PERFORMANCE TESTS AND SELECTED ANSWERS

JULY 1999 CALIFORNIA BAR EXAMINATION

This publication contains two performance tests from the July 1999 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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TUESDAY AFTERNOON
JULY 27, 1999

California
Bar
Examination

Performance Test A

INSTRUCTION AND FILE

IN RE STAN RICHARDSON

INSTRUCTIONS ……i

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In re Stan Richardson

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 District Court of Appeals for the Fifteenth Circuit..

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

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

5. Your response must be written in the answer book provided. In answering this performance test, you should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general

background for analyzing the problem; the File and Library provide the specific materials with which you must work.

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

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

LAW OFFICES OF MICHAEL JORDAN
Walton Towers North, Suite 2700
Century City Plaza
Century City, Columbia 90001

TO: APPLICANT
FROM: Michael Jordan
RE: In re Stan Richardson
DATE: July 27, 1999

I need some assistance on a fellow lawyer's potential disciplinary problem. Stan Richardson called me last night to say that he wanted me to help him with a potential disciplinary matter raised by one of his former clients, Lucille Mason, and set forth in a letter he'd received from a Special Investigator of the State Bar. Stan hopes that we will be able to deal with this in a quick and quiet manner that does not interfere with his new job. Stan recently accepted a full-time position in a city attorney's office in the northern part of the state.

In our conversation, Stan also asked that we advise him on whether this case could cause disciplinary problems for his former landlord and sometime contract employer, Mary Dinius Fegen. If this is a possibility, he may want to notify her of the pending State Bar proceeding.

This morning Stan faxed me the State Bar letter and attachments, which include a copy of Mrs. Mason's file. After quickly reviewing Stan's cover memo, I had time to do a couple of things. I called Stan and left a voice-mail message for him asking for some more background information about the office and work relationship that he had at the offices of Mary Fegen. While I was out at court today, he responded with a voice-mail message, which I have had transcribed.

Also, I called the State Bar's Ethics Hotline (800-2-ETHICS), and I was told that they technically don't give advice or opinions, but only discuss ethics questions with attorneys and refer them to appropriate authorities so the attorneys can come to an informed decision. I've had the authorities they referred me to assembled to give you a start in your research.

I will be talking to Stan today. We will discuss only the pending disciplinary matter. Stan and I agree that there may also be legal malpractice issues, which we will have to discuss in the future. So, at this time, you should not consider the legal malpractice issues.

To help me prepare to counsel Stan, I'd like you to draft a memorandum that addresses the following matters:

1. Was the attorney-client relationship between Stan and Mrs. Mason terminated?

2. Whether or not the relationship was terminated, does Stan have further obligations to Mrs. Mason?

3. Assuming that Stan has further obligations,

   (a) identify the courses of actions available to Stan; and
   (b) for each course of action, identify possible consequences or results and explain how likely they are to occur.

4. As to Stan's concerns about Mary Fegen,

   (a) was an attorney-client relationship created between Mary and Mrs. Mason;
   (b) has Mary violated any ethical obligation to Mrs. Mason; and
   (c) apart from possible ethical obligations, does Mary face possible liability for legal malpractice?

FAX COVER SHEET

Stan Richardson

TO: Michael Jordan FAX NO. (310) 976-2204

FROM: Stan Richardson (510) 987-6543 (phone/fax)

DATE: July 27, 1999

N0. OF PAGES, INCLUDING COVER SHEET: 16

MESSAGE:

Michael,

Thanks for agreeing to look into this misunderstanding with one of my former clients, Lucille Mason.

I don't have her file any longer, but the key documents are in the attachments to the letter from the State Bar which follows. The only other document is a substitution of attorney, also attached, which Mrs. Mason signed without protest and returned to me. That's what really stunned me when I got the letter from the State Bar. I was just about to mail it to the clerk's office for filing. The original is on its way to you via express mail. You should have it tomorrow and can file it before the hearing, if you think that's the best way to take care of this. I thought our dealings were over after the final judgment and her agreement that I'd done all I'd agreed to do, and that she was on her own in collecting. Filing the substitution should make it uncontestable that I ceased to represent her months ago and that she agreed to represent herself until she could get someone else.

Mrs. Mason was a walk-in about 10 months ago. She seemed to have a decent, sympathetic, provable claim, but there was little prospect for collection of damages, since the dealership was the responsible defendant, and it had gone out of business, and there was no reason to expect that the manager-owner had any assets. I made it clear to her that, for those reasons, I would not represent her for a contingent fee. Over the next few months I must have told her in every conversation that I was not interested in a contingent fee and that I'd take her case for a flat fee or on an hourly basis. So, I know that she understood it, but from the way she kept bringing it up, it seems that she either was

hoping I'd change my mind or had been led to believe by others that a lawyer would take most cases on a contingency. She was insistent. Since I got to San Luis every few months on contract cases for other lawyers and figured that I could set any hearing when I would be in the area, I relented and offered to help her get her car back by making a written demand for remedy for a flat fee of $300.

The next week, before I'd done anything -- since I doubted that she'd come up with money -- I received a letter from her stating that I'd agreed to file a complaint, apparently on a contingency, and that the $300 was to be for costs. I called her and explained that she'd gotten it wrong. We went back and forth, and I said that I'd do the demand for remedy for $300, but that's all I was agreeing to for now.

I did the demand, but it did not produce any result. Soon Mrs. Mason was pushing for a lawsuit. She even called Mary Fegen to complain when she felt that I wasn't moving fast enough for her. I explained that Mrs. Mason was responsible for the payment of costs, and that she'd have to advance $300, although she could make several payments.

On November 27, 1998, I filed a complaint in San Luis Municipal Court against the auto dealer, individually, and the dealership. Within a week, the dealer arranged for Mrs. Mason to get her car returned as well as title to the vehicle. About 2 months later, I filed a request for entry of default against the dealer, and set a hearing for the default prove-up on a date when I was going to be in San Luis. The court awarded damages of $25,000 and another $700 for fees. To ensure that she could proceed on her own, I got the clerk to enter the judgment, gave her a certified copy, and turned over the entire file to her.

About 4 months later, I moved up here to take the job with the city attorney's office. Then, just before the six-month deadline to challenge the judgment on the ground of inadvertence or mistake, the dealer filed a motion to set aside the default. The papers sat in the office for a couple of weeks before they were forwarded to me. I contacted Mrs. Mason and immediately sent her the documents, along with a letter unequivocally putting her on notice that she needed to hire another lawyer. To get her concurrence on the fact that I no longer represented her, I asked that she sign and return a substitution of attorney.

In sum, I did this without a fee--in effect a pro bono case--did all I promised, concluded the case very favorably and with the agreement of the client, and closed the case and gave her the file. The State Bar should be thanking me, not harassing me! Hopefully, once we file the substitution and show it to the investigator, the matter can be resolved. Going after me isn't going to help her get another lawyer to defend the judgment.

Although I'm very busy with my new job, I have a fair amount of control over my schedule and can come down to Century City to meet with you or with Mr. Rodgers to get this resolved. I'm still on probationary employment status. Although I don't know what the consequences of a disciplinary charge would be on my new job, it certainly can't help, and I want very much to nip this problem in the bud.

I'd prefer that you call me and direct correspondence to my home, rather than the city attorney's office.

Stan

STAN RICHARDSON
Barristers Executive Suites
Century City Plaza
Century City, CO 90001
(310) 976-2201

Attorney for Plaintiff

SUPERIOR COURT OF COLUMBIA
COUNTY OF SAN LUIS

LUCILLE MASON, Plaintiff, VS. BOB SIKES, Individually, and SIKES AUTO SALES, a business organization, Defendants	Case No. 012345-0 SUBSTITUTION OF PARTY IN PROPRIA PERSONA

I hereby discharge Stan Richardson, who has represented me as my attorney of record in the above-entitled case, and substitute myself in propria persona in his place and stead.

Dated: July 16, 1999 Lucille Mason

Signature
Lucille Mason
951 Adams Street
San Luis, CO 90010

The undersigned hereby consents to the above-substitution.

Dated: (July , 1999)

Stan Richardson

Stan Richardson

State Bar of Columbia
Office of the Trial Counsel
Disciplinary Enforcement Unit
1149 South Hill Street
Century City, Columbia 90015

July 22, 1999

Stan Richardson
Box C, Route 1
Lake Vacaville, CO 99999

Re: Complaint of Lucille Mason

Dear Mr. Richardson:

The complaint of Lucille Mason has been filed with this office. It has been assigned to me for investigation and action.

Enclosed is the letter from Lucille Mason, dated July 20, 1999, and the documents she has provided to the State Bar.

As part of the investigation, you may respond to Lucille Mason's allegations in the next 30 days.

Please keep in mind that it is the duty of all Columbia attorneys to cooperate and participate in any disciplinary investigation pending against the attorney.

Sincerely yours,

Frank Rogers

FRANK RODGERS
Special Investigator

Lucille Mason
951 Adams Street
San Luis, CO 90010
July 20, 1999

Complaint against attorney Stan Richardson

To whom it may concern:

I feel my confidence has been completely betrayed by my attorney. I have nowhere to turn and no money to hire someone else.

I hired and paid attorney Stan Richardson, an attorney in the Law Offices of Mary Dinius Fegen, to represent me and help me get my car back and reimbursement for money I lost when my car was illegally taken from me. Richardson and his firm have now abandoned me, and told me that I need another lawyer.

I need to have an attorney who will represent me at a court hearing which is scheduled in 10 days, July 30, 1999. The hearing is in San Luis in Magic Valley where I live.

This all started when my car was illegally repossessed due to the negligence by the car dealership I bought the car from in handling the preexisting loan of the prior owner of the vehicle. The dealership wouldn't help me, and kept telling me I had to deal with the bank that had caused the mistake, First Century City Federal. Thinking that I needed a lawyer in Century City I called the Century City Bar Association, and their referral service gave me the name and number of a Mary Fegen, who they said would meet with me for 30 minutes without charge.

It was quite a while before I could get to Century City, since I no longer had a car, but when I did the Fegen office had me see Stan Richardson. He was very nice, understanding, and listened to the whole story of how Sikes Auto's negligence got my car repossessed, how Bob Sikes refused to help, and then the dealership went out of business. Mr. Richardson said that I had a good case, and at the very least he'd be able to get the car back. Most of the talk was of the difficulty and cost of traveling to San Luis, where he said the case would be

filed, and whether he could do it when he was there on other cases. Since I didn't have any money, I needed him to take the case on-a contingency fee basis. Mr. Richardson said that I would have to come up with $300 for court costs before he'd take the case.

Then I sent him the paperwork I had received from the dealer and DMV, but he called and insisted on getting the money first before he would contact the dealer. Finally Richardson said he'd write a demand to the dealer and bank.

Richardson went ahead and wrote a threatening letter to the dealership. Just like I told him, nothing happened. Sikes didn't even call him. So I called Richardson to get him to sue them. Richardson again asked for money first, but he agreed to let me pay in two installments, and I immediately sent him $150. The canceled check is enclosed.

A month later, Richardson filed the suit. Within a week Bob Sikes called me and arranged with the bank to get my car returned along with lawful title to the car. I talked to Richardson, and he said that I could still continue the lawsuit to get back other expenses, the cost of a loaner vehicle and lost wages.

A couple of months later, Richardson called to tell me that a default had been taken and that there would be a hearing in San Luis on damages. We went to the hearing, and the judge decided that I should get $25,000, plus $700 in attorney's fees. Richardson turned over my file to me, got me a copy of the judgment, and said that it was good for 10 years, but that it was up to me to try to collect it.

I was contacting collection agencies and the sheriff's office and the county recorder's office to try to collect my money, when I received from Richardson a letter with a notice about a hearing in San Luis on July 30, 1999. Richardson said that Bob Sikes was going to get the default set aside unless I got a lawyer for the hearing.

I only had two weeks to get another lawyer. I called the San Luis Bar Association. They gave me names of local lawyers, and the legal aid office, which offered to try to get me an interview with one of their volunteer lawyers in 6 weeks. They said the lawyer would only give me advice. I called the lawyers suggested by the bar association, but their offices either

couldn't see me right away or said it would take a couple of thousand dollars for them to take any non-contingent fee case on such short notice. I don't think that I can get a lawyer even if I could afford it, which I can't.

I called Richardson at his law firm in Century City, but they said that he had closed his practice and moved away. I asked if another attorney in the Law Office of Mary Dinius Fegen could continue with my case, but I was told that no one there had taken over Richardson's cases. I don't know what I'm to do, except go to the hearing on my own. What do I-do if the judge changes the default? Does the State Bar help people like me who have been deserted by their lawyers?

Very truly yours,

Lucille Mason

Mrs. Lucille Mason

Lucille Mason
951 Adams Street
San Luis, CO 90010
September 27, 1998

Stan Richardson
Law Offices of Mary Dinius Fegen
Barrister Executive Suites
Century City Plaza
Century City, Columbia 90001

Dear Stan,

I'm writing to thank you and to make sure that my understanding of your taking my case is correct. I understand that if I need to file a complaint, I will have to send you $300 for expenses and you will receive 30% of my settlement. I also want you to tell me if I can get punitive damages.

I'm enclosing the paperwork I have received from the dealer and DMV. I want to thank you for helping me. I need to get this taken care of as soon as possible. I know that you will do your best.

Thanks for everything.

Very truly yours,

Lucille Mason

Lucille Mason

Stan Richardson
Attorney at Law
Barrister Executive Suites
Century City Plaza
Century City, Columbia 90001

October 27, 1998

Bob Sikes
SIKES AUTO SALES
333 Auto Row
San Luis, Columbia 90015

Notice Of Violation And Demand For Remedy

Dear Mr. Sikes:

I represent Lucille Mason in connection with her purchase of a 1992 Toyota automobile, VIN ADCGH 12B6NH065887, from your dealership, Sikes Auto Sales. This transaction occurred on or about July 13, 1998.

You are hereby notified in accordance with Columbia Civil Code, Section 1782 that you are in violation of Columbia Civil Code, Section 1770 as follows:

In violation of Section 1770(g) you represented that the automobile that you sold to Mrs. Mason has certain characteristics, uses, and benefits when in fact it had others. You represented to Mrs. Mason that:

1. You had legal title to that vehicle, 2. You had the right to sell that vehicle, 3. You would pay off any outstanding loan on the vehicle with the proceeds of the purchase price paid by Mrs. Mason, and 4. She would have the full use and benefits of her newly acquired automobile.

The true facts are:

1. You did not hold legal title to the vehicle sold to Mrs. Mason,

2. You had no right to sell the vehicle without first paying off the outstanding loan on that vehicle,
3. You did not pay off the outstanding loan on the vehicle,
4. The vehicle was repossessed by the legal owner and Mrs. Mason was deprived of the use and benefit of her newly acquired automobile.

I hereby demand that you correct or otherwise rectify the representations you made to Mrs. Mason regarding the automobile you sold to her.

You must either make an appropriate correction or pay money for the damages sustained by her within thirty (30) days of receipt of this letter. Please provide me with a written response to this letter within the prescribed time.

