PERFORMANCE TESTS AND SELECTED ANSWERS

JULY 2000 CALIFORNIA BAR EXAMINATION

This publication contains two performance tests from the July 2000 California Bar Examination and two selected answers to each test.

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

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TUESDAY AFTERNOON
JULY 25, 2000

California Bar Examination

Performance Test A

INSTRUCTIONS AND FILE

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Berov v. Nadchev

INSTRUCTIONS

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

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

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

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

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

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

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

Pierpoint, Tyebjee and Clark
190 Grumbacher Parkway, Suite 601
Garden City, Columbia

MEMORANDUM

TO: Applicant
FROM: Burke Williford
RE: Berov v. Nadchev
DATE: July 25, 2000

We represent Lyuba Berov, a young, legal immigrant from Bulgaria who until recently worked for Dobrina and Chuck Nadchev, my next-door neighbors in Garden City. I would occasionally see Ms. Berov in the yard or taking the neighbor children to the park on the weekends, but had never spoken to her until last week when Ivan Kolchev, who does my gardening one day a week, brought her in for an initial interview. Ivan, who is also an immigrant from Bulgaria, struck up a friendship with this young woman over the back fence. He learned that, because of her financial dependence and limited knowledge of English, she was virtually a prisoner in the Nadchev household. Ivan and his wife, Sofia, decided to get involved, and Ms. Berov has now moved in with them and their children. They are hopeful that we can help Ms. Berov collect any money that the Nadchevs may owe her so that she can enroll in school here in the U.S. and become financially independent. We plan to file a complaint early next week.

I have attached provisions of the Fair Labor Standards Act (FLSA) and some of the regulations and cases that seem applicable, but I need your help in analyzing this material.

Please draft an objective memo in which you discuss fully-the following questions:

1. In working for the Nadchevs, was Ms. Berov covered by the minimum wage or overtime provisions of the FLSA?

2. You will note that, in her interview, Ms. Berov claims she was required to remain in the Nadchevs' home seven days a week, and that her work day lasted from early in the morning until late at night. What must we prove for all of that time to be compensable under the FLSA? What legal and factual defenses may the defendants assert?

3. Ms. Berov also claims her sleep was disrupted for a period of almost six months after the birth of the Nadchevs' youngest child. Is she entitled to any compensation for the nighttime hours she spent with the baby?

4. What is the legal consequence of the Nadchevs providing Ms. Berov with a place to sleep, food, and cash payments?

5. Other than what you have discussed, what, if any, additional .recovery might Ms. Berov obtain under the FLSA?

I expect that to answer some of the questions we will need additional facts both to support Ms. Berov's position and to determine the Nadchevs' likely defenses. Therefore, in answering the questions, be sure to identify any additional facts that we need to obtain, and from whom or from where we would seek those facts.

INTERVIEW OF LYUBA BEROV
JULY 20, 2000

(Questions were propounded by Mr. Williford and translated into Bulgarian by Mr. Ivan Kolchev. Questions that could be answered with "yes" or "no" or other brief responses were sometimes answered by Ms. Berov in English; otherwise her answers were given in Bulgarian, which was then translated by Mr. Kolchev.)

Mr. Williford (Q): Mr. Kolchev has told me something about your situation with the Nadchevs, Ms. Berov, but I won't be the only lawyer working on your case, so 1 need to get some basic information about it on the tape recorder so that my secretary can type it and we'll have it in your file. Is that okay with you?

Ms. Berov (A): Yes, okay.

Q. How did you happen to come to this country?

A: I was living with my mother in our village in the mountains of central Bulgaria. She became ill and died and then my older brother, who was already living in Huntsville here in the U.S., brought me here.

Q: As I understand it, you are a legal immigrant and plan to reside here on a permanent basis?

A: Yes. My brother had immigrated to the U.S. when I was very young, and he was able to sponsor me. There is nothing for me to go back to in Bulgaria.

Q: When did you arrive in this country?

A: On July 15, 1997.

Q: And how old were you at that time?

A: Seventeen.

Q: So you are twenty years old now?

A: Yes. I turned twenty in May.

Q: What level of education had you completed in Bulgaria?

A: I had finished all but the last year of what would be high school here in the U.S. For about six months before I came to the U.S. I had to leave school to care for my mother.

Q: And I gather you don't know very much English?

A: That's right. I only took one year of English in school, and the teacher wasn't very good. I was beginning to learn some this year from a book Mr. Nadchev gave me. He was worried about the children starting school and not knowing enough English.

Q: How did you start working for the Nadchevs?

A: About six weeks after I came to this country, my brother was killed in a car accident, and they were some of the only people I knew. I didn't really know

them that well, but Mrs. Nadchev is Bulgarian and I had met them through my brother. The Bulgarian community in Huntsville is very small.

Q: Right, Mr. Kolchev told me about your brother. That must have been very hard on you, so soon after your mother's death. This was Huntsville, Alabama?

A: Yes.

Q: Okay. I need to know more specifically how you came to work for the Nadchevs, because I have no idea what they're going to say about all this. I mean, it's conceivable they started off thinking they were doing you a favor.

A: They were doing me a favor, at that time, because I needed work and I needed a place to stay arid they took me into their house. But it was not too be for free.

Q: Right. I understand that. But I need you to tell me exactly what was said at the time, what they promised you. First, tell me what happened from the time you learned about your brother's death until the day you moved in with them.

A: Okay. My brother died very suddenly, and it changed everything. I was still staying in his house with his wife and small children. I had planned to start English classes in just a few days, but suddenly we had no money coming in and my sister-in-law had to pay for a funeral and other things. There was a little money from insurance, but it was not much. My sister-in-law was not working, I was not working, and we couldn't even talk to each other. With my brother she always spoke English. I was a big burden in her life, and I began to talk to the few people I knew about finding work.

Q: And how long did this go on? '

A: About six weeks. Then it was decided that she would go home to live with her parents in Ohio and look for work there because her mother could take care of the children. I was really happy when the Nadchevs said I could move in with them, because it solved a big problem for all of us.

Q: I can see what a relief it must have been. What was your first contact with the Nadchevs concerning your working for them?

A: Mrs. Nadchev called on the telephone and said she had heard I was looking for work, and asked if I would be interested in taking care of their two children and helping with housework.

Q: And how did you respond?

A: I said it depended on whether I could make enough to support myself because my sister-in-law was moving away and I would have to rent a place to stay and buy my own food and clothing and such.

Q: And what did she say?

