exclude are coming to the mall without specific, legitimate goals in mind. They are there just to hang out and possibly cause trouble.

The proposed Curfew Policy would continue to exclude these troublemakers, while allowing teens with legitimate activities to pursue those activities.

The proposal will also serve to aid the Galleria in its many community events and activities. The Galleria sponsors a wide range of activities for the public, many of which are targeted toward young people. The current proposal would limit the ability of many to participate in these activities. For example, many young people would be unable to attend with a parent due to schedule conflicts. However, they may be able to attend with another adult that is a friend or relative. Also, some activities such as the racquet club, the water park, and the golf facility would often be used by teens for legitimate activities such as competitions and practices.

The new proposal would allow teens to participate in these legitimate activities.

In conclusion, I would again assert that the current proposal violates the Columbia Constitution. However, I have included a proposal for a version of the policy that will pass constitutional muster while still meeting the Galleria's needs.

I urge you to look over my proposal, and adopt it as the new policy at the Galleria. I believe that it will be satisfactory both to the Galleria and to the teens and parents that wish to continue to pursue legitimate activities at the Galleria.

Thanks for your cooperation,

Sincerely,
Tony Chase

ANSWER 2 TO PERFORMANCE TEST B

Sunrise Galleria Mall

Access Authorization Card
and Parental Escort Policy
(Effective April 1, 2000)

To better serve patrons and other visitors, protect property, maintain order, and insure personal safety at the Sunrise Galleria Mall, the following Access Authorization Card and Parental Escort Policy is adopted.

1. Persons under 17 years of age will be denied admission to the Mall after 7:00 p.m. unless they are accompanied by a parent or guardian, or unless they carry and can show on demand an access authorization card obtainable pursuant to Section 6 of this policy.

2. Persons who appear to be under 17 years of age will be approached by Mall employees at one of the 24 direct access entrances to the facility or in any other portion of the mall, and be requested to document their age and/or display an access authorization card.

3. Persons under 17 years of age without such access authorization card will be requested to immediately leave mall property. Failure to respond to such a request will be considered trespassing on the private property of Sunrise Galleria Mall, subjecting the individual to immediate arrest and subsequent prosecution.

4. If a person under 17 years of age appears unable to arrange transportation to his or her home or to another place of safety, mall employees will attempt to contact the individual's parent or guardian. If no other transportation is available, a mall security officer will escort the individual to a safe location.

5. This policy will not apply to the several magnet stores, restaurants and other retail establishments associated with the mall and which maintain separate entrances to their facilities. However, the policy will be enforced at entrances from those facilities into the mall proper.

6. This policy shall not apply to those individuals under the age of 17 that obtain and carry with them an appropriate Access Authorization Card. Applications to obtain an access authorization card are available in the mall management office. Such cards are available to those individuals under the age of 17 whose presence at the mall is necessary for a legitimate educational, political, employment or family interest. An access authorization card will be granted if:

a. The individual receives or gives instruction at an establishment within the mall after the hour of 7:00 p.m.

b. The individual makes use of the mall's athletic facilities.

c. The individual is employed at one of the mall's establishments after the hour of 7:00 p.m.

d. The individual participates in the distribution of reading material with an organization legitimately on the mall's premises.

e. The individual needs to enter the premises for some other legitimate purpose and this purpose is evidenced by a letter from the individual's parent, guardian, employer, or other relevant adult, depending on the circumstances.

Applications for an Access Authorization Card will be granted if applicant satisfies one of the requirements and so evidences by a letter from an appropriate adult, be it parent, guardian, athletic coach, employer, organizational leader, etc.

Holders of an Access Authorization Card will be required to show such card to mall authorities on demand after 7:00 p.m., and must adhere to the limits set on the card.