Very truly yours,

Stan Richardson

Stan Richardson

Lucille Mason
951 Adams Street
San Luis, CO 90010

6690
Nov. 13 1998

Pay To
The Order of The Law Offices of Mar Dinius Fegen $150.00

One Hundred and Fifty Dollars

San Luis Bank

For Costs

Lucille Mason

Endorse Here

Law Offices of Mary Dinius Fegen

Mary Dinius Fegan

Stan Richardson

Stan Richardson

MICHAEL GRIFFITH

133 Peach Street
San Luis, Columbia 90015
(209) 333-1233

Attorney for Defendant Bob Sikes

SUPERIOR COURT OF COLUMBIA

COUNTY OF SAN LUIS

LUCILLE MASON, Plaintiff, vs. BOB SIKES, Individually, and SIKES AUTO SALES, a business organization, Defendants	)	Case No. 012345-0 <u>NOTICE OF MOTION FOR AN ORDER SERRING ASIDE DEFAULT AND DEFAULT JUDGMENT</u> Hearing Date: July 30, 1999 Hearing Time: 9:00 a.m. Hearing Dept.: One

To Lucille Mason And Her Attorney Of Record, Stan Richardson:

NOTICE IS HEREBY GIVEN that on July 30, 1999 at 9:00 a.m. or as soon thereafter as the matter can be heard in Department One of this Court, located at 1000 Marine Ave., San Luis, Columbia, Defendant Bob Sikes will move for an order setting aside the default and default judgment entered against Defendant Bob Sikes and granting him leave to file an answer.

The motion will be made pursuant to the provisions of Section 473 of the Code of Civil Procedure on the ground that the default and default judgment were entered against him by reason of the mistake, inadvertence, and excusable neglect of the Defendant.

This motion will be based on this Notice of Motion, the accompanying Declaration of Bob Sikes, and the pleadings, files, and records in the above-entitled action, and such oral and documentary evidence as may be presented at the hearing

on this motion.

Dated: June 18, 1999

Michael Griffith

MICHAEL GRIFFITH
Attorney for Defendant

DECLARATION OF DEFENDANT BOB SIKES

Bob Sikes, under penalty of perjury, declares that the following is true and correct:

1. I am the named Defendant in this action and at all times mentioned in the complaint was the owner of Bob Sikes Auto, a business organization.

2. After I was served with the complaint in this action, I took immediate steps to arrange for the return to the Plaintiff of the vehicle which is the subject of this action. succeeded in arranging for Plaintiff to get the vehicle and lawful title to the vehicle. The receipt for release of the vehicle by the bank which was signed by the Plaintiff in my presence, contained the following provision:

> "Buyer hereby releases and promises not to sue BANK, SELLER, or their agents, employees, or assigns for any claims arising out of the sale or transfer of the VEHICLE."

3. As a result of the physical and legal transfer of said vehicle to Plaintiff and her execution of the above-quoted release, I believe that I have a good and valid defense to the causes of action set forth in the complaint and on which the default judgment is based. If granted leave to file an answer to the complaint, I will defend the action on the ground that the release is a full and complete defense to this action.

4. As a result of the physical and legal transfer of said vehicle to Plaintiff and her execution of the above-quoted release, I believed that the purpose of the suit had been satisfied, and I mistakenly believed that the suit was over. Thus, I failed to file an answer to the complaint.

EXECUTED this June 18, 1999, in San Luis, Columbia.

Bob Sikes

Bob Sikes

Stan Richardson
Box C, Route 1
Lake Vacaville, CO 99999

July 14, 1999

DELIVERED VIA NEXT DAY MAIL

Lucille Mason
951 Adams Street
San Luis, CO 90010

RE: Mason v. Sikes

Dear Mrs. Mason:

I have enclosed the documents which were forwarded to me from my former office. Mr. Sikes is trying to set aside the default judgment entered against him. He will probably succeed.

You should get a lawyer in San Luis who can attend the hearing set for July 30, 1999. The lawyer should be able to argue that Mr. Sikes had plenty of notice of the default, and that you were proceeding with the action, even after the vehicle was returned. After you got the car, he was served with notice of default twice.

The fact that you signed a release of all liabilities in connection with the car is not good. You had not told me of that. However, the release may not be valid, if return of the car was unfairly conditioned on signing it. The lawyer should be able to get the facts from you, research the issue, and better argue to the court why the release is not valid.

So that all future notices in the case will go directly to you until you have a new lawyer, I have prepared and enclosed a substitution of attorney. Please sign it and return it to me immediately.

If you have any further questions, please do not hesitate to call.

Very truly yours,

Stan Richardson
Stan Richardson

LAW OFFICES OF MICHAEL JORDAN
Walton Tower North, Suite 2700
Century City Plaza
Century City, Columbia 90001

TO: Michael Jordan
FROM: Stan Richardson, Voice-mail message
RE: In re Stan Richardson
DATE: July 27, 1999

Michael, I got your voice-mail. I'll quickly describe the situation at Mary Dinius Fegen's offices. Until about two months ago, I was both a "tenant" at and an occasional contract attorney for her law firm, the Law Offices of Mary Dinius Fegen.

Mary is only a sole practitioner, and has a rather modest general practice. However, she has a very large office rental operation, which because of the need of small practitioners for inexpensive, yet professional offices, has been very successful. Mary has rented an entire floor in the Barrister Executive Suites building in Century City Plaza. I was one of the 28 attorneys whose name was listed outside and on the door of the office, under the name of Law Offices of Mary Dinius Fegen. I paid $295 per month for use of this prestigious address, receptionist, voice-mail and phone operator (which answered all calls with "law offices"), and library; like other tenants, I paid additionally for use of messenger services, copying, fax facilities, word-processing, and office-conference rooms for meeting clients, depositions, interviews, etc. About a third of the "tenants" also paid to have an office of their own in the suite. I used the office services but did not maintain an office there.

In addition to being one of the 28 tenants, I also did occasional work for Mary as a contract attorney, primarily making special appearances in distant counties or by performing specific tasks, such as drafting a pleading. I also did contract work for other small firms, occasionally took on clients referred to me by Mary and other attorneys, and had my own clients.

I hope this helps. Talk to you later today.

TUESDAY AFTERNOON
JULY 27, 1999

California Bar Examination

Performance Test A

INSTRUCTION AND FILE

In re Stan Richardson

Library

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COLUMBIA RULES OF PROFESSIONAL CONDUCT.

RULE 3-1 10. FAILING TO ACT COMPETENTLY.

(A) A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.

(B) For purposes of this rule, "competence" in any legal service shall mean to apply the (1) diligence, (2) learning and skill, and (3) mental, emotional, and physical ability reasonably necessary for the performance of such service.

RULE 3-700. TERMINATION OF EMPLOYMENT.

(A)

(1) If permission for termination of employment is required by the rules of a tribunal, a member shall not withdraw from employment in a proceeding before that tribunal without its permission.

(2) A member shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably forseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, complying with rule 3-700 (D), and complying with applicable laws and rules.

COLUMBIA CODE OF CIVIL PROCEDURE

§ 284. CHANGE OR SUBSTITUTION; CONSENT; ORDER OF COURT

The attorney in an action or special proceeding may be changed at any time before or after judgment or final determination, as follows:

1. Upon the consent of both client and attorney, filed with the clerk, or entered upon the minutes;

2. Upon the order of the court, upon the application of either client or attorney, after notice from one to the other.

BERNSTEIN v. The STATE BAR OF COLUMBIA

Supreme Court of Columbia, 1992

Petitioner is charged with willfully failing to (a) perform the services for which he was retained, (b) return client files and documents, and (c) refund unearned portions of fees.

Petitioner was a part-time instructor at a state college. In July 1986 one of his students, John Wilson, approached him after class regarding an appeal he was prosecuting in propria persona. According to Wilson's testimony, petitioner said he was highly sophisticated in appellate work and told Wilson to contact his secretary far an appointment. After meeting with Wilson and his wife, petitioner accepted the case. He told Wilson he would prepare the opening appellate brief. Wilson paid petitioner $2,500, which Wilson borrowed from his sister. There was no written agreement. At the conclusion of the meeting, petitioner said that e was leaving town the next day and would be gone for about three weeks.

Petitioner testified that before leaving on his vacation, he left instructions to others in his office to work on Wilson's case. He claims that his daughter, a paralegal, organized the numerous papers Wilson had brought to the office. According to petitioner, when he returned from vacation an attorney in his office, William Bluestein, told him that another associate, Alan Goldberg, had read the file and done research; however, he could produce no time sheets or other records to support this claim.

On August 25, 1986, Wilson sent petitioner a letter stating that in response to two previous inquiries regarding his case, bath petitioner and his secretary had been rude and insulting to him. He fired petitioner and demanded the immediate refund of the fee and return of his documents.

Petitioner failed to respond to the letter or refund the fee. Not until a State Bar investigator intervened did petitioner return Wilson’s documents. Wilson then filed a complaint with the State Bar. Petitioner did not appear at the arbitration hearing, and Wilson was Awarded $2,400, which the arbitrator found to be the unearned portion of

the fee. Wilson's letter to petitioner demanding payment of the award went unanswered. Wilson then reduced the award to a judgment; nevertheless, petitioner has not refunded any portion of the fee. Wilson testified that because petitioner refused to refund the fee, he was unable to retain other counsel to prosecute his appeal.

In the Burrell matter, Nora Burrell, another of petitioner's students, hired petitioner to represent her and her husband in litigation involving the lease of an automobile. She paid petitioner an advance fee of $1,500 to represent them as plaintiffs in a superior court action. Petitioner failed to perform the service for which he was hired. The Burrells were also defendants in a municipal court action brought by the leasing company and arising out of the same factual situation as the superior court action. Mr. Burrell delivered the complaint to petitioner together with a check to cover the fee for filing an answer that petitioner said would be required. Petitioner never filed a response on the Burrells' behalf, and a default judgment was entered against them. They repeatedly attempted to contact petitioner, but their telephone calls and letters went unanswered. Eventually, their bank accounts were levied on and their wages were garnished. In September 1989 Mr. Burrell wrote petitioner a letter demanding a refund of the fee and return of the files. To date, the Burrells have received no response to the letter, no refund and no explanation about their cases.

Petitioner testified that he gave the Burrell cases to his associate, Bluestein, to handle. When he asked Bluestein about the status of the cases, Bluestein responded, "don't worry" and " there's no problem." After default was entered, Bluestein again told petitioner that there was no problem and that he would move to set aside the judgment. Bluestein prepared a motion to set aside the judgment but, according to petitioner, because Bluestein was not in the office when the papers were prepared, petitioner signed the declaration and memorandum of points and authorities accompanying the motion. The motion was denied.

Petitioner's primary contention is that the evidence shows that the Burrells and Wilson hired the corporation "Bernstein & Bluestein" as their attorney, not petitioner as an individual. We rejected a similar contention in Farnham v. State Bar (1978) Col.

Sup. Ct. In that case, a client, Graham, consulted the Legal Aid Warranty Fund to represent him in a lawsuit. When Graham complained that he was unable to contact the attorney originally assigned his case, Farnham took the file to review, met with him twice, and told him that he would handle the case and file the complaint. The complaint was never filed. Farnham maintained that he did not feel responsible for the Graham matter as he was merely an employee of the Legal Aid Warranty Fund and had never told Graham he was going to try the case. We explained, "There is no question that petitioner formed an attorney-client relationship with Graham. No formal contract or arrangement or attorney fee is necessary to create the relationship of attorney and client. It is the fact of the relationship which is important."

Similarly, in this case there is no question that petitioner formed an attorney-client relationship with the Burrells and Wilson. The Burrells and Wilson repeatedly testified that they retained petitioner to represent them. Their initial contact at the college was with petitioner. He directed them to call his secretary to make an appointment with him. He met with them, discussed their cases, accepted employment, explained the fees and accepted their money. Wilson testified that petitioner told him that he would file the opening brief. Wilson had no contact at all with either Bluestein or Goldberg. Similarly, the Burrells dealt almost exclusively with petitioner. They directed their telephone calls and letters to him, and Mr. Burrell delivered the municipal court complaint and the check to file an answer to petitioner.

Petitioner maintains that the Burrells engaged the services of the corporation and not his individual services. He relies on the written attorney-client agreement, which refers to the attorney as "Bernstein & Bluestein," and the Burrells' check, which was made payable to the corporation. This evidence is beside the point. Petitioner cannot rely on the corporate veil to cloak his own professional lapses. Wilson and the Burrells dealt directly with petitioner and reasonably expected him to perform the services for which they paid.

Petitioner next contends that neither Wilson nor the Burrells suffered harm as a result of his actions. It is clear in this case that both Wilson and the Burrells suffered harm. Wilson was unable to prosecute his appeal because petitioner refused to refund

his fee. The Burrells lost their cause of action in the superior court action, and suffered a default judgment in the municipal court action which resulted in their bank accounts being levied on and their wages being garnished. Petitioner's argument that Wilson was not harmed because he did not even attempt to retain another attorney to prosecute his appeal is patently frivolous, and one of many examples of petitioner's attempts to shunt the responsibility for his misconduct onto others, including the very victims of that misconduct.

Further, professional misconduct is not excused merely because the former client has suffered no harm. Lack of harm to the former client may, however, be considered a mitigating circumstance in determining appropriate discipline if clearly and convincingly supported by the record.

We now turn to the issue of discipline. According to the Standards for Attorney Sanctions for Professional Misconduct, the appropriate discipline of an attorney who willfully fails to communicate with clients or to perform the services for which he was retained in matters not demonstrating a pattern of misconduct is "reproval or suspension depending upon the extent of the misconduct and the degree of harm to the client." After considering the record and petitioner's objections, we conclude, in light of petitioner's prior record of discipline, the presence of several aggravating factors, and the absence of mitigating factors, that the recommended discipline is insufficient to protect the public and the profession and that a longer period of suspension is warranted. It is hereby ordered that petitioner Albert M. Bernstein be suspended from the practice of law in this state for a period of five years, that execution of the order of suspension be stayed, and that petitioner be placed on probation for a period of five years on condition that he be actually suspended from the practice of law for two years and until he makes restitution.

MILLER v. METZINGER

Columbia Court of Appeal, 1981

Plaintiff in a wrongful death medical malpractice suit which had been dismissed as being barred by the statute of limitations brought a suit against attorneys for legal malpractice. The initial complaint charged four different attorneys or law firms with negligently failing to bring the wrongful death action within the applicable statute of limitations. After some defendants were dismissed, the remaining defendant, Lewis Metzinger ("defendant") successfully moved for summary judgment.

Certain basic facts, as shown by the deposition testimony and declarations, were undisputed. Plaintiff's husband died January 4, 1975; thus any wrongful death action on her behalf had to be filed by January 4, 1976. She failed to do so, even though she had sought the services of an attorney before then. In early 1975, Plaintiff contacted attorney Meo with respect to the wrongful death. She gave his firm a written authorization dated March 2, 1975_, to obtain the medical records, which they did obtain. Although the date is uncertain, Meo did inform plaintiff that he declined to accept the matter. However, Meo retained the medical records until on or about December 28, 1975.

At some time in 1975, Plaintiff consulted with Defendant concerning the wrongful death claim and ultimately Defendant advised her that he was unable to handle the case because he "did not have sufficient expertise in medical malpractice." Determinative here is when defendant told plaintiff and whether it was in sufficient time to enable her to file the wrongful death action before the statute of limitations expired.

An additional undisputed fact of critical importance was that Defendant sent a letter to Meo, dated December 27, 1975, indicating his interest in representing plaintiff in the matter, requesting immediate access to the medical records, "to see if we will, in fact, take the case," and stating his concern "that the statute of limitations on this matter is running shortly."

Beyond those above recited, the facts were uncertain or there were conflicts. There was great uncertainty as to the dates when (1) Plaintiff contacted Defendant,

and (2) Defendant advised Plaintiff of his inability to handle the case and referred her to other attorneys.