A: She said that she understood that I would have to live with them because

that kind of work didn't pay enough for me to live on my own. She said they didn't have an extra room, but I would be able to sleep on the couch in the family room and they would give me a place to keep my things.

Q: Did she say how much you would be paid?

A: She didn't say how much per hour, or per day. But she said I would get $20 or $30 a week in cash, to spend, and that I would be able to save the rest of my salary for the future, for my education, my independence. She made it seem like a very good deal.

Q: What was the total salary you discussed?

Mr. Kolchev: (after discussion) She is embarrassed because she does not remember asking about the salary. She thinks Mrs. Nadchev said she would be paid the "usual amount" for work of this kind. She thought the amount was probably set by the government, and that she would be considered stupid for not knowing what it was.

Q: Tell her not to worry, that the government may actually play a role here. So, Ms. Berov, when did you move in?

A: On the last day of the month after I spoke with Mrs. Nadchev. I helped my sister-in-law move out of the house where we had been living, and then the Nadchevs came for me, and I stayed with them first in Huntsville and then in Garden City until ten days ago, when Mr. Kolchev came for me.

Q: And I understand the job and working conditions were very different from what you thought they were going to be, right?

A: Very much right. It was a very bad job.

Q: What was so bad about it?

A: I had to work very hard, very long hours. And they did not pay me. Also, I was not allowed to go around the town and meet people. I have no friends in Garden City except the Kolchevs.

Q: As you know, I live next door to the house where you stayed with the Nadchevs in Garden City, so I have a rough idea of how long they have lived here. I would have thought it was close to three years. Did they move here soon after you started to work for them?

A: Yes. It was about two months later.

Q: So it was about two-and-a-half years ago, a little more?

A: Yes.

Q : Now you said that in Huntsville, you had to sleep on a couch in the Nadchevs' family room.

A: Yes.

Q: Did you have your own room in the house here in Garden City?

A: In the beginning, yes, but at night only. There are three bedrooms in the children's part of the house, and they let me sleep in the one that was used as a playroom during the day. It was full of toys, including a big plastic playhouse, a slide, all kinds of things.

Q: Did that arrangement continue?

A: No, the room became the baby's room when he was born 15 months ago. I continued to sleep there, but it was not the same.

Q: You slept in the same room with the child?

A: Yes. It was very convenient for Mrs. Nadchev, not so convenient for me.

Q: Were you able to get any sleep at night?

A: For the last eight or nine months, yes. But for the first six months, the baby slept very little at night. He cried all the time. The doctor said he had "colic" and would grow out of it. But it is a very difficult situation because the baby was having gas pain and there is nothing you can do to help, except hold him and try to comfort him.

Q: I'm familiar with the colic. One of my children had it. Were you able to catch up on your sleep during the day?

A: No, because there were two other children, aged three-and-a-half and five, now, and both the Nadchevs work during the week. Sometimes on weekends if they went some place without me I could get a little nap. But even then, they often left the baby because he was young and cried so much.

Q: You must have been exhausted during those six months.

A: I was tired all the time. Sometimes I got angry with the other children over nothing, which made me feel bad. I do not like Mrs. Nadchev, and Mr. Nadchev is a weak man who does whatever his wife says, but I am still fond of the children. I think it is sad they have such parents.

Q: So in the time you worked for them--about two years, nine months, it looks like--did you have any time off at all?

A: No. I did not know anybody, so what could I do? Where could I go? They took me on vacations with the children two times, but that was so I could take care of the children while they went to expensive restaurants, played tennis, or did whatever they did when they would go off.' For me it was just more cooking and cleaning in a different place.

Q: I didn't realize that about vacations, and that's important information, but I. was thinking about your ordinary workday or workweek. Did you have a regular time off, like all day Sunday, or Wednesday evenings, or whatever?

A: No. Every evening I had to cook, do the dishes, and put the children to bed. Usually I would feed the children around six, and Mr. and Mrs. Nadchev

would eat dinner later, by themselves, and want me to keep the children away from them. On the weekends, I never knew what was going to happen. Sometimes they would go away for the whole weekend, and leave all of the children with me, or just leave the baby. Or if they were home they would usually go out at night, or go to their club during the day. I could never make any plans for myself. Just a few times, I took the bus to the mall when they went somewhere with all the children and I knew for certain I would get home before they did.

Q: Would they have punished you if you had been gone when they got back?

A: I think so. Yes. Mrs. Nadchev didn't like the house to 'be empty, especially at night. She said I had to be there to protect it.

Q: It's hard to believe this was all going on next door to me. I feel like I've been living next to Cinderella and her stepmother or something.

Mr. Kolchev: (after discussion) She understands. We also have this story in our country.

Q: I know I'm asking a lot of questions, but these are all things the court will need to know. I think another thing we need to talk about is how much you were actually paid. Did you at least get the $20 or $30 a week?

A: Not every week, no. For the first month, yes. Twenty dollars every Friday. But I had no safe place to put it, and Mrs. Nadchev knew that. So she said she would just give me money when I needed it, and at that time, that was okay with me. I still trusted her then. After the first few months, I began to keep list in my notebook.

Q: So you were supposed to ask her for money if you needed it, after that?

A: Yes. I did not have many needs. They let me have the same food as the children, and my old clothes were still good, so it was mainly things from the pharmacy, personal items.

Q: Do you know how much cash you received all together?

A: I began to keep a list in my notebook after the first few months. I think it's about $850.

Q: I see. 1 was going to ask you if you read books or listened to music in your leisure time, but I guess you didn't have any leisure time.

A: I did have a small radio, and Mrs. Nadchev had books in Bulgarian which I could read. But you are right, usually I was too tired, and after the baby was born, I could not make noise or turn on the light in my bedroom. I could sit in the kitchen after the children were asleep, and I did that sometimes. But usually I went to sleep at the same time as the children because I knew they would wake up early.

Q: I'm not sure this is relevant to anything, but I haven't heard you mention television. Were you able to watch much television, with the children, or maybe the Nadchevs, or on your own? I've heard people say that's a good way to learn English.

A: The Nadchevs do not believe in television for the children, only certain videos, which we played many, many times. I learned things for small children, like how to count and silly songs.

Q: So you didn't have a TV?

A: No. In the Nadchevs' bedroom there is a TV, but the children and I were not allowed to watch it. I went in that room only to collect the laundry and to clean.

Q: Okay. Let me get back to your list of payments here. You said the $20 to $40 you were collecting each month was mainly spent on personal items from the pharmacy?

A: And some food. Sometimes there would be no leftover food from the Nadchevs' dinner, and what the children were having was not enough. I would buy bread at the small store near the park, and also fruit and cheese, things like that.