Burris, Chase, Kalevitch & Rohr
Attorneys and Counselors
Sunrise Professional Centre - Suite 500
Sunrise, Columbia 55551

February 24, 2000

Leslie Kelleher
A1 Hibri Hodges & Kelleher
100 S. W. 3`d Avenue
Davie, Columbia 55515

Dear Ms. Kelleher:

Thank you for your recent letter regarding the Parent Escort Policy at the Sunrise Galleria Mall and for supplying a copy of the Parent Escort Policy. As you know, we represent a group of parents and teens concerned about the Parent Escort Policy and its implication on a variety of activities the young people participate in with their parent's knowledge and consent. I am writing to present to you the constitutional implications of the policy and present a proposed alternative that is both within the confines of the Constitution and will, hopefully, satisfy the goals of both our clients.

The Limits Set By the Columbia Constitution

Article 1, Section 1 of the Columbia Constitution provides that "every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." Article 1, Section 2 of the Colombia Constitution states that "the people have the right freely to assemble together, to consult for the common good, to make known their opinions to their fellow citizens and their representatives, and to petition for redress of grievances."

Application of the Constitution to Sunrise Galleria Mall

The Columbia Supreme Court has held that while the United States Constitution applies only to governmental or state actions, "Columbia's Constitution protects the free speech and petition rights of

Columbia citizens even when those rights are exercised in a privately owned shopping center." Savage. citing Robins. Therefore, any policy written by Sunrise Galleria Mall restricting a fundamental right such as freedom of speech or association must comply with the conforms of constitutional strict scrutiny.

I. SUNRISE GALLERIA MALL'S POLICY BURDENS THE FUNDAMENTAL RIGHT OF FREEDOM OF MOVEMENT

Sunrise Galleria Mall's Curfew Policy directly interferes with a fundamental right - the right of freedom of movement. In Hutchins v. City of Weston, a group of minors challenged the validity of the "Juvenile Curfew Ordinance of 1996," which prohibited minors under 17 years of age from being in a public place in Weston City between 11:00 p.m. and 6:00 a.m. weekdays and 12:00 a.m. and 6:00 a.m. weekends. An exception was made for minors accompanied by a parent or guardian. As you can see, this city ordinance is very similar to the curfew policy designed for Sunrise Galleria Mall.

The plaintiffs in Hutchins challenged the ordinance on equal protection grounds, claiming that the ordinance deprived them of their fundamental right of free movement.

Fundamental Right to Free Movement

There is a vast amount of legal authority holding that individuals have a fundamental right to move about. Justice Douglas of the United States Supreme Court states that "freedom of movement is the very essence of our free society, setting us apart. Like the right of assembly and the right of association, it often makes all other rights meaningful. Once the right to travel is curtailed, all other rights suffer. Hutchins, citing Aptheker.

Additionally the Supreme Court of Columbia holds that the freedom of movement stems from Article I of the Columbia Constitution, and refers to it as among the most cherished of our fundamental rights. Hutchins.

By restricting a person's ability to move freely in a place otherwise open to the public, the fundamental right of freedom of movement is implicated. Id.

Freedom of Movement Applies to Minors

The freedom of movement is a fundamental right enjoyed by all individuals, regardless of age.

The United States Supreme Court states that, in general, "constitutional rights do not mature and come into being magically only when one attains the state defined age of majority." Hutchins, citing Danforth. Minors are protected by the Constitution and possess constitutional rights. Id.

The Columbia Court of Appeals extended this notion to apply the fundamental right of movement to minors. Hutchins.

However, occasionally other interests regarding minors can come into play that will justify an intrusion into a minor's fundamental rights. "The peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing" all provide factors in balancing the state's and the child's rights. Balancing these factors, the court in Hutchins found that nocturnal curfew ordinances justify intrusion into minors' fundamental rights.

STANDARD OF REVIEW - STRICT SCRUTINY - NOT MET WITH THE CURFEW POLICY

While a curfew policy such as Sunrise Galleria Mall's can be constitutionally valid, this particular policy is not because it is not narrowly tailored to serve a significant state interest. This is the appropriate standard of review set by the court in Hutchins.

The court refers to First Amendment time, place and manner analysis to determine whether a curfew restriction is narrowly tailored. The court in Savage states that the restriction need not be the least restrictive means of doing so. It is sufficient so long as the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation. Savage.