There was also considerable uncertainty as to the content of the discussions between Plaintiff and Defendant. In his deposition, Defendant stated that he did not "remember any of the substance" of the conversations he had with Plaintiff and could not say whether he ever advised her that an action should be filed on her behalf prior to one year from the day of her husband's death. When asked, "Did you ever agree to perform any work on Plaintiff's children's behalf in connection with the medical malpractice claim?" he answered, "I don't know." However, in his declaration, Defendant stated that Plaintiff asked him to investigate the case, that he had advised her that in order to do so it was necessary to examine the medical records and suggested he would obtain them from her present counsel, but "never indicated at this time that I would undertake this matter nor represent her." In the declaration, Defendant summarized: "At no time during any conversation or consultation period did I agree to represent Plaintiff in any regard to this claim. My entire relationship to this action was of an investigatory nature."

Plaintiff was emphatic that "no attorney advised (her) of the statute of limitations within that year of (her) husband's death," and specifically stated, "Defendant never gave me any advice whatsoever as to what action to take to preserve my medical malpractice cause of action."

Plaintiff contends that the motion for summary judgment was improperly granted inasmuch as there were issues of fact as to 11) the date upon which Defendant informed Plaintiff that he would not represent her, (2) whether Defendant advised plaintiff as to the running of the statute of limitations.

We agree that issues of fact remain as to whether an attorney-client relationship was established between Plaintiff and Defendant, and as to the duration of that relationship. If it continued to the date indicated by the December 27, 1975 letter from Defendant, defendant was obligated to advise plaintiff of the imminent bar of the statute of limitations, and there is no claim that he did so.

The deposition testimony of Plaintiff describes an agreement under which Defendant undertook to obtain medical records necessary to an evaluation of the wrongful death claim and to advise concerning appropriate action to be taken. Defendant "would take care of it or have somebody take care of it that knew about trying malpractice suits." Defendant's statements in his declaration that his function was purely investigatory and that he did not agree to represent her, charge any fee for his services or secure a retainer agreement, do not suffice to eliminate the existence of an attorney-client relationship.

When a party seeking legal advice consults an attorney at law and secures that advice, the relation of attorney and client is established prima facie. The absence of an agreement with respect to the fee to be charged does not prevent the relationship from arising. Neither contractual formality nor compensation or expectation of compensation is required. For example, we have held that an attorney's undertaking "to see what could be done with regard to settlement" was an agreement sufficient as a matter of law to impose upon him the duties owed by an attorney to his clients. We stated:

> "The fiduciary relationship existing between lawyer and client extends to preliminary consultation by a prospective client with a view to retention of the lawyer, although actual employment does not result."

It thus appears that despite the fact that no retainer was signed between Plaintiff and Defendant, an attorney-client relationship giving rise to fiduciary obligations could rest upon the version of their arrangement testified to by Plaintiff.

There is also an issue of fact as to the time when Defendant terminated the relationship and referred Plaintiff to other attorneys. Defendant's attempt in his declaration to definitely date this event as "(On November of 1975" is belied (1) by his deposition testimony in which he admits his total inability to fix such date, and (2) by his admission that the December 27, 1975 letter to Meo was signed and mailed by him. An examination of that letter shows that by itself it constitutes substantial evidence that as of its date Defendant had not advised Plaintiff of his inability to handle their case. The letter gives rise to a clear inference that Defendant declined to handle the

case subsequent to December 28, 1975. It is, therefore, apparent that there is a serious issue of fact in the case as to whether Defendant advised the Plaintiff to seek other representation at any time prior to a date when the one-year statute of limitations had run or was about to run within a matter of a few days.

Finally, there is a genuine issue as to whether there was a breach of duty to plaintiff by defendant's failure to advise concerning the statute of limitations. Plaintiff's declaration and her deposition both indicate that she was never advised by Defendant of the bar of the statute of limitations. He does not attempt to take issue with her in this respect. If, therefore, the correct dating of the conversation, which both of them agreed occurred prior to her seeking representation with other attorneys, is subsequent to the December 27 date of Defendant's letter to Meo, defendant failed to negate the existence of a breach of duty.

Defendant's letter of December 27 clearly states his understanding that the statute of limitations "is running shortly." This implies that he was advised by Plaintiff of the date of her husband's death. Since that date was January 4, 1975, he presumably knew that plaintiffs had only until January 4, 1976, within which to commence the action. Even if it be assumed that Defendant did not wait any substantial period to receive the medical records before declining the case, a breach of duty could be found in his failure to advise Plaintiff of the necessity to act promptly in contacting other attorneys in view of the fact that there were only a few days remaining within which to institute an action.

Moreover, in view of Defendant's apparent knowledge of the statute of limitations problem, a breach of duty to plaintiffs might exist even though he left it up to Plaintiff to make the appointment with other attorneys. If, as her deposition and declaration indicate, she was given no advice as to the statute of limitations (when Defendant declined the case on the basis of his lack of expertise, at a time when there remained only a few days within which to commence the action), there was a breach of duty.

The judgment is reversed.

STRAUSS v. FOST

Columbia Court of Appeal, 1988

In 1984 plaintiff's wife was injured in an automobile accident. Plaintiff was driving the vehicle in which his wife was a passenger, and one Sherry Sansone was the driver of the other car. Plaintiff's wife instituted an action for personal injuries against plaintiff and Sansone. Plaintiff's insurance carrier retained defendant, an experienced civil litigator, to defend plaintiff in that action. At the time plaintiff also had a claim for property damage and alternate transportation in the amount of $3,636.66. As soon as defendant was retained, he informed plaintiff of that fact and further let him know that, if he was injured in the accident and wished to make a claim against the driver of the other vehicle, or anybody else, it was essential that plaintiff assert his claim as part of this action. Defendant offered to represent plaintiff on a contingent basis or on an hourly fee basis.

Plaintiff responded requesting defendant to represent him in the property damage claim against Sansone, and enclosed the repair bills for the car. Defendant in due course applied for and was granted leave to assert a cross-claim for property damage.

In response to letters from the defendant requesting that the plaintiff inform him which payment method he preferred, plaintiff replied to defendant that he had "made other arrangements to collect property damages" and, therefore, would "not require [defendant's] services regarding this matter." At trial plaintiff testified that other lawyers had told him that he could wait and bring his claim after his wife's suit had been concluded, at which time he could pursue his property damage claim. Defendant testified, however, that he read plaintiff's letter to mean that "he had collected his property damage." He further stated that he "knew that [plaintiff] had been negotiating with [Sansone's insurance company] and had been in touch with them."

To this point in the chronology we cannot fault defendant's actions, since an attorney and client can limit the scope of representation. We suggest, however, that the better practice would have been at least to have personally spoken to the client. Defendant had properly informed plaintiff of his options and had received a definitive

response. His first error, however, was failing to withdraw formally from the representation of plaintiff that had been undertaken by the filing of the cross-claim. Without such formal withdrawal, defendant's responsibility continued until the expiration of the time to appeal from the final judgment or order entered in the cause.

Sansone's attorney then moved to dismiss the property damage claim with prejudice. Defendant did not respond to the motion, or send plaintiff a copy of the moving papers. Nor did he inform the court or opposing counsel that he no longer represented plaintiff with respect to the matter encompassed by the motion so that the judge would have known that there had been no service of the notice of motion upon either plaintiff or an attorney representing him with respect to the claim. An order dismissing the cross-claim with prejudice was duly entered.

One month later plaintiff and defendant first met face to face at the trial of plaintiff's wife's personal injury suit. Defendant then learned for the first time that plaintiff had not collected his property damage claim but that, on the advice of unnamed attorneys, plaintiff intended to pursue the claim after the trial was over. Defendant correctly informed plaintiff that it would be too late to assert such a claim "and it may already be barred." He explained the effect of the dismissal of the claim in layman's language. At the trial Sansone was found 90% liable for the accident and plaintiff 10% liable; (plaintiff's wife recovered $75,000 for her injuries). Plaintiff subsequently instituted this separate action for legal malpractice.

Plaintiff was required to have asserted his claim for property damage in the original litigation. Thus, the central point in this case is whether defendant owed any duty to plaintiff following plaintiff's unqualified rejection of defendant's representation of him concerning plaintiff's affirmative cross-claim. The trial judge found no such duty, but we disagree.

As noted earlier, defendant remained plaintiff's attorney of record in the cause both for defense and for the assertion of the cross-claim. Although defendant assumed that plaintiff had separately adjusted his affirmative claim, when defendant received the notice of motion to dismiss plaintiff's claim with prejudice, defendant's decision to do

nothing was palpably incorrect. He could not simply abandon his client with respect to the cross-claim. There was no indication that plaintiff was otherwise represented with respect to this motion or that he was served personally so that he would have had an opportunity to appear pro se and explain to the court his incorrect view of the law concerning mandatory joinder.

We, of course, do not fault defendant for the incorrect legal advice allegedly given to plaintiff by other attorneys, but by neglecting his client whom he was defending against related claims, defendant was negligent as a matter of law. Even more importantly, defendant remained as plaintiff's attorney of record concerning the cross-claim and in that capacity received the notice of motion as such without indicating to the court, opposing counsel, or his client that the service upon defendant was other than effective.

We reverse the judgment of dismissal and enter judgment in favor of plaintiff for two-thirds of the net loss after applying the jury's allocation, or $2,182, plus interest and costs as provided by law.

In the Matter of RILEY, a Member of the State Bar.

State Bar Court of Columbia, 1994

Respondent was retained by Brian King in February 1991 to represent him with regard to personal injuries he sustained in an accident. Sometime in 1992, King spoke with someone in respondent's office regarding terminating their attorney-client relationship, and King indicated that he would take over his own case. In response to a deposition notice, respondent wrote to the opposing counsel advising him that respondent no longer represented King, and would not appear on King's behalf at the deposition.

King's deposition was scheduled for August 2, 1992. Approximately two weeks before the deposition, an attorney named Dalby agreed to become King's new attorney. However, no substitution of attorney had been executed or filed by August 2, and respondent had not obtained leave of court to withdraw from King's case. Dalby notified respondent by fax on August 1, the day before King's deposition, that Dalby had not yet been substituted into the case and would not be able to attend the deposition. The fax pointed out that respondent was still King's counsel and had an obligation to represent his interests. On Dalby's advice, King appeared for his deposition but declined to respond to questions. since he was unrepresented.

King did not recall whether or not respondent's office had sent him a substitution of counsel form prior to August 2, 1992. The record contains a letter from respondent's office to King indicating that a substitution form was sent either on July 30, 1992, or on August 20, or possibly on both dates. In any event, it is undisputed that no substitution of counsel was executed until November 1992, and that the substitution was not filed with the court until December 4, 1992. Legal proceedings were required to compel King's deposition. Respondent was charged with violating rules 3-1 101A) and 3-700(A)12). The hearing judge found that respondent intentionally failed to perform competently in the matter, and thus violated current rule 3-1 101A). However, he found no violation of rule 3-7001A112), because there was no evidence that King was prejudiced.

Respondent argues that he should not have been found culpable of .intentional failure to perform legal services competently in violation of current rule 3-1 101A), because King had discharged him prior to the scheduled date of King's deposition. However, it is undisputed that no substitution of counsel had been executed and filed

as of the date of the deposition.

Regardless of whether it is the attorney or the client who initiates the termination of their relationship, the attorney's ethical duties upon such termination remain the same. An attorney of record in pending litigation remains counsel of record, and thus continues to have a duty to take such actions as are essential to avoid foreseeable prejudice to the client's interests, unless and until a substitution of counsel is filed or the court grants leave to withdraw.

Since respondent wished to be relieved of the responsibility for defending his client's deposition, and knew that successor counsel was not available to take his place, it was respondent's obligation to take appropriate steps to avoid prejudice to the client, such as obtaining a postponement of the deposition until the transfer of the case to successor counsel could be perfected. The record shows clearly and convincingly that respondent intentionally absented himself from his client's deposition even though he was still officially counsel of record and knew his client would be unrepresented in his absence.

We agree with the State Bar that respondent also should have been found culpable of violating current rule 3-700(A)(2) in this matter. The rule requires that withdrawing (or terminated) counsel take steps to avoid any foreseeable prejudice to the client. It does not require that such prejudice actually occur. It is unquestionably foreseeable that a client may be prejudiced if his or her attorney of record does not appear to defend the client's deposition. In fact, such prejudice occurred in this case. As a result of respondent's failure to take appropriate steps to protect King's interests, King was subjected to legal proceedings to compel his deposition.

THE RECOMMENDED DISCIPLINE IS ADOPTED.

ANSWER 1 TO PERFORMANCE TEST A

You have asked me to write a memorandum regarding potential professional responsibility violations by Stan Richardson. You have also asked me to address concerns regarding Mary Fegen, Richardson's former landlord and sometime contract employer.

I. Was the attorney-client relationship between Stan and Mrs. Mason terminated?

Before determining what obligations Richardson may have to Mrs. Mason, it is necessary to determine whether Richardson and Mason had effectively terminated their attorney-client relationship.

According to §284 of the Columbia Code of Civil Procedure, an attorney may be substituted at anytime as long as (I) both the attorney and client consent, and a notice of substitution is filed with the court, and entered in the minutes, or (2) the court orders such substitution, upon application by either the client or attorney and after notice has been received by the party not seeking substitution.

Rule 3-700(A)(2) of the Columbia Rule of Professional Conduct further elaborates that before withdrawal from the attorney-client relationship can be taken, the attorney is required to take reasonable steps to avoid "reasonably foreseeable prejudice" to the rights of the attorney's client. This includes giving notice to the client, allowing time for employment of other counsel, and complying with applicable laws and rules, such as §284 of the Columbia Code of Civil Procedure.

In the matter of Riley, further elaborates on the above requirements. In Riley, respondent Riley was subject to discipline by the state bar of Columbia for violating Rules of Professional Civil Responsibility 3-11 O(A) and 3-700(A)(2). Riley had been retained by Brian King to represent him in a personal injury lawsuit. Sometime later, King informed a member of Riley's office that he was terminating employment. Nevertheless, Riley failed to file a substitution of counsel, as required by Civil Code §284, until December 4, 1992. In the meantime, however, King was scheduled to be deposed in August 1992. Riley did not attend the deposition because he argued that his services had been terminated. However, the client, King, was unable to obtain new counsel because Riley was still the attorney of record, since no substitution of counsel had been filed. Thus, King attended the deposition alone and refused to answer questions.

The State Bar of Columbia disciplined Riley for this conduct. According to the State Bar, the attorney of record continues as attorney for a client until a substitution of counsel is filed with the court, regardless of which party terminated the relationship. Consequently, because King indicated that he no longer wanted to be represented by Riley, the State Bar instructed that, pursuant to Rule 3-700(A)(2), Riley had a duty to take appropriate steps to avoid prejudice to his client, King. Failure to take such steps was a violation of Rule 3-700(A)(2). Here, in the matter of Stan Richardson, Richardson and Mrs. Mason clearly had an attorney-client relationship. In line with Miller v. Metzinger, Mrs. Mason sought legal advice from Richardson, and secured the advice. Thus, an attorney-client relationship was entered into. In fact, the relationship between Richardson and Mason is more clear than that.

Mason met with Richardson regarding her car and sought advice as to how she could seek its return. In response, Richardson made a written demand for the car. Subsequently, Richardson initiated a lawsuit against the defendant, which resulted favorably to Mrs. Mason. Finally, Mrs. Mason had a fee agreement regarding Richardson's services, although the agreement is in some dispute.

Thus, Richardson and Mason clearly had an attorney-client relationship. Consequently, as in the matter of Riley, §284 of the Code of Civil Procedure, and Rule 3-700(A)(2) of the Columbia Rules of Professional Conduct indicate, this attorney-client relationship cannot be effectively terminated until the notice of substitution of counsel is filed with the court. It is not enough that Richardson instructed Mrs. Mason, after the favorable end to the lawsuit, that she could proceed alone to recover additional expenses without him. Nor is it enough when Richardson subsequently advised Mason after receiving the motion to set aside default judgment and mailing it to her, that she should retain new counsel to represent her in the motion. Finally, even the fact that Mrs. Mason recognized the relationship as being over, as evidenced by the fact that she sought to retain new counsel for the July 30 motion, is not sufficient to terminate the relationship.