Q: As I understand it, you don't know how to drive an automobile, so if you were going to buy anything, it had to be from some place you could walk to, or from some place you could reach by bus?

A: Yes, except sometimes on the weekend we would all go to the supermarket, the children, too, and I would be able to buy things for myself at that time.

Q: And pay for them yourself?

A: Yes.

Q: Did Mrs. Nadchev do most of the shopping for the family?

A: I think she did all of it. Mr. Nadchev was not interested in doing this.

Q: Do you know if she bought extra food especially for you, or soap or other things you needed? You made it sound as if it was a little uncertain that there would always be enough food for you to have some.

A: That is the way it was. Sometimes they would have a stew, or a type of casserole dish, and there would be nice leftovers, and I could eat those for several days. This was especially true if they entertained on the weekend. And then the . children would have things like pasta or pizza for their dinner, and they would not eat much, so I would have that. But to buy food especially for me? No, I do not believe she did that. If they were having a nice piece of fish, for example, or shanks of lamb or something, she would only buy enough for two.

Q: So when it came to getting enough to eat, you were kind of on your own?
A: Yes, I think that is the way it was.
Q. How about clothes?
A: I got a few items from Mrs. Nadchev, such as a sweater and some gloves.
Q: Did Mrs. Nadchev tell you those things were part of your salary?
A: I didn't know what they were. Sometimes she gave me old things that she was no longer wearing. But sometimes she gave me new things because she knew I needed them. I liked to think they were presents. Maybe she thought they were payments.
Q: Do you know if Mrs. Nadchev--or Mr. Nadchev for that matter--was keeping records of the amounts they paid you?
A: I don't think so, but I don't know for certain. Mrs. Nadchev always just went to her purse when I asked for money. That is one thing that worried me. She didn't seem to have the money she was saving for me in a special place, separate from her own money.
Q: And Mr. Kolchev told me that at some point you asked her where the money she was saving for you was, and how much there was?
A: Yes, I did.
Q: And what did she say?
A: She said that they had already paid me everything they owed me, that it was all used up in the vacation trips and food and housing they were providing me.
Q: This was just a few weeks ago, right?
A: Yes, at the beginning of this month.
Q: Since you left the Nadchevs' home, have you spoken to them?
Mr. Kolchev: Lyuba hasn't, but Mrs. Nadchev called me to find out why Lyuba had left.
Q: What did she say to you, Ivan?
A: She was very upset. Mrs. Nadchev said that they had considered Lyuba a member of the family. She had thought that they were helping her by giving her a place to live. She started to tell me how they always tried to include Lyuba in every family activity.
Q: Did she say anything else?
A: She did say that often they were inviting friends over to meet Lyuba.

TUESDAY AFTERNOON
JULY 25, 2000

California Bar Examination

Performance Test A

LIBRARY

Berov v. Nadchev

LIBRARY

UNITED STATES CODE, TITLE 29 -- LABOR

CHAPTER 8 - FAIR LABOR STANDARDS

Section 206. Minimum Wage

(a) Employees engaged in commerce. Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates:

(1) except as otherwise provided in this section, not less than $4.25 an hour during the period ending on September 30, 1996, not less than $4.75 an hour during the year. beginning on October 1, 1996, and not less than $5.15 an hour beginning September 1, 1997;

* * * * * *

(f) Employees in domestic service. Any employee who in any workweek--

(1) is employed in domestic service in one or more households, and

(2) is so employed for more than 8 hours in the aggregate,

shall be paid wages for such employment in such workweek at a rate not less than the wage rate in effect under subsection (a) of this section.

(g) Newly hired employees who are less than 20 years old.

(1) In lieu of the rate prescribed by subsection (a)(1) of this section, any employer may pay any employee of such employer, during the first 90 consecutive calendar days after such employee is initially employed by such employer, a wage not less than $4°.25 an hour.

(2) No employer may take any action to displace employees (including partial displacements such as reduction in hours, wages, or employment benefits) for purposes of hiring individuals at the wage authorized in paragraph (1).

* * * * * * *

(3) This subsection shall only apply to an employee who has not attained the age of 20 years.

Section 207. Maximum Hours

(a) Employees engaged in interstate commerce. Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce . . . for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * * * * * *

(l) Employment in domestic service in one or more households. No employer shall employ any employee in domestic service in one or more households for a workweek longer than forty hours unless such employee receives compensation for such employment in accordance with subsection (a) of this section.

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Section 211. Collection of data.

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(c) Records. Every employer subject to any provision of this chapter . . . shall make, keep, and preserve records of the persons employed by him and of their wages, hours, and other conditions and practices of employment . . . .

* * * * * * *

Section 213. Exemptions

(a) The provisions of § §206 and 207 of this title shall not apply with respect to

* * * * * * *

(15) any employee employed on a casual basis in domestic service employment to provide babysitting services or any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations);

* * * * * * *

(b) The provisions of § 207 of this title shall not apply to

* * * * * * *

(21) any employee who is employed in domestic service in a household and who resides in such household;

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Section 216. Penalties

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(b) Damages; right of action; attorney's fees and costs. Any employer who violates the provisions of §206 or §207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional amount as liquidated damages. An action to recover the liability prescribed in this section may be maintained against any employer in any Federal or State court of competent jurisdiction by any one or more employees for and on behalf of themselves and other employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

CODE OF FEDERAL REGULATIONS

CHAPTER 29 -- LABOR

Section 552.3 - Domestic service employment. As used in section 213 (a)(15) of the Act, the term *domestic service employment* refers to services of a household nature performed by an employee in or about a private home (permanent or temporary) of the person by whom he or she is employed. The term includes employees such as cooks, waiters, butlers, valets, maids, housekeepers, governesses, nurses, janitors, laundresses, caretakers, handymen, gardeners, footmen, grooms, and chauffeurs of automobiles for family use. It also includes babysitters employed on other than a casual basis. This listing is illustrative and not exhaustive.

* * * * * * *

Section 552.5 - Casual basis. As used in section 213(a)(15) of the Act, the term casual basis, when applied to babysitting services, shall mean employment which is irregular or intermittent, and is not performed by an individual whose vocation is babysitting. Casual babysitting may include the performance of some household work not related to caring for the children: *Provided, however,* that such household work is incidental, i.e., does not exceed 20 percent of the total hours worked on the particular babysitting assignment.