A COMPLETE BAN SUCH AS SUNRISE GALLERIA MALL'S IS NOT NARROWLY TAILORED

The curfew policy set out by Sunrise Galleria Mall is not narrowly tailored because it is a complete ban on all activity by children under 17 without exception for legitimate activity on the premises. "A complete ban can be narrowly tailored but only if each activity within the proscription's scope is an appropriately targeted evil." Savage. The means chosen must not be broader than necessary. Id.

The court in Hutchins used this analysis to invalidate the City of Weston's curfew ordinance

similar to Sunrise Galleria Mall's. "It is not only conceivable but likely that unaccompanied juveniles will be engaged in legitimate activities that require them to be abroad during the hours covered by the curfew."

Because the ordinance involved placed a blanket ban on all activities by minors under 17 during certain hours without exemptions, the ordinance failed. The exception for minors accompanied by an adult was not sufficient to save the ordinance.

Likewise, if challenged, Sunrise Galleria Mall's curfew will most likely fail due to its blanket ban on all, even legitimate, activities by persons under 17 after 6:00 p.m. While a curfew has been held constitutional by the court, it cannot be over broad. If the curfew prohibits activities that are not included in the evils behind the curfew, it will fail as not narrowly tailored.

II. OUR PROPOSED CURFEW ALTERNATIVE WILL PASS CONSTITUTIONAL SCRUTINY

Attached to this letter is a copy of an alternative curfew policy that we believe is likely to pass constitutional scrutiny. The general premise is the same as the original curfew policy. It prohibits children under 17 from being on the mall premises after a certain hour. We have made two substantive changes to the policy.

First, we have changed the "blackout" hour from 6:00 p.m. to 7:00 p.m. The standard applied by the court in cases of teen curfews is the same as with the First Amendment time, place and manner restrictions, Hutchins, which requires alternative channels of communication. Savage. We have research that provides that alternative shopping establishments such as downtown business districts are disappearing. As such, your curfew policy must give these children ample time to shop after school before the curfew begins, since alternative shopping fora are unavailable.

Second, and more importantly, our proposed alternative provides an outlet for legitimate activities on the mall premises. Your current policy provides no way for children like our clients to do the things at the mall they normally do - work, tutor music, practice on the swim team, exercise their constitutional rights to free speech, etc. You state that the main purpose behind the curfew is to stop violence, and protect the public. The activities by our clients do not contribute to violence or public harm. Thus, the current policy may be unconstitutionally overbroad.

The alternative allows for children who have a legitimate reason to be on the premises to obtain a card from the mall authorizing their presence at the mall after 7:00 p.m. They can apply but submitting a letter from an adult explaining why they need to be there. Their presence at the mall can be limited on

the face of the card, such as "access to and from, and presence within, place of employment."

The court has held that a curfew policy that allows for non-"evil" activity is probably constitutional. The proposed alternative allows for such good activity while still eliminating the undesired activity.

III. OUR PROPOSED ALTERNATIVE MEETS THE MALL'S NEEDS

As we understand it, the motivation behind enacting the curfew policy is to balance the interest in maintaining customer rapport with your teenage clients and in maintaining customer safety and happiness with all of your clients. You have had some rather unfortunate encounters with teenagers recently that have made it difficult to maintain security and order and keep customers safe. As a result of these incidents, you have suffered a loss in business.

However, I'm sure you'll agree that kids like our clients are not the kind of kids you are trying to deter. Our clients work at your stores, take classes there, train to be professional athletes and musicians, even make deliveries for their parents, whose busy schedules don't allow them to leave the home. These children are not causing trouble, nor are they violent, nor do they harm other customers. These children are not the kids you want to keep away from the mall.

Therefore, our proposed policy creates an avenue for these children to continue doing the things they are doing, while still allowing you to keep out the bad kids who cause you so much trouble.

Please look over the attached policy and let me know your comments.

Thank you,

Tony Chase