Here, Richardson had mailed the substitution of counsel form to Mrs. Mason. Mrs. Mason signed it and returned. However, the substitution of counsel form has not yet been filed with the court. As such, Richardson's relationship with Mrs. Mason has not yet been effectively terminated. As a result, Richardson owes Mrs. Mason further obligations.

II. What are Stan's further obligations to Mrs. Mason? Because Richardson's and Mason's attorney-client relationship has not been terminated, Richardson owes Mrs. Mason further obligations.

First, as described in the matter of Rilev, an attorney whose relationship has not been terminated because a substitution of counsel has not been filed, has an obligation to take appropriate steps to avoid prejudice to his/her client. According to Rilev, it does not matter that prejudice actually occurs. As long as possible prejudice is foreseeable, a lawyer has a duty to his client to avoid such prejudice. In Rilev, the state bar instructed that such prejudice could be avoided simply by postponing his client's deposition until new counsel could be substituted.

Second, even if withdrawal as counsel was effective or if Richardson subsequently files the substitution of counsel with the court so that withdrawal is effective, Miller v. Metzinger implies that Richardson would still have an obligation to Mrs. Mason.

In Miller. plaintiff met with defendant and asked him to take on her case. The defendant responded, however, that he could not take the case because he didn't have the expertise required to act as attorney in a medical malpractice case. However, before notifying plaintiff regarding this lack of expertise, defendant proceeded with some research and even obtained plaintiffs medical records. At no time during this period, did the defendant warn plaintiff that the statute of limitations for her case was ready to run. In fact, when defendant finally communicated his inability to take the case, defendant left plaintiff only a few days before the statutory period would run on her case. The court held that defendant breached a duty owed to plaintiff by not allowing plaintiff sufficient time to obtain new counsel so that she can proceed with her case after defendant declined.

Miller demonstrates that even if Richardson successfully terminated his relationship with Mrs. Mason by filing the substitution of counsel with the court, he would still owe Mrs. Mason a duty of taking appropriate steps to avoid prejudice to Mrs. Mason. Rule 3-700(A)(2), as previously discussed, is in accord. Richardson cannot terminate his employment without giving Mrs. Mason due notice, giving her time to retain new counsel, and without avoiding other foreseeable prejudices.

III. Stan's Further Obligations

Whether Richardson is still counsel of record to Mrs. Mason, or whether Richardson chooses to terminate the relationship by filing the notice of substitution with the court as described above, Stan must take actions to avoid foreseeable prejudice to Mrs. Mason.

First, Richardson can resume his relationship with Mrs. Mason and can 'attend the July 30 motion to set aside default himself as attorney for Mrs. Mason.

However, given Richardson's past conduct and communicated desire to withdraw from the case, Mrs. Mason may not desire Richardson to represent her at the motion. This is Mrs. Mason's prerogative. However, as long as Richardson makes the offer to act as Mason's attorney at the motion and legitimately intends to do so, he will likely have satisfied his professional and ethical role if Mrs. Mason refuses the representation. Nonetheless, Richardson may still be subject to discipline for informing Mrs. Mason of the motion only two weeks prior to it, and leaving her little time to obtain a lawyer.

Richardson might also have a conflict with his new employer, the city attorney's office. it is likely that they will allow him to finish up all prior work before he joined the city attorney's office.

If not, and a conflict results (perhaps because the city attorney's office is involved in a case against Mrs. Mason or has confidential information about her). Richardson must still, nevertheless, represent Mrs. Mason. He may, however, be screened off from similar work with the attorney's office.

Second, Richardson can seek a postponement of the motion on July 30. In the matter of Riley, the state bar noted that a postponement of the deposition would constitute sufficient acts by Riley to avoid foreseeable prejudice to his client.

In seeking the postponement, Richardson will have to make it far enough in advance so that Mrs. Mason will be able to retain new counsel. This may be greater than a subsequent postponement, since the referral service that Mrs. Mason spoke to said she wouldn't be able to talk to any attorney for six months.

It is very possible and likely that a court will not agree to an almost two-month postponement of the motion. If this is the case, Richardson will be subject to his other alternative causes of action. However, if Richardson makes the court aware of the circumstances and sufficiently demonstrates that Mrs. Mason will not be able to retain a new lawyer for greater than six weeks, the court is likely to grant the postponement.

Third, Richardson can himself find someone else to represent Mrs. Mason at the motion. Richardson can seek the aid of Mary Fegen, on another attorney leasing from her offices. However, Richardson must ensure that the new attorney can competently represent Mrs. Mason given the short period of time (two weeks) he/she would have to prepare. Further it is unclear what the fee agreement would be in such a case. Perhaps the new lawyer will have to enter into a new agreement, or perhaps the prior contingency agreement will control. The latter is doubtful, however, because it's unclear whether a valid contingent agreement was ever entered into.

Nonetheless, Richardson would most likely be able to receive a *referral* fee for finding another lawyer.

Fourth, Richardson's last option is not to do anything at all. If Richardson takes this option, Mrs. Mason is likely to be materially prejudiced. She will be forced to attend her deposition alone, and will probably be unable to argue the case sufficiently. Bob Sikes will likely succeed in his motion to set aside default judgment.

As a result, Richardson would most likely be subject to discipline. As in the matter of Riley makes clear, such discipline *could* range from a reprimand to a suspicion. The greater the harm caused and the more likely it could be avoided would likely be determinate when the bar decides what discipline to invoke. Like Riley, the discipline may very well be suspension.

Of all of Richardson's options, the option that *would* probably be the easiest to achieve and the least burdensome would be to seek a postponement of the motion on July 30.

IV. Stan's concerns regarding Mary Fegen

A. Attorney-client relationship created.

According to Bernstein v. State Bar of California. an attorney-client relationship is formed with an attorney and not with the attorney's firm. In determining that an attorney client relationship had been created between Bernstein and Wilson and the, the court listed factors which were indicative of an attorney-client relationship. These factors included: (1) the client made an initial contact with the attorney, (2) the client was instructed to call the attorney's secretary for an appointment, (3) the client met with the attorney to discuss the case, (4) the attorney accepted employment, (5) the attorney and client explained fees and accepted money, (6) and the client directed phone calls and letters to the attorney.

In this case, Mason contacted an attorney referral service and was given the name of Mary Fegen. Mason called to speak to Mary Fegen to seek advice and to retain her as counsel, but was subsequently turned over to Richardson before even speaking to Fegen. Further, after Richardson was not pursuing the matter as diligently as Mason thought he should be, Mason contacted Fegen to complain. And, Richardson explained his conduct to Fegen as though she were ultimately responsible. Further, it appears that Mrs. Mason believes that Richardson is an actual attorney in Mary Fegen's law offices as that is the way she refers to him in correspondence, and that's how she made her payment to Richardson (the $150 payment was made to the law offices of Mary Fegen). Finally, Mary Fegen personally endorsed the $150 check from Mason.

On these facts, it appears that an attorney-client relationship was not created between Fegen and Mason. Although Mason initially called to speak with Fegen, she was never given the opportunity but was, immediately transferred to Richardson. Further, Fegen and Mason never disclosed Mason's case, and Fegen never explicitly entered employment with Mason. Further, the two never discussed fees. These discussions were between Richardson and Mason. Finally, although there is record of one phone call between Mason and Fegen, the one phone call would likely not be sufficient to create an attorney-client relationship. The majority and probably super majority of Mason's phone calls and correspondence were directed to Richardson.

Thus, there likely was no attorney-client relationship between Fegen and Mason. At

most, it appears that Mason believed that Fegen had supervisory or direct control over the actions of Richardson. This is not sufficient for the creation of an attorney-client relationship because, as explained earlier, the relationship is with the attorney and not the firm.

However, if Fegen has supervisory control over Richardson, she may be subject to ethical obligations.

B. Mary's ethical obligations to Mason

It should first be noted that if Mary had entered into an attorney-client relationship with Fegen, then Mary could be ethically liable for failing to represent her (i.e., at the motion on July 30). However, as explained above, this is likely not the case.

Rather, Mary may be liable ethically for failing to oversee those she had supervisory control over to determine that they were acting ethically. This will probably only be the case if it's found that Mary did have supervisory control.

Mrs. Mason, it appears, believed that Mary had supervisory control because she believed it was Mary's firm that Richardson worked for. If Mason's belief was reasonable, Mary may have an ethical obligation to ensure that junior lawyers satisfy ethical rules. She will have to oversee their work. Thus, she would have had an obligation to determine whether Richardson had adequately terminated employment by filing the substitution.

C. Malpractice for Mary

In the same regard, Mary may be liable for legal malpractice if she faltered in her supervisory role. If Mary should have ensured that Richardson got substitution, she will be liable if he didn't.

ANSWER 2 TO PERFORMANCE TEST A

Pursuant to your request, I have drafted the following memorandum to help you prepare to counsel Stan Richardson.

1 WAS THE ATTORNEY-CLIENT RELATIONSHIP BETWEEN STAN AND MRS. MASON TERMINA TED?

TERMINATION OF EMPLOYMENT - RULE 3- 700:

Columbia Rules of Professional Conduct Rule 3-700 provides the requirements for the termination of legal employment.

Rule 3- 700(A) provides in pertinent part:

> "(1) If permission for termination ... is required ... a member shall not withdraw from employment in a proceeding before that tribunal without its permission.
>
> (2) A member shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel ... "

Pursuant to Rule 3-700(A)(1) and Columbia Code of Civil Procedure §284, change or substitution of an attorney must be done by consent of both attorney and client which is filed with the court or upon order of the court. In Stan's case, he has not yet complied with the provisions of CCP §284 as required in order to terminate the employment with Mrs. Mason. Stan did obtain a signed substitution form from Mrs. Mason dated July 16, 1999, but Stan did not file the substitution with the clerk or have it entered on the minutes as required. Stan also did not apply for substitution as attorney from the court, give notice to Mrs. Mason and obtain a court order. Since Stan did not comply with either of the provisions of CCP §284, the attorney-client relationship between Stan and Mrs. Mason has not been terminated.

Both Rilev and Strauss are in accord. In Riley, the client fired the attorney and obtained a new one. However, a substitution of counsel had not been executed and filed. The Riley court therefore held that the employment had not been terminated and that the attorney had continuing obligations. The court in Strauss stated that an attorney must formally withdraw from the representation and his responsibilities continue as long as he remains attorney of record in the client's case.

Here, Stan has not formally withdrawn as counsel of record for Mrs. Mason. Stan remains her attorney of record. Although he sent Mrs. Mason a substitution of counsel form and she executed it, the substitution was never filed with the court. As such, under Riley and Strauss the attorney-client relationship has not been terminated between Stan and Mrs. Mason and Stan has continuing obligations as her attorney.

2. WHETHER OR NOT THE RELATIONSHIP WAS TERMINATED, DOES STAN HAVE FURTHER OBLIGATIONS TO MRS. MASON?

Assuming first that there was a termination of the attorney-client relationship, Stan would still have continuing obligations to Mrs. Mason.

TAKE REASONABLE STEPS TO A VOID REASONABLY FORESEEABLE PREJUDICE:

Under Rule 3-700, an attorney cannot withdraw from employment until he has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of his client. This includes giving notice to the client and allowing time for the employment of other counsel.

In this case, Stan did give Mrs. Mason notice of his intent to terminate the employment when he spoke to her, sent her the substitution form, and returned all her files. Stan also sent Mrs. Mason a letter in which he explained that the dealership was contesting the default and that she would have to get another lawyer to represent her at the hearing. However, this did not provide Mrs. Mason with enough time to secure other counsel. Stan sent the letter on July 16, 1999 and the hearing was scheduled for July 30, 1999. This only provided Mrs. Mason with two weeks to get another attorney who could appear in a foreign jurisdiction (San Luis) which is some distance from Century City.

In addition, Stan is not permitted to withdraw until he has taken reasonable steps. Stan did return all of Mrs. Mason's files to her and give her instructions on what to do. However, Mrs. Mason now faces a challenge to the default judgment obtained and she has not obtained new counsel. Moreover, Stan had not been replaced as counsel of record. Since Mrs. Mason plans to represent herself at the hearing there is a reasonably foreseeable possibility that she will suffer prejudice because the default may be over turned. Since she may suffer this prejudice, Stan cannot withdraw.

Now, assuming Stan's relationship with Mrs. Mason has not been terminated as discussed above, Stan also has continuing obligations to Mrs. Mason as her attorney.

ACT COMPETENTLY:

Rule 3-110 states that an attorney shall not intentionally, recklessly, or repeatedly fail to perform legal service with competence. This competence requires performing legal services with diligence, learning and skill, and mental, emotional, and physical ability reasonably necessary to perform the services.

The court in Strauss. stressed that as the attorney of record, an attorney cannot simply abandon his client. In Stan's case, it may appear that Stan abandoned Mrs. Mason. Stan did turn over her files and inform her what she should do, but he never withdrew as counsel of record. That means that service and notice was still being sent to Stan instead of Mrs. Mason or a new attorney. The court was not informed of the termination either. Stan also sent Mrs. Mason a letter informing her of the hearing on the default with only two weeks for her to get another attorney. Stan knew that Mrs. Mason could not afford to hire an attorney because Stan wasn't even paid for his services. By not providing Mrs. Mason with adequate legal services for her upcoming hearing, Stan will be violating his duty of competence to her.

LIMITING THE SCOPE OF THE RELATIONSHIP:

Stan has an argument that his attorney-client relationship with Mrs. Mason was limited to his making the demand and filing the complaint and that he agreed with her to do nothing more. This argument has major flaws.

Not only is there conflicting evidence regarding the scope of the relationship, Stan still has ongoing duties. It is unclear whether Mrs. Mason agreed to limit the relationship in the way Stan suggests. It could be that Stan and Mrs. Mason never really came to an agreement. However, even if there was a limited attorney-client relationship reached, Stan still has responsibilities to Mrs. Mason. As her attorney of record, his responsibilities will continue until he formally withdraws. See Strauss.

In addition, as discussed above, Stan may not be able to withdraw from representing Mrs. Mason because he has not taken reasonable steps to avoid her rights being prejudiced.

3. COURSES OF ACTION AVAILABLE TO STAN ASSUMING STAN HAS FURTHER OBLIGATIONS:

CONTINUE ACTIVELY REPRESENTING MRS. MASON:

Assuming Stan has further obligations to Mrs. Mason, he must competently represent her. One of his options is to continue to represent her. This would require Stan to go to the hearing and defend against the default contest. If Stan is going to do this, he should speak with Mrs. Mason immediately and get the file back so that the can adequately prepare and competently represent her.

CONSEQUENCES OF CONTINUING THE REPRESENTATION:

There will be several consequences if Stan decides to continue to represent Mrs. Mason personally. First of all, Mrs. Mason is not happy with Stan. She filed a letter with the state in which she said she felt abandoned by Stan. As such, Mrs. Mason may not be all that cooperative with Stan in the representation. Secondly, Stan will not likely be compensated for his time. The services he provided Mrs. Mason so far were free. Third, Stan will have to take time away from his new employment and Stan likely doesn't want to represent Mrs. Mason because he feels she should be grateful to him for what he has done so far. Lastly, by representing her competently, Stan will be able to avoid continuing ethical violations.

TERMINATE RELATIONSHIP BY FILING SUBSTITUTION:

Another option Stan has is to file the signed substitution of counsel form with the court in an attempt to terminate the attorney-client relationship by formal withdrawal. He already has the substitution, so this could be accomplished by filing the form with the clerk.