* * * * * * *

Section 785.15 - On duty. A stenographer who reads a book while waiting for dictation, a messenger who works a crossword puzzle while awaiting assignments, a fireman who plays checkers while waiting for alarms and a factory worker who talks to his fellow employees while waiting for machinery to be repaired are all working during their periods of inactivity .... The employee is unable to use the time effectively for his own purposes. It belongs to and is controlled by the employer. In all of these jobs, waiting is an integral part of the job. The employee is engaged to wait ....

* * * * * * *

Section 785.16 - Off duty. Periods during which an employee is completely relieved from duty and which are long enough to enable him to use the time effectively for his own purposes are not hours worked. He is not completely relieved from duty and cannot use the time effectively for his own purposes unless he is definitely told in advance that he may leave the job and that he will not have to commence work until a definitely specified hour has arrived. Whether the time is long enough to enable him to use the time effectively for his own purposes depends upon all of the facts and circumstances of the case.

* * * * * * *

Section 785.23 - Employees residing on employer's premises or working at home. An employee who resides on his employer's premises on a permanent basis or for extended

periods of time is not considered as working all the time he is on the premises. Ordinarily, he may engage in normal private pursuits and thus have enough time for eating, sleeping, entertaining and other periods of complete freedom from all duties when he may leave the premises for purposes of his own. It is, of course, difficult to determine the exact hours worked under these circumstances and any reasonable agreement of the parties which takes into consideration all of the pertinent facts will be accepted . . . .

* * * * * * *

Section 785.30 - Facilities furnished by employer. The reasonable cost of board, lodging, or other facilities may be considered as part of the wage paid an employee only where acceptance of the facility is **voluntary and uncoerced.**

Beaston et al. v. Scotland School for Veterans' Children

(U.S. District Court, Pennsylvania, 1988)

The plaintiffs are former or present houseparents at the Scotland School for Veterans' Children ("School") located in Franklin County, Pennsylvania. The School is a residential school operated by the Pennsylvania Department of Education. Originally founded to educate orphans and half-orphans (one parent still living) of Civil War veterans, the school now accepts orphans and half-orphans of veterans of other wars as well as the non-orphan children of other veterans, who are often indigent. On average, 360.to 380 students in first through twelfth grades attend the School and reside on campus. Most of the male senior high school students are housed in a single dormitory building. The remaining children generally are grouped by grade level and gender and are housed in 26 cottages, each holding up to 13 students.

The plaintiffs and other houseparents care for the children while they are in the cottages. Currently, and since November, 1985, houseparents work a seven-day shift normally starting at 3:00 PM on Friday and ending at 8:30 AM the following Friday. Then they normally do not return to work until 3:00 PM one week later. On Saturday and Sunday they work from 8:30 AM to 11:00 PM and 8:30 AM to 10:00 PM, respectively, and on weekdays they normally work from 6:30 AM to 8:30 AM and from 3:00 PM to 10:00 PM, with certain paid and unpaid breaks during this time. On Monday through Thursday from 8:30 AM until 3:00 PM, when the children are in classes, the houseparents have no work-related responsibilities and are free to either remain on campus or leave. They are not compensated for these hours, which are not in dispute in this lawsuit. Nor -are the houseparents routinely paid for the hours designated for sleep, during which they are required to remain in their respective cottages. They normally retire to their private bedrooms to sleep, but are free to do whatever they wish so long as they remain in their cottages. During sleep time the houseparents' only responsibility is to investigate and deal with matters of which they become aware, such as illness, homesickness, runaways and disciplinary problems. However, there is no requirement that they maintain a vigilant watch for potential or actual problems. The school takes no action against a houseparent who does not become aware of problems or who does not hear noises in the night.

Should the sleeping period be interrupted, and the houseparent called to duty, the interruption may be counted as hours worked. Each houseparent is responsible for recording this duty time on his or her time card and is then paid for that period. Sleep time work is generally compensated at one and one-half the houseparent's usual rate of pay because it is normally overtime. The plaintiffs filed this lawsuit claiming that they are entitled to overtime compensation for the entire sleep period, whether or not they are

actually engaged in work. They claim that the defendant's failure to pay them overtime compensation violates the Fair Labor Standards Act (FLSA), 29 U.S.C. § §201 et seq.

I. Discussion

Section 206 of the FLSA requires that employees not specifically exempted be paid a minimum wage. Section 207 provides that employees working more than forty hours per week must receive one and one-half times their regular hourly wage for overtime hours. At issue here is whether sleep time constitutes work time and is thus compensable under sections 206 and 207 of the FLSA.

It is well settled that under appropriate circumstances sleep time constitutes work time. The work week ordinarily includes all the time during which an employee is necessarily required to be on the employer's premises, on duty, or at a prescribed workplace. In this case it is clear that the plaintiffs are required to remain on campus during the period designated for sleep. However, other factors must be considered, including the following: 1) the parties' agreement; 2) the degree to which the employees are permitted to engage in their own activities; and 3) whether the employee's availability is predominantly for the employer's or the employee's benefit.

In examining all the circumstances of this case, the court has reviewed the interpretation of the FLSA by the Administrator of the Wage and Hour Division of the United States Department of Labor, set out in the Code of Federal Regulations, 29'C.F.R. Part 785. Although the Administrator's interpretation of the Act is not binding, the court may properly look to it for guidance. According to the Administrator, as a general rule sleep time is compensable unless it falls under either of two exceptions. First, subject to certain conditions, and by agreement, sleep time of up to eight hours need not be considered as working time if the employee is on duty for 24 hours or more. Second, where an employee resides on his employer's premises permanently or for extended periods of time, sleep time may be excluded by agreement, again subject to certain conditions.

The court finds those conclusions, so far as they are relevant to this case, to be . logical and practical interpretations of the Act. However, the court parts company with the Administrator with respect to his conclusion in 29 C.F.R. §785.21 that no sleep time maybe deducted from the employee's hours of work if the employee is on duty for less than 24 hours, regardless of the other surrounding circumstances. Rather than blindly follow the interpretive regulations, the court will examine all the circumstances of this case, as directed by opinions of the United States Supreme Court. Armour & Co. v. Wantock (1944); Skidmore v. Swift & Co. (1944).

A. Working and Sleeping Conditions

The evidence shows that except for the period beginning at 3:00 PM on Friday until 8:30 AM on Monday, the plaintiffs are not required to remain on the School premises for 24 hours or more. They are relieved of all duties and are free to leave from 8:30 AM until 3:00 PM on Monday through Thursday. The evidence also shows they do not permanently reside there. They maintain residences elsewhere and raise families off campus. However, that does not preclude a finding that they reside at the school for extended periods of time.