CONSEOUENCES OF FILING THE SUBSTITUTION:

Since Stan has continuing obligations to Mrs. Mason, he faces some serious consequences if he files the substitution form. First, he would be violating his ongoing duty of competence because Mrs. Mason does not have substitute counsel. Second, the court may not allow Stan to withdraw because it may prejudice Mrs. Mason's rights. Third, Stan will be breaching ethical Rule 3-700 as explained above because he will be terminating the relationship without taking reasonable steps to avoid prejudicing Mrs. Mason's rights. Last, since terminating the relationship will result in the aforementioned additional ethical violations, Stan will be subjecting himself to additional discipline by the state bar. According to Bernstein. discipline can include suspension from the practice of law, a probationary period, restitution, fines or even disbarment.

TAKE REASONABLE STEPS AND THEN WITHDRAW:

Stan's last option would be to take reasonable steps to avoid prejudice to Mrs. Mason's rights and then withdraw. The only likely reasonable step Stan could take at this point would be to seek a continuance of the default hearing and get another attorney for Mrs. Mason. At this point, the hearing is only four days away and for a new attorney to competently represent her the new attorney would need some time to get familiar with the case.

CONSEQUENCES OF TAKING REASONABLE STEPS:

If Stan seeks a continuance and gets another attorney to represent Mrs. Mason, and then he withdraws from the representation he will be taking reasonable steps to avoid prejudicing Mrs. Mason's rights. As a consequence he will be complying with Rules 3-100 and 3-700. Therefore he will avoid further ethical violations and likely disciplinary action. Although this course of action would involve Stan spending more time away from his new job with no compensation, it doesn't have the other bad consequences of the other two alternatives.

4. STAN'S CONCERNS ABOUT MARY FEGEN:

(a) WAS AN ATTORNEY CLIENT RELATIONSHIP CREATED BETWEEN MARY AND MRS. MASON?

When a party seeking legal advice consults an attorney and secures that advice, the relationship of attorney and client is established prima facie. See Miller. The absence of an agreement with respect to fee does not prevent the relationship from arising and contractual formality is not required. Miller. In addition, statements by an attorney that his function is purely investigatory and that he did not agree to represent the client do not suffice to eliminate the existence of an attorney-client relationship. Miller. The court in Bernstein stated that the fact of the relationship is the most important and the fact that a check may be made payable to a different entity is not determinative.

In Mary's case, Mrs. Mason was referred to Mary by the referral service. At that time, Mrs. Mason spoke to Mary and she agreed to consult with Mrs. Mason for a half an hour free of charge. However, when Mrs. Mason came to the office, she consulted with Stan. On the other hand, Stan's name appears on the directory to the building along with twenty-eight other attorneys under the name of the Law Offices of Mary Fegen and this would suggest Stan works for Mary. Although Stan sent letters to Mason on his own letterhead, the letter Mrs. Mason sent to Stan was addressed to Stan at the Law Offices of Mary Fegen. In addition,
the canceled check by Mrs. Mason was made out to the Law Offices of Mary Fegen. Although this is not determinative of itself, it is evidence that Mrs. Mason may have considered Mary to be her attorney as well. In fact, Mrs. Mason called Mary to complain to her that Stan was not acting as fast as she wanted. This should have indicated to Mary that Mrs. Mason was under the impression that Mary represented her as well. Under the circumstances, Mrs. Mason has a strong argument that an attorney-client relationship was established between herself and Mary.

(b) HAS MARY VIOLATED ANY ETHICAL OBLIGATIONS TO MRS. MASON?

At the very least, Mrs. Mason went to Mary to seek legal advice initially. At the most, Mary and Mrs. Mason have a current attorney-client relationship. Either way, Mary owed Mrs. Mason the same ethical duties that Stan owes her. These ethical duties include Rules 3- I 00 and 3-700.

As such, Mary may have committed the same ethical violations that Stan has. Mrs. Mason sought her advice. Mary gave the case to Stan and did not ensure that Stan was acting diligently to pursue Mrs. Mason's rights. After Mason complained to Mary, there is no evidence that Mary did anything to remedy her problems with Stan. Mary also did not correct any mis-impression Mrs. Mason may have had regarding the relationship between Mary and Mrs. Mason. By failing to supervise Stan appropriately and by not being diligent, Mary violated her ethical duty to act competently. See Bernstein (supervising attorney violated duty of competence by delegating to incompetent associate).

(c) DOES MARY FACE POSSIBLE LIABILITY FOR LEGAL MALPRACTICE?

As explained above, Mary and Mrs. Mason probably entered into an attorney-client relationship and therefore Mary faced potential liability for legal malpractice in that Mary failed to act competently as described above. Failure to act competently would render Mary liable because a reasonably prudent attorney would act competently in representing his/her clients.

Mary also faces possible legal malpractice liability on a vicarious liability theory as the employer of Stan. Although Stan worked for Mary as a contractor, Mary may still be vicariously liable because she held Stan out as her employee. His name was listed along with twenty-eight other attorney's names under her law office, when Mrs. Mason was referred to Mary. Mary sent her to Stan, and Mary failed to correct any misunderstandings Mrs. Mason had regarding the employment status of Stan when Mrs. Mason called Mary to complain about
Stan and when Mrs. Mason sent the check to Stan made out to the law offices of Mary Fegen. Therefore, vicarious liability may be appropriate. If so, Mary faces exposure for malpractice liability to the same extent Stan does as well as liability for negligent supervision of Stan.

Since Mary's interests are implicated in the pending disciplinary action as Stan suggested. Stan may wish to inform Mary of the state bar disciplinary action against him.

TUESDAY AFTERNOON
JULY 27, 1999

California
Bar
Examination

Performance Test A

INSTRUCTION AND FILE

Westside Community Corporation

INSTRUCTIONS..... i

FILE

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WESTSIDE COMMUNITY CORPORATION
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 jurisdiction of the fictional United States District Court for the Eastern Judicial District.
3. You will have two sets of materials with which to work: A File and a Library. The File contains factual information about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
4. The Library contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this examination. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read them thoroughly, as if all were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit volume and page citations.
5. Your response must be written in the answer book provided. In answering this performance test, you should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.
6. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to organizing and writing.
7. This performance test will be graded on your responsiveness to instructions and on the content, thoroughness and organization of your response.

MEHERRIN & ROANOKE
1600 Skyscraper Towers, Suite 700
Lewiston, Columbia 09190

TO: Applicant
FROM: A. Hilliard Meherrin
SUBJECT: Westside Community Development Corporation
DATE: July 29, 1999

I met today with Paulette Wade, Executive Director of our client, Westside Community Development Corporation. The Board of Directors of Westside has been negotiating a deal with Lewiston Historic Preservation Society (LHPS) for the transfer of the old Lewiston High School property. The proposal they've been concentrating on is contained in the draft of a lease, a copy of which Ms. Wade left with us. Westside's Board, however, has been considering at least two alternatives, and they're not quite sure which way they want to go. The alternatives are spelled out in other documents Ms. Wade gave me.

Ms. Wade wants me to meet with the Board tomorrow to discuss with them the legal consequences of the deal. An aspect of the deal that bothers me is that it might raise issues that violate the rule against perpetuities. However, I'm not sure about this because the Columbia legislature has just recently adopted the Uniform Statutory Rule Against Perpetuities, and I need to know what the effect of that enactment will be on the choices being considered by Westside's Board.

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

Write a memorandum analyzing whether under prior Columbia law either of the alternatives would have created problems under the rule against perpetuities and whether prior law provided any way to avoid those problems. Then analyze the new Columbia statute and explain whether and why it eliminates whatever problems might previously have existed. The Westside Board will have to make some decisions regarding the proposed alternatives.

To help me advise the Board regarding the proposed alternatives, please prepare a second memorandum that analyzes the effect each alternative has on each of the concerns and needs they have expressed.

WESTSIDE COMMUNITY DEVELOPMENT CORP
2424 Sunshine Street
Lewiston, Columbia 09190

July 29, 1999

A. Hilliard Meherrin, Esq.
B. Meherrin & Roanoke
1 600 Skyscraper Towers
Suite 700
Lewiston, Columbia 09190

Dear Hilliard:

Thanks for taking the time to speak with me today. Here are the documents that I told you I would send over. Please review them and give me some guidance. The board gave me broad discretion in negotiating the deal with the Historic Preservation Society. My main goal is to obtain access to the fine arts building to get the cultural and arts center off the ground. However, the Board made it very clear that it was strongly interested in getting control of the entire school property for our community.

Right now there are two alternatives on the table: (1) a lease of the fine arts building with an option to purchase the entire property, and (2) an outright purchase of the school with an option in LHPS to buy the property back. You do not need to worry about the specific dollars and cents.

Please get back to me as soon as possible.

In the spirit of justice,

Paulette Wade

Paulette Wade
Executive Director

LEASE

THIS LEASE dated _____, 1999, is between LEWISTON HISTORIC PRESERVATION SOCIETY, a Columbia nonprofit corporation (Lessor) and WESTSIDE COMMUNITY DEVELOPMENT CORP, a Columbia nonprofit corporation exempt from taxation under § 501 (c)(3) of the Internal Revenue Code (Lessee).

Recitals

A. Lessor seeks to preserve the historic character of buildings and structures in Lewiston, Columbia, including but not limited to the old Lewiston High School that was built in 1917.

B. Lessor desires to lease the fine arts building of the Lewiston High School (the "premises") for a period of ten years. The building includes an auditorium, music and glee club rooms and is identified as Building C.

C. Lessee is an organization dedicated to the cultural and economic development of the Westside Heights community of Lewiston, Columbia. Lessee desires to preserve the historic character of the premises and to lease the premises from the Lessor.

Agreement

In consideration of the mutual promises set forth in this Lease, Lessor and Lessee agree as follows:

1. Lease. (a) Lessor hereby leases to Lessee the building commonly known as the fine arts building, of the old Lewiston High School located at 674 Marshall Avenue, Lewiston, Columbia, and designated as Building C.

(b) Lessee shall use the premises as a cultural and arts center for the Westside community of Lewiston.

3. Term. The term of this lease shall be for ten years, beginning on _____ , 1999, and ending on _____ ,2009. This lease may be renewed annually thereafter upon the same terms and conditions, except for the rental amount. If the new rental amount cannot be agreed upon by the parties within 60 days prior to the expiration of the term, this Lease shall not be renewed.

3. Obligation to Pay Rent. The rent for the premises shall be $2000 per month, payable in advance on the first day of each month, beginning and each and every month thereafter. Such payments shall be made to Lessor at 1236 Forester Road, Lewiston, Columbia or at such other address as Lessor shall provide to Lessee in writing.

4. Historic Preservation. (a) It is acknowledged that Lessee will make renovations to

the premises, but all such renovations must be approved in advance in writing by Lessor.

(b) Lessee shall present its renovation plans to Lessor on or before _____ Lessor shall provide written approval or rejection, and a list of required changes, if any, on or before _____ Lessee shall have the right to terminate this lease if final approval of its renovation plans is not received on or before _____.

5. Condemnation. If all of the premises are taken or condemned by a governmental authority, the term of the lease and Lessee's rights shall end as of the date the authority takes title to the premises. If less than all of the premises is taken by condemnation, Lessor -may cancel this lease on notice to the Lessee setting forth a cancellation date not less than _ days after the date of the notice. If the lease is canceled, Lessee must deliver the premises to the Lessor on the cancellation date, together with all rent due to that date. The entire award for any taking belongs to Lessor. Lessee hereby gives to Lessor any interest Lessee may have in any part of the award and shall make no claim for the value of the remaining part of the term.

* * *

IN WITNESS WHEREOF, the parties hereto have set their hands and seals the day and year first above written.

LESSOR:

LEWISTON HISTORIC PRESERVATION SOCIETY,
a Columbia nonprofit corporation

BY:_____
President

_____
Secretary

LESSEE:

WESTSIDE COMMUNITY DEVELOPMENT CORP, a Columbia nonprofit corporation
BY:

_____
President

_____
Secretary

Lewiston Historic Preservation Society
1236 Forester Road
Lewiston, Columbia 09190

June 21, 1999

Paulette Wade
Executive Director
Westside Community Development Corp
2424 Sunshine Street
Lewiston, Columbia 09190

Dear Paulette:

Your organization has expressed an interest in purchasing the fine arts building of the Lewiston High School. As you know, we have been trying to find a developer to acquire the entire high school property. The Lewiston School District had also been unsuccessful in a search for a developer for several years before it conveyed the property to our organization five years ago. As I am sure you are aware, the school district will receive 75% of whatever price we sell it for.

We acquired the property from the school district because of our concern that it would eventually succeed in selling the property to an outsider who would raze the school. It is our desire to preserve the buildings and their historical character. We have already rejected two offers to purchase the property for about $3,000,000. One offer was from Discount World Stores and the other from 21st Century Shopping Centers. Neither offeror was willing to commit to preserving the historical character of the school. We are willing to sell the property for less to a buyer who would ensure the preservation of its historic character.

The sale of only a portion of the property to your organization may make finding a proper buyer for the remainder of the property exceedingly difficult. Although we empathize with your organization's goals, we regretfully cannot entertain a proposal for purchase of only the fine arts building. We would, however, be interested in a lease of the fine arts building for

use as a cultural and arts center. Such use, under a lease, might make the school more attractive to the type of purchaser we are seeking.

It also occurs to us that your organization might be interested in the entire property. Perhaps, we can come up with an arrangement that meets both our needs. We can be flexible on price and payment terms. We can even include an option for Westside to buy the entire property at any time, at a price to be negotiated. On the other hand, you may be interested in purchasing the whole school now. If so, kindly make us an offer.

We can be flexible when it comes to terms and the time frame for payout. If we were to sell you the entire property on modest terms, we would expect to have an option to buy the property back on equally modest terms in case we are able to find a buyer who will pay market value and still observe our historical preservation objective.

Please let me know which of these choices interests Westside most. For the time being, I am enclosing a proposed lease without reference to either of these other options.

Sincerely,

Jane Kovnat

Jane Kovnat
President

Westside Community Development Corp
2424 Sunshine Street
Lewiston, Columbia 091 90

June 11, 1999

Antoinette Montoya
THE RAPPAPORT FOUNDATION
10 Downing Street
Boulder Shore, Columbia 09173

Dear Ms. Montoya:

We hereby request a grant in the amount of $1,000,000 to acquire and restore the fine arts building of the Lewiston High School, 674 Marshall Avenue, Lewiston, Columbia.

The Westside Community Development Corp was incorporated five years ago to develop the Westside Heights area of Lewiston. Our organization was formed to provide housing, economic, cultural and health development to the Westside Heights community. The area has been plagued with high unemployment and dropout rates. Since formation, our energetic board of directors and volunteers have had a tremendous impact on the community. The board of directors consists of seven members who have strong professional credentials and have been active in our community. Their most successful accomplishment to date has been the attraction of a doctor and other health professionals who recently opened a new medical clinic. They have had some modest success with fundraising and the organization has been able to hire an executive director.

We have more ambitious plans for improving the quality of life in Westside Heights. We now aspire to open and operate a cultural center that would offer community theater, a choir, a brass ensemble, a writing workshop, an artists studio and gallery and photography center.

We have found the perfect site. Westside Heights had been served for years by the old

Lewiston High School at 674 Marshall Avenue. When a new high school was constructed in 1980 in another area of town, our community lost one of its most cherished institutions.

The Lewiston High School has been vacant now for 19 years. The School District sought to sell the property to developers but there were no takers. Five years ago, the School District transferred the property to the Lewiston Historic Society. The Society has continued the search for a developer which will preserve the historic character of the school. We suspect that development efforts have failed because of its proximity to Westside Heights.