During the seven-day work- shift the plaintiffs spend. their on-duty time and sleep time in their respective cottages. Each cottage is furnished and has a living-room, dining area, kitchen, bathroom and playroom or office on the first floor. The children's bedrooms, the houseparents' bedrooms and bathrooms, and an additional bathroom are on the second floor. The plaintiffs sleep in their private bedrooms and utilize private bathrooms. They are authorized to furnish their rooms as they wish, may have personal telephones installed and may bring in articles of personal property and food. They have access to the cottage's kitchen, which is equipped with the normal assortment of appliances. They may also use the cottage living room to watch television or relax in other manners. The houseparents may, if they wish, remain on campus continuously during their duty week. They may receive visitors when the children are in school and for one-half hour on Saturday and Sunday.

The plaintiffs contend that the sleeping facilities provided by the school are' inadequate in that they are unable to obtain normal rest during the uncompensated periods of sleeping time. Complaints at trial concerned noises from students, the heating system, passing trains and security guards. Depending upon the cottage, its location on the campus and the sleeping habits of the individual houseparents, the intrusiveness of the disturbances varied. Some houseparents did not hear noises. Of the plaintiffs who were disturbed by noises, some testified they would remain awake for long periods while others went back to sleep immediately.

The variations in testimony reveal the personal factors involved in an inquiry into the adequacy of sleeping facilities. There is no doubt that the houseparents' sleep is temporarily disturbed on occasion. Upon consideration of all the evidence, however, the . court is unable to conclude that the plaintiffs are furnished inadequate sleeping facilities or are unable to get normal rest. The noises they complain of are not unlike those in many homes in many communities.

The court concludes that the School provides adequate sleeping facilities for the houseparents. They are provided an opportunity for and usually obtain at least five hours of uninterrupted sleep per night. Since they spend seven consecutive days and nights on campus, they reside there for an extended period of time.

B. Benefits to the Plaintiffs

The defendants contend that the plaintiffs receive a benefit by sleeping at the school since they receive free lodging and meals during working hours. The defendants argue that the plaintiffs are able to avoid driving home at'10:00 'PM and returning at 6:00 AM, thus saving time. Finally, the defendants claim that by remaining in the cottages during sleep time hours, the houseparents are readily available to earn overtime pay. The court does not doubt that the houseparents receive such incidental benefits by virtue of their employment. It is clear, however, that they are not sleeping at the school primarily to receive those perquisites. They remain on campus, not for their own benefit, but at the behest of their employer and for the employer's benefit.

C. Compensation Agreements

When time spent on an employer's premises is not clearly spent working, employers and employees may reach an agreement concerning what portion of that time is to be classified as "hours worked" for compensation purposes. Employee sleep time on the employer's premises constitutes a time period subject to such agreement.

The houseparents' compensation and benefits were covered under a Master Agreement between the Commonwealth of Pennsylvania and Council 13 of the American Federation of State, County, and Municipal Employees (AFSCMEI. When the agreement was negotiated in 1985, and again in 1988, it provided that "present practices" with regard to houseparents would remain in effect. Present practice was and still is to pay houseparents only for those sleep time hours during which they were called to duty and actually worked. Accordingly, the court finds express agreements that houseparents were to be paid only for those sleep time hours actually worked, and that otherwise, sleep time hours are not "hours worked." That conclusion is supported by the plaintiffs' unanimous testimony that when they began working at the School, each had a clear understanding that they would not be paid for sleeping. Thus, by the acceptance of and continuation of employment, the plaintiffs impliedly agreed that sleep time was not work time.

Accordingly, judgment will be entered in favor of the defendants.

Hultgren et al. v. County. of Lancaster

(U.S. Court of Appeals for the Eighth Circuit, 1990)

This case arises under the Fair Labor Standards Act (FLSA), 29 U.S.C. § §201 et seq. Certain "relief" employees hired by the Lancaster Office of Mental Retardation to work in residential facilities for people with mental retardation brought suit alleging that failure to compensate them for "sleep time" violated the FLSA. The case was tried by consent before a magistrate, who concluded that the plaintiffs' "sleep time" did constitute working time under the FLSA and awarded damages of $23,056 for uncompensated hours from April 15, 1986, the date the FLSA became applicable. to local governments, to February 18, 1988, the date plaintiffs filed their complaint. . This appeal followed.

The facts found by the trial court are as follows. The County of Lancaster, through the Lancaster Office of Mental Retardation (LOMAR), operates numerous residential facilities for mentally retarded individuals. Although each residential facility is unique, they all are staffed under the same general conditions. Most have a residential manager who lives on the premises for extended periods of time, usually five or six consecutive days. "Relief" employees, formally known as human service instruction assistants (HSIAs) take the place of the residential managers one or two days a week to give the managers time off from their supervisory duties. An HSIA assigned to a typical "relief" shift would report to a facility at 2:45 PM in the afternoon and remain on the premises until 8:30 AM the next day. Eight hours of the shift, from 11:00 PM to 7:00 AM, would be designated as "sleep time."

Unlike the resident managers, who were hired to care for residents at one facility, HSIAs moved from facility to facility. Accordingly, they "did not have the luxury of knowing the clients as well or having the clients become comfortable with their presence." They also had to adapt to the different sleeping accommodations provided at each facility. In some places, the HSIAs were required to sleep on a couch or a hide-a-bed in the living room. Other facilities had staff bedrooms, which normally were used by the residential managers. "Relief" employees often slept in the living room, even when a separate staff bedroom was available, because of the behavior patterns of the residents and/or the condition of the particular staff bedroom.

escape or leave the facility, displaying aggressive and self-abusive behaviors, taking frequent loud and disruptive trips to the bathroom and kitchen, urinating in inappropriate places, talking in their sleep, turning on the stereo, being afraid of thunderstorms, attacking other residents, throwing tantrums, having itching attacks, waking up and wandering around, watching the television (which in at least one facility was in the same room where the relief employee was supposed to sleep!, asking for cigarettes, and having delusions or coughing attacks.

The frequency and duration of interruptions varied from facility to facility and from night to night, but plaintiffs testified, and the magistrate found,, that the interruptions were so numerous that it was impossible for plaintiffs to get even several hours of uninterrupted sleep. Plaintiffs testified they usually went home to sleep after their relief shift ended.

In reviewing the trial court's findings of fact, we give deference to the court's opportunity to judge the credibility of witnesses and will reverse only if, upon review of the entire record, we are left with the definite and firm conviction that a mistake has been made.