The fine arts building of the high school includes an auditorium, music and glee club rooms. We have approached the Lewiston Historic Preservation Society about acquiring the building. It will need extensive renovations. Although this space satisfies our immediate needs, we may want to eventually acquire the entire complex. In addition to the cultural center, we could operate an office complex, especially for other community organizations and neighborhood businesses.

Accordingly, we request $1,000,000 to purchase the fine arts building.

In the spirit of justice,

Paulette Wade

Paulette Wade

Executive Director

WESTSIDE COMMUNITY DEVELOPMENT CORP

Minutes of Board of Directors' Meeting
July 1, 1999

The meeting was called to order by the chair, Ashleigh McKynzie. The minutes for the last meeting on May 21, 1999, were read by the secretary Wade Herndon, and were approved. The only other item on the agenda was the Lewiston High School acquisition.

Executive Director Paulette Wade described the status of the project. The Rappaport Foundation did not accept the grant proposal as submitted, but did approve $250,000 for renovations to and remodeling of the fine arts building should we succeed in acquiring it by purchase or lease. Since the June 8, 1998 letter from the Historic Society, Paulette and Jane Kovnat met and discussed the lease-option and sale-buy back alternatives. Thereafter, the Historic Society drafted and sent over proposed language (attached) for each of these alternatives.

The chair expressed her delight at the favorable response from the Lewiston Historic Preservation Society. She then asked for discussion of the project.

Paulette Wade, the executive director, said that we have always talked about a business park to go along with the cultural center. However, such ideas were a long way from fruition. Moreover, Westside does not now have the financial resources or the people to purchase the entire school, much less maintain it. She argued that if LHPS will not sell the fine arts buildings that Westside sought, we should go for the lease. The $24,000 annual rental LHPS is asking was reasonable and they may take less. She could also go for the option for those who wanted to keep the idea alive of buying the whole school.

Reverend S.C. James Dawes also expressed his excitement. He thought that this was an historic moment. To him, LHPS represented the downtown business establishment. This was the first time he had witnessed them reaching out to help in the development of our community. He added that he had been advocating community economic development for years and that the LHPS proposal was a golden opportunity. He then indicated that the

organization should accept the challenge of buying the entire property. Several other members joined in and concurred with Reverend Dawes.

Then, Jenny Ailey, a former dancer agreed that Westside ought to think big, but expressed her concern that the current projects of the organization and the motivation for approaching LHPS in the first place was the cultural center. She was afraid that trying to acquire the entire property now would result in the neglect of the cultural center as efforts were made to acquire the financing and maintain the property if the whole school- was acquired. With respect to the proposed lease, she thought the ten year term was inadequate in light of the renovations that Westside was going to make, stating, "25 years would not be long enough, but it's close."

Ellis Hart, the lawyer, spoke next. He urged caution. He pointed out that the letter from LHPS was not itself an offer. As he saw it, their letter presented two options. First, LHPS was willing to lease the fine arts building to Westside and throw in an option to buy the entire school if Westside wanted one. Second, LHPS asked Westside if it were interested in buying the entire property, and if we were, to make an offer. He also stated that Westside must take into account the limitations of the grant. It provided money to renovate the fine arts building but not to acquire it. The other buildings need renovation as well and money will have to be obtained somewhere to pay for those.

Acquiring the entire property, he said, was a huge undertaking but ought to be pursued "if for no other reason than to assure control of this valuable institution in the Westside Heights community." He added that Westside could acquire the entire property if the terms were modest enough. He wondered if they would consider something as low as $250,000. Moreover, if plans progressed we might be able to line up potential tenants who might advance funds to help pay for it. But he felt very strongly that the organization ought not bind itself to financial terms for which it did not have hard cash commitments.

Nicole Figures, CPA, stated that while she favored trying to buy the entire property, she thought that it would be many years before the organization did anything besides the performing arts center. Nevertheless, she thought that Westside should try to lock up the entire property for a minimum of 25 years if feasible. She thought that the grant from The

Rappaport Foundation proved that Westside could raise the money to renovate and maintain the rest of the school. She suggested that we may try to get enterprise zone status. She also stated that we should not give LHPS the repurchase option because they would just try to cash in the value that Westside added. "That school ought to belong to Westside Heights. I got my start there."

After an hour of further discussion, Ellis Hart made the following motion which was seconded by Nicole Figures:

> Paulette Wade is hereby authorized to proceed to negotiate either a lease of the fine arts building of Lewiston High School, or a purchase of the entire Lewiston High School property from the Lewiston Historic Preservation Society, provided that any such transaction must be presented to the board for approval.

A motion was then made to adjourn the meeting. It was seconded and the meeting ended. Lawrence Nichols was absent.

Respectfully submitted

Ann Roundtree

Ann Roundtree, Secretary

Lewiston Historic Preservation Society
1236 Forester Road
Lewiston, Columbia 09190

MEMORANDUM

TO: Paulette Wade
FROM: Jane Kovnat
SUBJECT: Language for Options

In my letter of June 21, 1999, I indicated that LHPS was interested in giving Westside the option to buy the entire school or in selling the entire school to Westside as long as LHPS retained an option to buy it back. I have proposed some language below for both alternatives to assist you with your consideration.

Westside's Lease Option Alternative

As part of the consideration for this Lease, Lessee shall have the option to buy the property known as Lewiston High School for _____at any time beginning two years from the date of this Lease. Lessee shall exercise the option by giving written notice of intent to exercise and the closing of the purchase shall occur within 30 days thereafter.

LHPS' Option to Repurchase Alternative

At any time after sale of the property to Westside, LHPS shall have the right to purchase said property with all improvements for the same price the property was sold to Westside, plus 10 percent. LHPS shall exercise the option by giving written notice of intent to exercise and the closing of the purchase shall occur within 30 days thereafter.

THURSDAY AFTERNOON
JULY 29, 1999

California Bar Examination

Performance Test A

INSTRUCTION AND FILE

Westside Community Corporation

LIBRARY

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PROBATE CODE

§ 21 201. Effect of common law rule

This chapter supersedes the common law rule against perpetuities.

§ 21205. Property Interest

A nonvested property interest is invalid unless one of the following conditions is satisfied:

(a) When the interest is created, it is certain to vest or terminate no later than 21 years after the death of an individual then alive.

(c) The interest either vests or terminates within 90 years after its creation.

ARTICLE 4

Reformation

§ 21220. Procedural; Conditions

On petition of an interested person, a court shall reform a disposition in the manner that most closely approximates the transferor's manifested plan distribution and is within the 90 years allowed by the applicable provision in Article 2 (commencing with Section 21205), if any of the following conditions is satisfied:

(a) A nonvested property interest or a power of appointment becomes invalid under the statutory rule against perpetuities provided in Article 2 (commencing with Section 21205).

(b) A class gift is not but might become invalid under the statutory rule against perpetuities provided in Article 2 (commencing with Section 21205), and the time has arrived when the share of any class member is to take effect in possession or enjoyment.

(c) A nonvested property interest that is not validated by subdivision (a) Section 21205 can vest but not within 90 years after its creation.

ARTICLE 5

Exclusions from Statutory Rule Against Perpetuities

§ 21225. Interests Excluded

This chapter does not apply to any of the following:

(a) A nonvested property interest or a power of appointment arising out of a nondonative transfer, except a nonvested property interest or a power of appointment arising out of (1) a premarital or postmarital agreement, (2) a separation or divorce settlement, (3) a spouse's

election, (4) or a similar arrangement arising out of a prospective, existing, or previous marital relationship between the parties, (5) a contract to make or not to revoke a will or trust, (6) a contract to exercise or not to exercise a power of appointment, or (7) a transfer in satisfaction of a duty of support.

(b) A fiduciary's power relating to the administration or management of assets, including the power of a fiduciary to sell, lease, or mortgage property and the power of a fiduciary to determine principal and income.

(c) A power to appoint a fiduciary.

(d) A discretionary power of a trustee to distribute principal before termination of a trust to a beneficiary having an indefeasibly vested interest in the income and principal.

(e) A nonvested property interest held by a charity, government, or governmental agency or subdivision, if the nonvested property interest is preceded by an interest held by another charity, government, or governmental agency or subdivision.

(f) A nonvested property interest in or a power of appointment with respect to a trust or other property arrangement forming part of a pension, profit-sharing, stock bonus, health, disability, death benefit, income deferral, or other current or deferred benefit plan for one or more employees, independent contractors, or their beneficiaries or spouses, to which contributions are made for the purpose of distributing to or for the benefit of the participants or their beneficiaries or spouses the property, income, or principal in the trust or other property arrangement, except a nonvested property interest or a power of appointment that is created by an election of a participant or a beneficiary or spouse.

(g) A property interest, power of appointment, or arrangement that was not subject to the common law rule against perpetuities or is excluded by another statute of this state.

(h) A trust created for the purpose of providing for its beneficiaries under hospital service contracts, group life insurance, group disability insurance, group annuities, or any combination of such insurance, as defined in the Insurance Code.

§ 21 230. Selection of lives in being

The lives of individuals selected to govern the time of vesting pursuant to Article 2 (commencing with Section 21205) of Chapter 1 may not be so numerous or so situated that evidence of their deaths is likely to be unreasonably difficult to obtain.

The Symphony Space, Inc. v. Pergoia Properties, Inc.

(Columbia Supreme Court, 1988)

This case presents the novel question of whether options to purchase commercial property are exempt from Columbia's rule against perpetuities. We agree with the lower courts that the option in question violates the statutory prohibition, and is therefore unenforceable.

The subject of this proceeding is a two-story building situated on the Broadway block between 94th and 95th Streets. In 1970, Broadwest Realty Corporation owned this building, which housed a theater and commercial space. Broadwest had been unable to secure a permanent tenant for the theater -- approximately 58 % of the total square footage of the building's floor space. Broadwest also owned two adjacent properties, Pomander Walk (a residential complex) and the Healy Building (a commercial building). Broadwest had been operating its properties at a net loss.

In 1970, Broadwest sold the entire building to Plaintiff, Symphony, for the below market price of $10,010 (secured by a mortgage held by Broadwest) and leased back the income-producing commercial property, excluding the theater, for $1 per year. As a condition of the sale, Symphony, for consideration of $10, also granted Broadwest an option to repurchase the entire building.

The purpose of this arrangement was to enable Symphony, as a not-for-profit corporation, to seek a property tax exemption for the entire building -- which constituted a single tax parcel -- predicated on its use of the theater. The sale-and-leaseback would reduce Broadwest's real estate taxes by $30,000 per year, while permitting Broadwest to retain the rental income from the leased commercial space in the building. The arrangement also furthered Broadwest's goal of selling all the properties, by allowing Broadwest to postpone any

sale until property values in the area increased and until the commercial leases expired. Symphony, in turn, would have use of the theater at minimal cost, once it received a tax exemption.

It is the option agreement that is at the heart of the present dispute. Section 3 of the agreement provides that Broadwest may exercise its option to purchase the property at any time following the maturity of the indebtedness evidenced by the Note and secured by the Mortgage, whether by acceleration or otherwise. Section 6 of the agreement established that the option constituted "a covenant running with the land, inuring to the benefit of heirs, successors and assigns of Broadwest."

Symphony ultimately obtained a tax exemption for the theater. In the summer of 1973, Broadwest sold and assigned its interest under the lease, option agreement, mortgage and mortgage note, as well as its ownership interest in the contiguous Pomander Walk and Healy Building to defendants Pergola Properties, Inc., Bradford N. Swett, Casandium Limited and Darenth Consultants as tenants in common, for $4.8 million.

Subsequently, defendants initiated a cooperative conversion of Pomander Walk, which was designated a landmark, and the value of the properties increased substantially. An appraisal of the entire blockfront, including the Healy Building and the unused air and other development rights available from Pomander Walk, valued the property at $ 27 million assuming the enforceability of the option. By contrast, the value of the leasehold interest plus the Healy Building without the option were appraised at $5.5 million.

In March 1979, Pergola thus served Symphony with notice that it was exercising the option pursuant to section 3(a), with the closing scheduled for September 11, 1979. Symphony objected and brought suit.

The trial court concluded that the Rule against Perpetuities applied to the commercial option contained in the parties' agreement, and that the option violated the Rule.

The Rule against Perpetuities evolved from judicial efforts during the 17th century to limit control of title to real property by the dead hand of landowners reaching into future generations. Underlying both early and modern versions of the rule is the principle that it is socially undesirable for property to be inalienable for an unreasonable period of time. These rules thus seek to ensure the productive use and development of property by its current beneficial owners by simplifying ownership, facilitating exchange and freeing property from unknown or embarrassing impediments to alienability.

Columbia's current statutory rule states that "[n]o estate in property shall be valid unless it must vest, if at all, not later than twenty-one years after one or more lives in being at the creation of the estate and any period of gestation involved." The rule is predicated upon the public policy of the State and constitutes non-waivable, legal prohibitions.

In addition to the statutory formula, Columbia also retains the more flexible common law rule against unreasonable restraints on alienation. Unlike the statutory Rule against Perpetuities, which is measured exclusively by the passage of time, the common law rule evaluates the reasonableness of the restraint based on its duration, purpose and designated method for fixing the purchase price.

Under the common law, options to purchase land are subject to the rule against remote vesting. Such options are specifically enforceable and give the option holder a contingent, equitable interest in the land. This creates a disincentive for the landowner to develop the property and hinders its alienability, thereby defeating the policy objectives underlying the Rule against Perpetuities.

Typically, however, options to purchase are part of a commercial transaction. For this reason, subjecting them to the Rule against Perpetuities has been deemed" a step of doubtful wisdom." The rule has been frequently criticized as an anachronism whose original purposes are inapposite to modern arms-length contractual transactions.

However, a review of the history of the statutory provision shows that the legislature specifically intended to incorporate the American common law rules governing perpetuities into the Columbia statute. Because the common law rule against remote vesting encompasses purchase options that might vest beyond the permissible period, the statute necessarily encompasses such options. Inasmuch as the common law prohibition against remote vesting applies to both commercial and noncommercial options, it likewise follows that the legislature intended to apply to commercial purchase options as well.

While there are substantial policy justifications for declining to apply the Rule to options like the one in question, such statutory reformation would require legislative action.

Our decision in *MTA* v*. Bruken Realty Corp* is not to the contrary. In *Bruken,* we held that the Rule did not apply to a preemptive right in a "commercial and governmental transaction" that lasted beyond the statutory perpetuities period. In doing so, we explained that, unlike options, preemptive rights (or rights of first refusal) only marginally affect transferability:

> An option grants to the holder the power to compel the owner of property to sell it whether the owner is willing to part with ownership or not. A preemptive right, or right of first refusal, does not give its holder the power to compel an unwilling owner to sell; it merely requires the owner, when and if he decides to sell, to offer the property first to the party holding the preemptive right so that he may meet a third-party offer or buy the property at some other price set by a previously stipulated method.

Enforcement of the preemptive right in the context of the governmental and commercial transaction, moreover, actually encouraged the use and development of the land, outweighing any minor impediment to alienability.

Here the option agreement creates precisely the sort of control over future disposition

of the property that we have previously associated with purchase options and that the common law rule against remote vesting and the Rule against Perpetuities seek to prevent. As the trial court found, the option grants its holder absolute power to purchase the property at the holder's whim and at a token price set far below market value.

That the defendants, the holder of this option, are also the lessees of a portion of the premises does not lead to a different conclusion. The option here arose within a larger transaction that included a lease. The option encompasses the entire building -- both the commercial space and the theater -- yet defendants are leasing only the commercial space. With regard to the theater space, a disincentive exists for Symphony to improve the property, since it will eventually be claimed by the option holder at the predetermined purchase price. We therefore conclude that the option agreement is invalid under the Rule Against Perpetuities.

The Temple Hoyne Buell Foundation v. Holland & Hart

(Columbia Supreme Court, 1994)

In this legal malpractice action, defendant, Holland & Hart, appeals the final judgment entered on a jury verdict awarding plaintiffs, Buell Development Corporation, over $3,000,000 in damages. The judgment at issue arose from defendant's representation of plaintiffs in connection with the sale of stock in Kings County Development Corporation (KCDC), a Columbia corporation, to John Rocovich. As part of the transaction, defendant drafted an option contract which provided plaintiffs with an option to acquire from Rocovich a percentage of KCDC's minerals underlying its farmland should KCDC ever distribute these assets to its shareholders, including Rocovich.

Having examined the terms of the option, we hold that the option did not violate the rule against perpetuities. The question remains whether defendants, as reasonably prudent attorneys, should have foreseen that the option, as drafted, was likely to result in litigation and whether other attorneys, in similar circumstances, would have taken steps to prevent such a result.

Plaintiffs argued at trial that the principal negligence of defendants was their not protecting plaintiffs from loss by failing to research and analyze the rule's applicability in the option, to recognize the likelihood that a good faith dispute could occur over the enforceability of the option because of the rule against perpetuities, and to take the simple step of either adding a time limitation or "savings" clause or recommending the deletion of the provision that made the option binding on heirs, successors, and assigns.

The experts produced by both sides disagreed over the issue of negligence and what was required of an attorney to satisfy the requisite standard of care. However, defendant's expert under cross-examination testified unequivocally that, in his opinion, an attorney would be guilty of malpractice if he: (a) did not research the issue of the rule in the context of this

transaction, (b) failed to consider the potential for a dispute over the applicability of the rule to the option, and (c) failed to utilize a savings clause to protect against that potential dispute.

Thus, although there was a conflict in the expert testimony as to attorney negligence in drafting the option, no witness disagreed with the premise that the option would have been protected from legal challenge if defendants had considered the rule, had recognized the clear potential for dispute, and had either included a savings clause or excluded the language making the option binding on heirs, successors, and assigns.

In short, resolution of the rule against perpetuities issue does not conclusively resolve the issue of whether defendants met the applicable standard of care in preparing the option contract.

Citgo Petroleum Corp. v. Hopper

(Columbia Supreme Court, 1995)

The sole issue presented in this appeal is whether the rule against perpetuities applies to an option to purchase that is appendant to a commercial lease and exercisable during the term of the lease.

The facts are undisputed. On. March 17, 1967, the Hoppers leased certain unimproved real property in Henrico County to Sun Oil Company (Sun Oil) to be used as a site for a gasoline filling station. The lease contemplated that Sun Oil would construct a gasoline station and related improvements on the property. Sun Oil did construct a station that has been in continuous operation since its completion. Sun Oil assigned all of its interest in the lease to Southland, and Southland, thereafter, assigned its interest in the lease to Citgo.

The lease was in full force and effect from its date of execution and provided for an original 1 5-year term, to begin on the date that the building and other improvements were to be completed. Additionally, the lease provided for two five-year renewal periods. The lease also contained a provision that gave the lessee "the option to purchase [the leased premises] at any time during the term of this lease or any renewal or extension thereof. "

On October 8, 1993, during the second five-year renewal period, Citgo sought to exercise its option to purchase. Citgo made a formal tender in accordance with the terms of the lease, but the Hoppers declined the tender, claiming that the option to purchase was void.

The rule against perpetuities, which invalidates interests that vest too remotely, exists to further the public policy of preventing excessive restraints or limitations upon the alienation of real property. Nearly 70 years ago, we applied the rule to options in gross, or independent options. However, we have not previously considered whether the rule should apply to an option that is appendant to a long-term commercial lease and exercisable during the term of the lease.

Courts in a majority of other jurisdictions have held that the rule does not apply to such options. Many of these courts have concluded that an option appendant to a lease is consistent and in harmony with the policy objectives of the rule. They reason that such an option stimulates improvement of the property and fosters full use thereof by the lessee. This in turn benefits the lessor, the lessee and the community at large.

We agree with the majority rule that an option to purchase that is included in a long-term commercial lease and exercisable during the term of the lease actually fosters the purpose of the rule. We think that there is a real and valid distinction to be drawn between an option in gross and an option appendant to a long-term commercial lease. Accordingly, we reverse the trial court's judgment and enter final judgment in favor of Citgo.

Shaver v. Clanton

(Columbia Court of Appeal, Second Appellate District, 1996)

Shaver, a commercial landlord's sole heir, upon the landlord's death, challenged under the rule against perpetuities the validity of shopping center space lease amendments between the landlord and the lessees. The amendments granted the lessees options to extend the lease for additional periods at the end of each lease period and gave the lessees a right of first refusal if the property were offered for sale. Shaver appeals the trial court's order of dismissal.

Until the adoption in Columbia of the Uniform Statutory Rule Against Perpetuities, Columbia common law applied the rule against perpetuities to commercial transactions. Accordingly, the rule was applied to such interests as options to renew, rights of first refusal, and commercial leases. The Uniform Act changed Columbia law by explicitly excluding such commercial transactions from coverage under the rule.

The Law Revision Commission Comment explains, "[S] ubdivision (a) [of section 21225,] is ... inconsistent with decisions holding the common law rule to be applicable to the following types of property interests or arrangements when created in a nondonative, commercial-type transaction, as they almost always are, e.g., options, preemptive rights in the nature of a right of first refusal, leases to commence in the future, at a time certain or on the happening of a future event."

Shaver argues that even if the Uniform Act does not apply to commercial transactions, it should apply here. She claims the transaction was donative because it "had some of the elements of a donative, family-type transaction and was at least quasi-donative." The question is whether the transaction was essentially gratuitous in nature, accompanied by donative intent on the part of at least one party to the

Her argument is based on the very favorable terms of the transaction, i.e., the substantially below-market rent increases and the close personal friendship of the tenant to

her father. Although the lease amendments did give the tenants favorable terms, there is no evidence that there was any detriment to the landlord which would characterize the amendments as donative or that either party had donative intent. The terms the landlord offered in 1987 to a third party were similar to those he offered these tenants. Moreover, the terms were not specific to these tenants. The 1991 amendment allowed them to assign the lease with the landlord's written consent which he could not unreasonably withhold. - Since the transaction was commercial and nondonative, the rule against perpetuities does not apply.

Affirmed.

ANSWER 1 TO PERFORMANCE TEST B

Memorandum

To: A. Hilliard Meherrin
From: Applicant
Re: Effects of the rule of perpetuities (pre-and post-Uniform Statutory Rule of Perpetuities) on Westside Community Development Corporation's (WCDC) potential deals for the High School
Date: July 29, 1999

Below I have compiled the analysis of the effect of the rule against perpetuities, both as it was before the enactment of the Uniform Statutory Rule of Perpetuities and as it exists now, to the two alternative deals WCDC is considering to obtain the High School or a portion of it. As the USRP is a new law, there is very little case law interpreting and clarifying its terms, so most of my analysis was directly from statutory language. As such, my analysis may be refined or changed by subsequent cases that interpret the language of the statute.

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1. The effects of the Rule Against Perpetuities (RAP) under Columbia Law prior to the enactment of the USRP on WCDC's alternatives to obtain the high school

Prior to the USRP, the RAP invalidated a future property interest "unless it must vest, if at all, not later than 21 years after one or more of the lives in being at the creation of the estate and any period of gestation involved." Statute (quoted in Pergola). As such, any property interest which could vest after this statutory period was invalid.

Strictly applying the above rule, both the lease with option to purchase and the purchase with option to buy back would have RAP problems because they are indefinite in nature and capable of vesting outside the statutory period. The lease with option to purchase could have a problem because the lease is renewable indefinitely and could continue for more than 21 years plus a life in interest before the WCDC decided to exercise the option to buy. Similarly, the purchase with right to buy-back would be problematic because more than a life in interest plus 21 years could pass before LHPS decided to exercise its option to buy. However, the RAP limitations did not apply to all future property nonvested interests, and there were ways to avoid application of the RAP to particular interests. So, this strict analysis is not sufficient.

The pre-USRP Rap would have applied to the WCDC's alternatives in the following ways:

A. Alternative 1: Lease of the Fine Arts Building (Building C) with an option to purchase the entire property.

1. RAP applicability to the option to purchase would have turned on whether the option to purchase was interpreted as an option appendant to the lease or an option in gross or independent option

a. Option appendant to the lease

Under prior law, an option to purchase appendant to a long-term commercial lease was not

subject to the rule against perpetuities, even it its term extended beyond the statutory limit. See Hopper.

Hopper concerned an option to purchase contained as a term of a I 5-year lease to run a gas station, with two 5-year renewal periods. When lessee attempted to exercise the option and tendered payment in accordance with the terms of the lease, lessor declined the tender, claiming that the option to purchase was void. The Columbia Supreme Court found that options appendant to the lease fostered the purposes of the rule against perpetuities, since they stimulated improvement of the land and encouraged full use of the land by the lessee. The Court opined that as such an option appendant to the lease befitted the lessor, the lessee, and the community at large. The Court concluded that the rule against perpetuities does not apply to options to purchase appendant to the lease.

b. Options in gross or independent options

As opposed to options appendant to the lease, options in gross or independent options are subject to the rule against perpetuities. See Homer. In Hopper, the Columbia Supreme Court distinguished between its holding to that affect 70 years earlier and its decisions not to apply RAP to options appendant to the lease. In doing so, the Court stressed the extent to which options appendant to the lease further the goals of the rule against perpetuities to prevent restraints on alienation of land and other limitations on ownership that stifle the development and free exchange of land ..

2. Solutions to RAP problems

a. Draft the language of the option to purchase to be an option appendant to the lease

An easy solution to avoid RAP all together would be to phrase the language of the option to purchase to be an option appendant to the lease. As such, no RAP problem would arise even if the option could vest outside the statutory period.

b. Include a time limitation on the option that would ensure vesting within the statutory period

Including specific language in the contract, lease, or other document sufficed to preclude application of the RAP. See Holland. Thus, inserting a statement that limited the option to purchase to "the duration of a life in being plus 21 years" or "to a period of 20 years" would automatically take the option out of the RAP's purview.

c. *Include a "savings clause"*

Similarly, an otherwise invalid interest could be salvaged from the RAP by including a "savings clause" in the document that created that interest. See Holland.

d. Delete any language which would allow the interest to vest outside the statutory period

An additional way to prevent RAP invalidation was to remove any language which created the possibility that the interest could vest after the statutory period. See Holland. In Holland, for example, the Columbia Supreme Court stated that the RAP could have been avoided by removing the provision that the option contract was "binding on heirs, successors, and assigns." As, it was this language that created the possibility of vesting outside the statutory period.

B. Alternative 2: Purchase of the entire school with an LHPS option to buy back

To review, the pre-USRP RAP invalidated future interests that vest, if at all, more than the period of a life in being plus 21 years. In addition, the pre- USRP RAP incorporated all provisions of the common law rule against remote vesting, and applied to both commercial and non-commercial transactions. The Columbia Supreme Court applied it strictly, although it didn't always want to.

1 RAP

A purchase subject to a buy-back provision was an invalid restraint on alienability before the USRP. See Pergola.

In Pergola. the Court found that a sale of a theater building to a non-profit symphony, which included a provision that the seller had an option to repurchase the property for the same price that ran with the land, was invalid. The Court opined that such an option contravened the policy concerns behind the common law rule against remote vesting, incorporated into Columbia's RAP statutes, since it 1. constituted a disincentive for the land owner to develop the land, and 2. hindered the alienability of the land.

The court was particularly concerned because the option holder held a contingent equitable interest in the land and could enforce the option by specific performance, which in this case meant selling the land at a pre-set below-market price, regardless of the increased value imparted by Owner's improvements. Thus, the option holder could force the sale of the land even if the owner did not want to sell. See Pergola (citing Brunken). Although the Court demonstrated hesitance in applying the RAP in a commercial setting, it held that the option to purchase was invalid.

2. Solutions

a. Change from an option to purchase to a right of first refusal

In Pergola the Court stated that the RAP constituted non-waivable, legal prohibition on such options. However, it distinguished between options to purchase and rights of first refusals. See Pergola (citing Brunken)

The Court opined that a right of first refusal was not subject to RAP restrictions because it constituted a far lesser restraint on the alienability of property. Furthermore, a right of first refusal does not grant its holder any power to compel the sale, but requires the owner to first offer the holder the opportunity to buy before selling to someone else. The court stated that the terms of the right of first refusal agreement can even set a price through a stipulated method or require the holder to meet the offer of a third party. See Pergola (citing Brunken).

II. The USRP and its effect on WCDC's alternatives to obtain the high school

A. Central changes to the RAP imposed by the USRP

The most notable changes the USRP made to prior RAP law were including an alternative period

to measure when the RAP-like rule is triggered and to establish a judicial safety net to salvage future interests in property that are otherwise invalid under the new rule.

1 . Measuring when the rule is triggered

Section 21205 of the USRP states that a non vested property interest is invalid unless it: a. vests within 21 years of the death of an individual alive at the time the interest's creation, or b. vests or terminates within 90 years after its creation. The section rephrased the traditional rule against perpetuities and added an alternate measure for determining which non-vested interests are invalid.

2. Judicial safety net to salvage otherwise invalid non-vested future interests

More importantly, §21220 created a mechanism by which courts can remedy an otherwise invalid grant of future interest. Upon petition of an interested part, the courts may reform the grant in a way that "most closely approximates the transferor's manifested plan" but which is within the 90 year measure in §21205, under certain circumstances. For this case, the applicable circumstance is subsection (a) "a nonvested property interest ... [that] becomes invalid under the statutory rule against perpetuities." That is, §21220 can modify the options which were invalid under prior RAP law.

B. Threshold issues that may prevent applying the USRP to WCDC's alternatives:

The USRP may not apply to WCDC's alternatives for two reasons: 1. There is an exception in the statute itself for grants of interests between charitable or governmental organizations; 2. The USRP applies to commercial, but not donative, transactions.

1 . The statutory exception

Section 21225 states that the USRP does not apply in certain situations. Most pertinent for us is subsection (e), which states that the USRP does not apply to nonvested property interests held by a charity if the interest is preceded by an interest held by another charity, government, or governmental agency or subdivision.

a. WCDCs option to purchase under the lease could fall into this exception

WCDC would obtain its nonvested option to purchase from another nonprofit organization- the LHPS, which would fit the exception. If, however, LHPS is not a "charity," this exception would not apply.

b. LHPSs option to buy back could fall into the exception

Similarly, LHPS would obtain its nonvested option to buy back from another charity (WCDC) or a government agency (the education department), depending on how the term "preceding" in the subsection is interpreted. Again, a central issue will be whether LHPS is a charity; although it is non-profit, 1 do not know if it has tax-exempt charity status as WCDC does.

2. The donative transaction exception

The **USRP invalidated RAP** restraints on commercial transactions, but it did not alter the application of the RAP to donative transactions. See Shaver. The inquiry is whether "the transaction was essentially gratuitous in nature, accompanied by donative *intent* on the part of at least one party to the transaction." Shaver. If the transaction between WCDC is donative rather than commercial, USRP will have no effect.