We find no clear error here. The record amply supports the magistrate's finding that the plaintiffs rarely were able to obtain a full night's sleep while on duty at LOMAR's facilities. It is undisputed that the clients at each facility displayed behaviors which required the attention of the staff during the night, and although plaintiffs were compensated when called to duty for ten minutes or more, they were only compensated for such documented calls to duty. The record reflects that plaintiff's duties frequently included other tasks at night which precluded them from sleeping but which did not require a documented "call to duty." For example, plaintiffs were required to listen to make sure clients returned to their rooms after a trip to the bathroom or kitchen, were required to get up to check on the whereabouts of clients, and were required to direct clients back to their rooms. The clients who resided in LOMAR's facilities had a wide range of psychological and physical disorders which made these tasks more difficult and more numerous than might be expected. Plaintiffs testified that these types of interruptions occurred from five to 25 or 30 times per night.

Nor did plaintiffs agree that their sleep time could be uncompensated. While under, certain circumstances employers and employees may agree that up to 8 hours of sleep time will be uncompensated, the exclusion of sleep time may not be a unilateral decision of the employer. The magistrate in this case found that LOMAR's contracts "were drafted exclusively by the defendant with no input or negotiation from the plaintiffs . . . . The

evidence is uncontested that the contracts at issue in this case were almost certainly presented on a take-it or leave-it basis without any possibility of negotiation by the plaintiffs."

Although the county agreed to compensate employees whose sleep was significantly interrupted, the county's system of counting only interruptions that lasted ten minutes or more effectively excluded many of the smaller interruptions which cumulatively resulted in the plaintiffs averaging from zero to four hours of sleep each night. Under the regulations, if an employee cannot get at least five hours of sleep during the designated "sleep time," the entire period is to be counted as "work time."

We have no difficulty concluding that, under all of the above circumstances, the plaintiffs were required at all times during their scheduled "sleep time" to be at LOMAR's facilities "ready to serve," and were not there for the purpose of sleep or for any purpose of their own, but for their employer's benefit. The magistrate's conclusion that LOMAR's failure to compensate relief employees for their "sleep time" violated the FLSA must, therefore, be affirmed.

Ramos v. Partida

(U.S. Court of Appeals for the Fifth Circuit, 1980)

In this case we must review a district court finding that certain Laundromat employees worked only two hours per day for the purpose of the minimum wage provisions of the Fair Labor Standards Act (FLSA). Because we conclude that the finding is clearly erroneous, we reverse the district court decision and remand for a new trial.

Between 1969 and 1972 Partida employed Gregoria Ramos, then Alicia Munoz, successively as the attendant for his coin-operated laundry in El Paso. Partida negotiated the employment terms with Ramos' son-in-law and with Munoz' husband; the parties signed no written agreements. Partida furnished the attendant and her family with living quarters, separated by a counter and a partition from the rear of the laundromat. The attendant also received all income from the soap and soft drink vending machines, plus a percentage of the income from dry-cleaning that the attendant received at the laundromat. The total value of the living quarters and other income was about $1600 per year.

The laundromat was open for business seven days a week from 7:00 AM until 10:00 PM during Ramos' tenure, and from 6:30 AM until 10:30 PM during Munoz' tenure. Partida wanted the attendant to open the laundromat in the morning, close it at night, and clean up afterwards. Munoz testified that this job took her about two hours of work each day. Partida testified that when Munoz' children helped her clean up, the job took about half an hour or an hour. Partida also expected the attendant to accept and return drycleaning; the laundromat served as a substation where customers could drop off and pick up clothes for cleaning at Partida's central dry-cleaning plant. Partida also expected the attendant to make change for laundromat customers in the period before he installed a change machine, and to return money lost in faulty machines at all times.

The parties disagreed whether Partida required either the attendant or a substitute to be present at the Laundromat during all hours of operation. Partida conceded that he wanted the attendant or her family "to keep their eyes on" the machines to see that they operated properly. Partida also expected the attendant or her family to mop up spillage and clean the machines throughout the day. One witness testified that he called the laundromat about four or five times and received no answer. Another witness testified that he delivered soft drinks to the laundromat every Monday morning and that the attendant was on the premises only about every other week, although he did not indicate whether a substitute appeared in her place on those occasions. While Ramos worked as the attendant she did alteration work in the laundromat for her own profit. Partida, however, did not

object to this activity; in fact, he encouraged Ramos to accept alteration work so that more customers would be attracted to the laundromat. Throughout the years in question Partida kept no records to show the hours that the attendants worked; his failure to keep such records violated section 21 1(c) of the FLSA.

Because of the summary nature of the trial court's findings of fact, we are unable to discern the basis of the court's determination that the claimants worked only two hours each day. A hearing on remand is necessary, therefore, to determine the amount of time for which the claimants are entitled to be compensated under the FLSA.

At the hearing, the applicable standard will be that enunciated by the Supreme Court in Anderson v. Mt. Clemens Pottery Co. (1946):

> An employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negate the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate.

Although the trial court record would support a finding that the attendants worked less than the full 15 hours per day claimed by plaintiff, we conclude that the finding' that the attendants worked only two hours per day is clearly erroneous. The testimony from the attendants and from Partida indicates that opening, closing, and final cleaning alone took an attendant two hours per day, and half an hour to an hour if the attendant's family members assisted her. The district court's finding makes no allowance for the time that the attendant spent each day handling dry-cleaning, making change, cleaning machines, mopping spillage, and generally keeping her eyes on the place as Partida expected. The attendant is entitled to compensation for the full amount of time that she actually spent performing such tasks. To what extent she might be compensated for her remaining idle time depends upon whether the time is spent predominantly for the employer's benefit or for the employee's, dependent upon all the circumstances of the case.

We remand the case for a new finding, based upon either the present record alone, or also upon new evidence if the district court concludes that a new hearing is necessary.

We remind the district court that the attendants may be entitled to compensation for the time that substitutes took their places, as long as Partida knew about the substitutes and acquiesced in their participation. We also remind the district court not to penalize the employees by denying them any recovery on the ground that they are unable to prove the precise extent of uncompensated work. Such a result would place a premium on the employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labor without paying due compensation as contemplated by the FLSA.

REVERSED AND REMANDED.

ANSWER A TO PT-A

MEMORANDUM

TO: Mr. WILLFORD

FROM: APPLICANT

RE: LYUBA BEROV

1. In working for the Nadchevs (Ds) was Ms. Berov (or B) covered by the minimum wage or overtime provisions of the FLSA?

According to CFR Chapter 29, section 552.3, a domestic servant is defined as service of a household nature performed by an employee in or about a private home of the person by whom he or she is employed. The terms include cooks, waiters, butlers, maids and housekeepers. It also includes babysitters on other than a casual basis.

Here, Berov was employed as a domestic servant since she lived with the Ds, cooked and did cleaning, babysitting and other similar tasks.

Minimum Wage

FLSA Section 206f states that any employee who is 1) employed in a domestic service in one or more households and 2) is so employed for more than 8 hours a day in the aggregate, shall be paid wages for such employment in such work week at a rate not less than the wage rate in section a.

Section 206a states that wages for the period ending on September 30, 1996 should be not less than $4.25. Wages for the period beginning on October 1, 1996 should not be less than $4.75 per hour. Wages beginning on September 1, 1997 should be no less than $5.15 per hour.

Additionally, Section 206g focuses on newly hired employees who are less than 20 years old. This provision provides that, in lieu of the rates prescribed above (in Section 206a1), any employer may employ such an employee, during the first 90 consecutive calendar days after such employee is initially employed by such employer, a wage not less than $4.25 per hour must be paid. Thus, this provision focuses on the "probationary period" of employment during the initial 90 days and prohibits employers from paying less than $4.25 per hour.

These provisions apply to Berov. She came to the U.S. on July 15, 1997, when she was 17 years old. She worked for the Nadchevs (hereinafter Ds) about 6 weeks after coming to the U.S. Thus, Berov was under the age of 20 when she began her employment with

Ds. Thus, under Section 206g, the Ds, for the first 90 days, could not pay Berov less than $4.25 per hour.

Additionally, since Section 206g is limited to the initial 90 day probationary period, the remainder of Berov's employment would be governed by Section 206a and f. Following Berov's initial 90 day period, the Ds should have been paying her no less than $5.15 per hour.

Overtime Provisions

According to Section 207a of the FLSA, employees engaged in interstate commerce may not be employed for a workweek longer than 40 hours unless, that employee receives compensation at a rate not less than one and one-half times the regular rate at which he is employed.

Additionally, Section 207 indicates that with regard to domestic servants, an employer may not employ a worker for a work week longer than forty hours unless such employee receives compensation for such employment as provided in Section 207a (above).

However, under Section 213a, sections 206 and 207 shall not apply with respect to casual domestic servants such as babysitters or companions.

Indeed, under Section 213b, section 207 is not applicable to any employee in domestic service in a household and who resides in such household.

In the present matter, Berov was employed at the Ds' home as a domestic servant. She lived with them first in Huntsville, Alabama, and then at their current residence. While at the Ds' home, Berov had to work long hours - cooking, cleaning, doing dishes and putting the children to bed.

Additional Facts:

- Are there any documents which Ds kept regarding the employment?
- Did Ds keep a record of the expenses which they planned on deducting from B's salary - subpoena these records?
- Did Ds inform B at any time what her duties would be?
- Did B inquire about what her duties would be?
- Talk to B's sister-in-law and see if she knows anything about the agreement.
- Ask B for her book of records.

- Did Ds ever tell B what her hours would be, vacation, etc.? Ask B. Depose both Mr. And Mrs. D.

- Serve form interrogatories on Ds in order to get some background information.

- Ask the folks in your neighborhood if they know anything about the Ds or their relationship with B.

2.

A. What must we prove for all of that time (7 days a week from early in the morning until late at night) to become compensable?

Section 785.15 of the CFR defines "on duty" as where an employee is working during those periods. The employee is unable to use the time effectively for his own purposes. It belongs to and is controlled by the employer.

Contrarily, Section 788.16 defines "off duty" as periods which an employee is completely relieved from duty and which are long enough to enable him to use the time effectively for his own purposes. He is not completely relieved from duty and cannot use the time effectively for his own purposes since unless he is definitely told in advance he may leave the job and that he will not have to commence work until a definitely specified hour has arrived.

With regards to employees residing in the home or on the premises, CFR 785.23 states that an employee who resides on the premises is not considered working all the time CFR states that ordinarily such employees may engage in normal pursuits that enable them to have enough time to eat, sleep and entertain. Additionally, if the employee lives at the employer's home, the reasonable cost of board, lodging or other facilities may be considered as part of the wage paid an employee only where acceptance is voluntary (CFR Section 785.30).

In the present matter, Berov was employed as a domestic servant 24 hours a day 7 days a week. At one time, she slept in the child's rooms and later on the sofa. However, during the week and on weekends, she was not able to meet people and did not have friends except for the Kolchevs. The agreement she entered into with the Ds was an oral agreement where Dobrina told her that she would be working the "usual amount" of time and obtain about $20 to $30 per week. However, when Berov arrived, she had to work long hard hours where she had to cook, clean, take care of the colicky child, and not have any vacation time.

Under the CFR, Berov was likely "on duty" since she had little time to herself in order to entertain and engage in the normal activities of someone off duty.

Berov's Time Spent Predominantly for the D's Benefit

According to Ramos v. Partida, to determine the amount of time for which an employee may be compensated under the FLSA, we apply the Anderson v. MT Clemens Pottery Co. approach. Under this rule, an employee must first prove that he has in fact performed work for which he was improperly compensated and if he produced sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the present amount of work performed or with evidence to negate the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee even though the result be only approximate.

Here, like in Ramos, Berov will argue that she was on duty all of the time. Berov will point out that she, like the Ramos', worked from early morning until late into the evening caring for the Ds' children, preparing dinner and other meals, laundry and the like. Essentially, Berov will have to show that she was working throughout the day and that her time was spent predominantly for the Ds' benefit. B will have to argue that looking at all the circumstances of her case, her employment at the Ds' did not allow her to take vacations. Berov can show that she had no regular days off -like no Sundays or Wednesdays. Every day she had to cook, do dishes, put the children to bed, feed the children at around 6 p.m. and make the Ds' dinner later. B will show that on weekends, she did not know what would happen, whether she could make plans for herself or whether she would have to take care of the children that the Ds left behind.

B. What legal and factual defenses may the defendants assert?

If B shows that her employment at the Ds' was predominantly for their benefit and that she had no control over her time, the burden will then shift to the Ds to negate the evidence by evidence of the precise amount of work performed or with evidence to negate the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee even though the result be only approximate.

First, Ds will try to introduce evidence of the number of hours which B actually worked. They will argue that B was provided with room and board and as such this amount can be deducted from her salary. Furthermore, the Ds will show and argue that they gave B clothing and gloves and food and paid her whenever she asked for money.