In considering whether a transaction is donative rather than commercial, the Columbia Supreme Court looks at 1. whether the land I ord/transf eror suffered any detriment, evidencing a donative intent on the part of the parties, and 2. whether the terms are offered to third parties or are specially created for the transferee/lessee. See Shaver

Here, LHPS is willing to suffer a detriment, because *it* will forego offers of $3,000,000 to lease or sell the property to someone who will maintain the character of the school; this suggests donative intent. However, LHPS also is interested in making a profit, which is plain since it sells the school to WCDC below market price, it wishes to retain the option to buyback so that it can sell to someone else who wants to buy it at a higher price. Furthermore, the favorable terms are not reserved for WCDC; LHPS would probably offer the same favorable treatment to others who agree to maintain the school character but LHPS has been unable to find other interested parties. The balance of these facts seems to favor that the transaction would be considered commercial rather than donative.

C. Alternative 1: Lease of the Fine Arts Building (Building C) with an option to purchase the entire property.

1. Does the USRP eliminate the prior law RAP problems?

Assuming the USRP is applicable, it would allow a judicial solution for any RAP problems in the lease. This would avoid the need to draft special language limiting the scope or assuring it is an option appendant to the lease. However, the judicial reformation is likely to be the same as the option with special language to limit its duration: the court will impose termination of the option within 90 years if it is not exercised.

2. Why?

The USRP invalidates traditional RAP restraints on commercial transactions, but it replaces them with judicially imposed termination or vesting within 90 years in order to make the interest comply with the requirements of §21205. So, the USRP will actually make the option shorter than if it were an option appendant to the lease, unless the courts interpret the USRP to leave such exceptions to prior RAP law intact after its passage.

D. Alternative 2: Purchase of the entire school with an LHPS option to buy back

1. Does the USRP eliminate the prior law RAP problems?

Assuming the USRP is applicable, it makes a major difference to the LHPS because it will permit the buy-back option. Under prior law, this buy back option would be invalid. Under the USRP it will be valid, although under §21220, the court will limit it to 90 years. As such, under the USRP, LHPS would have 90 years to exercise its buy back option.

2. Why?

The RAP invalidated any interest which would not necessarily vest within the time of a life interest plus 21 years. As such, the buy back option would be invalid and unenforceable, even if LHPS did try to exercise it (thus vesting) before that time expired. The USRP ends such restraints in commercial transactions, and removes the restrictions of the RAP. See Shaver. Thus, the buy-back provision is valid. However, under §21220(a), the court, upon petition of an interested person, will reform the option to limit it to the 90 year period in §21205; so, the buy back option will be reformed to terminate after 90 years if LHPS does not exercise it.

ANSWER 2 TO PERFORMANCE TEST B

Memorandum

To: A. Hilliard Meherrin
From: Applicant
Re: Westside Community Development Corporation
Date: July 29, 1999

You have asked me to complete a number of tasks. First issue: Whether, under prior Columbia law either of Westside's following alternatives would have created problems under the Rule Against Perpetuities (RAP), and whether prior law provided any way to avoid those problems.

AI. Westside's First Alternative

Lease the fine arts building of Lewiston High School (LHS), with an option to purchase the entire property .

1a. In 1995, our State Supreme Court discussed the Rule Against Perpetuities in the context of an option to purchase that is appendant to a commercial lease and exercisable during the term of the lease. In the case of Citgo Petroleum v. Hower.

As the court said, the RAP, "which invalidates interests that vest too remotely, exists to further the public policy of preventing excessive restraints or limitations on the alienation of real property. "

Relying on the wisdom of the courts in a majority of other jurisdictions, the Citgo Court reasoned that such an option stimulates improvement of the property and fosters the full use thereof. Of course, if there is an incentive to perhaps buy the site, tenants will be less likely to commit waste and more likely to improve. Therefore, the court held that an option to purchase included in a long-term commercial lease and exercisable during the lease fosters the purpose of the rule, rather than violates it.

Here, the initial lease proposed is 10 years, with annual renewals thereafter. (Source: sample lease provided with Ms. Wade's July 29, 1999 letter to you).

Further, the Option Language samples provided to Ms. Wade by Ms. Kovnat indicate the option is tied to the lease

Based upon our Supreme Court's pronouncement in Citgo, construing the common law

RAP, as applied to Westside/Lewiston historic's proposed long-term lease (10 years and annual renewals) plus option to buy at anytime beginning two years from the date of the lease, the old CL RAP is not violated by option one.

Note: Kovnat's proposed wording is ambiguous. It says the option is exercisable anytime beginning two years after date of lease. If the lease terminates, no where is it stated the option terminates.

If the option survives on a stand-alone (or option in gross) basis, the Citgo Court explicitly said their analysis does not apply. There is no end date to the option, it could go on in perpetuity.

Under the Symphony Space case, the Columbia Supreme Court said options to buy commercial land do or can violate the RAP.

1 b. Where, as here, there would have been a violation under our old RAP law, you asked me if prior law provided ways to avoid violating the RAP.

1. As under the first part of my analysis set the lease and the option up to operate in the manner approved by the Citgo Court.

2. Follow the instructions provided by our State Supreme Court in Temple Hoyne Buell to either:

a. add a time limitation (savings clause) that would ensure interests vested within 21 years, the RAP period in our prior law

b. make sure there is no wording that makes the option binding on heirs, successors and assigns.

A2. Westside's Alternative 2: outright purchase of the school with option in LHPS (Preservation Society) to buy the property back.

2a. Symphony Space, Inc. v. Pergola was decided by Columbia Supreme Court in 1988. The issue there was similar. A property was sold to Symphony, and the parties inserted an option for seller to repurchase the entire building.

Broadwest, the seller, did this to evade paying taxes while still receiving rents until such time as the property became economically viable, at which time they would repurchase and sell at a profit.

Here, the purposes of the parties differ, as both have a genuine interest in preserving the historic value of the old high school property and fine arts building.

The RAP, which the court cited, was said by the court to be based on the public policy of the state and is a non-waivable, legal prohibition Columbia also adheres to the rule of unreasonable restraints on alienation. This evaluates the restraint based on:

1. duration
2.purpose
3.method for fixing the sale price.

The court then said as we have incorporated American common law into our state RAP, which says the common law prohibition against remote vesting applies to commercial options, the RAP applies to commercial purchase options.

Here, LHPS proposes that at anytime after the sale to Westside they shall have the right to buy the high school property back. (Kovnat suggested wording). This is not time limited in any way. So long as LHPS, or any LHPS successor in interest, has the property, it is conceivable LHPS could show up. This could occur beyond the 21 year life in being vesting applicable under our old law.

2b. As above, prior law did provide ways to avoid this problem:
(1) put a time limit - savings clause into the agreement.
(2) use a pre-emptive right of first refusal which is triggered by owner's desire to sell rather than the previous owner's desire to show up and force owner to sell.

It can be noted this analysis applies to what we are presuming is a commercial lease.

The next task you assigned to me is to analyze the new Columbia Statute and explain whether and why it eliminates whatever problems may previously existed.

Thus far, there is little case law interpreting our new rule, based on the Uniform Statutory RAP ·(USRAP).

As a side note, if we have time to further develop our analysis, I would like to review cases from other jurisdictions that employ the USRAP.

Section 21201: says our prior, common law RAP is superceded by the new law.

Section 21205: (a) keeps the intent that a property interest must vest or terminate no later than 21 years after the death of an individual then alive. (b) this section is new. The non-vested interest which was invalid under the old rule may be found valid if it actually vests within 90 years after creation.

In essence, this is the "wait and see" approach. Before, whether an interest actually did vest in the time, even if it was possible it might not, was irrelevant. This is favorable for Westside with respect to their option to buy. If by chance the lease and option wording violates the RAP, the interest will not be voided if it vests or terminates in 90 years.

Also, this allows us to use a time (savings) clause of90 years.

<u>REFORMATION</u>

Section 21220: the court, on petition of interested party may reform, the document that violates the RAP to a valid disposition consistent with the transferor's intent if some conditions are satisfied.

If the RAP was violated, thus making a non-vested property interest invalid. I understand this to mean if within the 90 year period in §21205, an interest is invalidated as violating RAP, the court may reform it. So, if there is an error in our drafting, the court will try to correct it as to either the lease - option, or the sale - repurchase

ARTICLE 5

Exclusions from Statutory RAP &21225

The RAP chapter does not apply in certain situations. I understand that since this entire chapter is replacing the common law RAP in Columbia, and this section flat out excludes certain things from the RAP. There is also no more common law RAP as to the statutorily designated exclusions enumerated.

Support (a) of § 21225 has been interpreted by our 2nd Appellate District Court.

Section (a) says RAP does not apply to a non-vested property interest ... arising out of a nondonative transfer ... except in [in situations primarily related to marital relationships].

The case interpreting this is Shaver v. Clanton. The court referred to the Law Revision comment, which acknowledged this provision directly contradicts common law as respects nondonative, commercial type transactions such as options, and pre-emptive first refusals.

What is donative v. nondonative becomes critical for us, because we have two charitable type organizations involved here.

We ask: (I) was the transaction essentially gratuitous in nature, and (2) was there donative intent on the part of at least one party.

LHPS is treating this as a commercial transaction. They have given no indication they will make a gratuitous transfer. They want a sizable rent *(2000/month)* for a building no one other than the LHPS or commercial developers want. Their intent may be to preserve the old building, but not to give it away. On the other hand, their letter of June 21, 1999 indicates they had offers of $3,000,000 but would sell for less to a buyer who would ensure the preservation of historic character. This may constitute sufficient detriment to be considered evidence to characterize this as donative intent.

Further, at Westside's July 1, 1999 Board meeting, Ellis Hart suggested seeing if they would consider an offer as low as $250,000, which suggests donative intent by Westside.

Either way, if we establish the transaction as having no donative intent by either party then we will be exempt from the RAP under either scenario (Lease -Option or Sale - Repurchase Option).

Even if donative intent is found, §21225(e) of the new law has a charity-to-charity exception to the RAP. If LPHS is a charity and transfer is to Westside Community Development, and they are a charity, then either option does not violate the RAP.

Looking at the lease, Westside is a nonprofit corporation and is exempt under 501 (c)(3), so I believe they are a charity. We need to ensure the same for LHPS.

I hope this adequately addresses your concerns.

Associate

* * * *

Memorandum

To: A. Hilliard Meherrin
From: Applicant
Re: Effects of WCDC's alternatives for the High School on WCDC's concerns and needs
Date: July 29, 1999

WCDC's board members expressed several concerns and needs when discussing the possible deals for obtaining access to the High School. These need to be addressed so that the board can debate the alternatives from an informed position and without the burden of uncertainty about which alternative will best address their concerns.

From Paulette Wade's letter and the minutes of the director's meeting, I have culled the below list of 6 concerns. For each concern, I have analyzed how each alternative deal-a. Lease + option to buy (Lease), or b. Purchase w/LHPS option to buy back (Purchase)-may address or exacerbate those concerns. Please note that in this discussion, I will assume there is no rule against perpetuities problem, unless specifically noted.

WCDC's concerns and needs:

1. To obtain access to the fine arts building and get the cultural/arts center off ground as soon as possible.

a. Lease: quicker access

Leasing the property may provide the fastest way to establish the cultural center, because obtaining $2,000 rent is probably faster than obtaining the significant funding or financing the WCDC will need to buy the school in its entirety.

WCDC already has the $250,000 from the Rappoport Foundation to renovate building C, so the only obstacle to getting the project started is having access to Building C itself.

b. Purchase: raising money to buy may delay access

Unless the LHPS is willing to finance the purchase at the same $2,000 per month as the lease or make some other arrangement, it appears that purchasing the property will take more time. It does not appear from the file that WCDC has immediate access to the kind of money they will need to buy the entire school, and it also appears that they are hesitant to finance such a large investment, since there is much discussion of fund raising. So, if the goal is to get to work on the cultural center as quickly as possible, the lease would be the better option. Furthermore, if the lease contains the option to purchase,

WCDC will have *time* during the lease to raise the funds or negotiate a purchase arrangement with LHPS.

2.To obtain control of the entire school grounds, to ensure that the high school remains part of the community or belongs to community (as opposed to the business establishment or LHPS)

a. Lease: perhaps the most secure wav to -gain permanent control

If the lease goes forward with the purchase option, it may offer the most secure manner to ensure permanent control of the school property. The option to purchase provides that although WCDC would only be leasing Building C, they would have an option to purchase the entire school for a price determined at the signing of the lease. If WCDC exercises this option, they would obtain permanent ownership of the entire property.

c. Purchase: immediate. but perhaps not permanent. control of the school grounds

d.

Although WCDC could gain immediate control of the school grounds by purchasing it today, if the purchase agreement includes and enforceable buy back option for LHPS, WCDC's interest will be subject to LHPS's interest. Under such a situation, we DC would not have permanent control over the school ground, because LHPS could enforce its option to purchase at any time (until void under the USRP), effectively evicting WCDC from the premises if LHPS so chose.

If the goal is permanent control and ownership of the school grounds, WCDC should avoid the purchase agreement due to the uncertainty the buy back options would impose.

3. To gain control of the arts building for at least 25 years, since 10 years is too short a time to achieve all the renovations and establish the arts/cultural center

a. Lease: at least 10 years guaranteed

The lease as it stands would provide WCDC with at least 10 years of guaranteed use of building C. The lease is year-to-year after that period, with rent to be renegotiated, which would make it relatively easy for LHPS to force WCDC off the property by pricing them out.

WCDC should try to renegotiate the lease terms to extend them.

b. Purchase: length of occupancy uncertain

c.

However, even 10 years is longer than WCDC might have under the purchase agreement. The purchase agreement states that LHPS can exercise its option to buy back any time after sale of the property, by giving only 30 days notice. This could be 90 years or it could mean only a month of ownership, depending on HLPS's whim.

Even though the lease may be shorter than they want, it is still a more stable and has a longer guaranteed right of usage and occupancy than does the purchase agreement.

4. To comply with the limitations of the Rappoport Grant, which is expressly earmarked for

renovations should WCDC obtain the property

Lease or Purchase: The money must be used to renovate Building C

WCDC must use the money from the Rappoport grant for its express purpose: to renovate building C to make the arts/cultural center. It cannot use the funds to: buy the school, payment on building C, or renovate or maintain the other building in the school.

5. WCDC should not bind itself to financial terms that exceed its hard cash assets

a. Lease: more manageable:

Under the lease, the WCDC would only be bound to the lease payments, upkeep and utilities of building C, and the renovations of building C. These are more manageable than the expenses under purchase, and WCDC is strapped for resources. It should avoid the risk of foreclosure or a mortgage.

b. Purchase: many incidentals as well as purchase vice

In addition to the cost of buying the school, WCDC will become responsible for the maintenance and upkeep, as well as insurance and other expenses for all the buildings on the grounds. This is a huge obligation, especially since the school is likely to be in bad repair after 19 years of being empty.

6. WCDC should not allow the repurchase option because LHPS will just take advantage of WCDC and cash in on WCDC's work by exercising the option after WCDC renovates and increases the value of the high school

a. Lease: avoid the buy-back option

b.

The lease will put WCDC in charge of the buying options, since it will hold the option to buy. Furthermore, if it exercises this option within the lease period, LHPS will be bound to sell at the price set at the signing of the lease. And, the purchase under the option will not expose WCDC to any risk of losing it to LHPS because it will be an outright purchase with no options to LHPS.

b. Purchase: try to renegotiate to give LHPS a right of first refusal rather than an option to buy back

Even if WCDC really wants to purchase the school immediately, it should not do so unless it can remove the buy-back option from the sales agreement. Instead, it should see if LHPS would accept a right of first refusal. This could be set at the same low price LHPS states it will sell to WCDC. Since WCDC's goal is to keep the school for the community and since they are a charity, it should not be a big issue that they may not make money. Since LHPS's goal is to maintain the character of the school, it should not object to a right of first refusal, since that will protect the school from being sold to someone who would not maintain its character.