Additionally, the Ds will argue that Berov was not on duty all of the time. Ds will argue that B had time for herself. Ds will argue that Berov went on vacation with the Ds numerous times and was not required to work during those times. Ds will try to argue that B, in fact, had time off but since she did not know anyone and could not read or speak English, that she chose to stay at the house and work. The Ds will argue that on weekends B would have time to herself to go to the mall or to talk to other people - such as the Kolchevs.

Additionally, Ds will argue that B had time to go to the supermarket and the like.

FACTS WE NEED:

Did the Ds keep a record of the hours which B worked? Subpoena any and all documents relating to B's employment with the Ds.

Did the Ds allocate a reasonable amount for food and board and other things (clothes) which they provided B? Depose the Ds.

Did the Ds separate the amount which they owed B in a separate account so that they can show that she only earned a certain figure? Subpoena any records pertaining to bank accounts or trust funds which the Ds could have opened for B's benefit.

Did the Ds ever tell B that they would do any of the above? Did they tell her that they would deduct from her salary any amounts for excesses? Depose Ds.

Did the Ds give 13 any specific days off? Did B ever take advantage of those days or was she reluctant because she did not speak English?

Talk to people who knew B and find out what she said, if she ever suggested a friendly gathering.

Talk to B's sister--in-law and see what she knows or what B told her about the employment.

Corroborate B's story that she never had time to herself.

Talk to Sofia and Ivan and determine what their perception of the Ds are and how they have been treated by the Ds. Inquire about how B first confided in them and why she confided in them, what she said, how she re-acted, and whether they spoke with the Ds.

Talk to people in the neighborhood and see if they have heard or know anything.

Talk to guests of the parties which the Ds held and ask them what they thought of the Ds' working relationship with B.

Did B work all the time? Did she take any time off during the (approximately) 3 year period?

Why doesn't B like Mrs. D? Maybe it is the fact that Mrs. D is forceful and demanding.

Talk to any former house servants which the Ds may have employed. Find out what their experience was like with regards to wage deductions and other benefits.

3. Is Berov entitled to any compensation for the nighttime hours she spent with the Nadchevs' new baby?

B will have to show that she was on duty during the evening hours and that she should be compensated for the lack of sleep during those hours since she was constantly on duty.

In order to be compensated for sleep time benefits, the court will consider the following factors. According to Beaston v. Scotland, the court will look at 1) the parties' agreement; 2) the degree to which the employee is permitted to engage in their own activities; and 3) whether the employee's availability is predominantly for the employer's benefit.

Agreement

In the present matter, there was no written agreement regarding sleep time. Here, Berov was employed by the Ds on the usual basis for the "usual amount of work" for this kind. Along with her regular daily cleaning and cooking arrangements, B's sleep was interrupted. At the time of her employment, the Ds had two young children. Subsequently, the Ds had another very sickly child that kept B awake all hours of the night. However, as there was no actual agreement, we must look at the other factors.

Additionally, as in Hultaren, B will argue that any agreement implied or otherwise she may have had with the Ds was drafted "exclusively by the defendant with no input or negotiation from the plaintiffs . . . almost certainly on a take it or leave it basis without any possibility of negotiation."

On this point, B will argue that when the Ds first contacted her, they knew that her brother had recently died and they were "doing her a favor." Additionally, since she was a recent immigrant, she was completely unfamiliar with the U.S. system. B can show that she was told that she could save her salary but had no say as to what her salary was. Furthermore, B can show that when she asked about the salary, she was told it was the usual amount and did not know what the minimum requirements were. B can further try to show that there was no discussion regarding her job and that she was essentially trusting the Ds. As such, B can argue that her employment was on a take it or leave it basis and she had no say in any of the terms.

Degree to which employee permitted to engage in her own activities

In the present case, B will argue that her job at the Ds' home did not permit her to engage in other activities. B will argue that even when she went to the mall for a few minutes, she would have to be home before the Ds came home with the children. B will argue that she was certain that she would be punished if she was not home in time. This is especially true in light of the fact that the Ds did not want the house to be left alone and wanted B to act as a guard. Additionally, even when B wanted to do something on her own, B will show that she was not able to as she shared a small room with a colicky child who cried all the time. Indeed, B will argue that she could sit in the kitchen at night and read but that this

rarely happened since she was so exhausted from the day's work. Lastly, B can show that even though she had a radio and books, she rarely had time to enjoy these things as she could not make any noise or turn on the lights in the bedroom. Since she was so tired, she usually just went to sleep along with the children as she had to wake up when they did and take care of them.

Whether the employee's availability is predominantly for the employee's benefit

B will argue that she was predominantly available for the benefit of the Ds. As discussed above, B will show that she worked all hours of the day. Since the Ds worked all day long, B will show that she had to stay home and take care of the home. Additionally, B will argue that even when she went on vacation with the Ds, she had to cook and clean and take care of the children. Moreover, on the weekends, B had to ensure that the children were taken care of while the Ds were out. B also can point to the numerous weekends where B was responsible for the guests whom the Ds invited to their home.

Along with the above three factors, the court in Beaston also engaged in further balancing. The court in Beaston looked at 1) working and sleeping conditions, 2) benefits to the plaintiff, 3) and compensation agreement.

Working and sleeping conditions

In Beaston, the houseparents had their own cottages where they were able to rest and were not compensated. Additionally, the cottages were located on the campus but the houseparents were undisturbed by the noises. Additionally, the houseparents had adequate sleeping conditions.

Here, B can show that for the first few months of employment, she slept in the children's playroom. This room was filled with toys and a big plastic play house. Since the children played in the room during the daytime, B can show that she did not have her own privacy during this period. Subsequently, after the Ds moved from Huntsville to the new residence and had another child, B was forced to sleep in the same room with the child. B will show that the child was colicky and cried a lot. B will show that it was very difficult because the child had pain and there was nothing to do but hold him and try to comfort him. Additionally, since the Ds didn't work on the weekends, B can show that she tried taking naps but that the baby was always left behind and he continuously cried. Thus, B can show that she had inadequate sleeping conditions as her sleep pattern was always disturbed.

Additionally, B can point to Hultgren v. County in order to demonstrate how her situation was more analogous to the situation of the relief workers. B can argue that just as the relief workers were interrupted during the nighttime, so was she. B can argue that the frequency and duration of the interruptions of her sleep varied since she had to wake up to care for the colicky child. Furthermore, B can argue that just as the relief workers were unable to get an adequate night's sleep, so she was unable to sleep since her sleeping conditions were so horrendous.

FACTS WE NEED:

- B's job history - ask B because it is important to determine if, in fact, the Ds were unreasonable or that B simply did not have this type of experience and could not handle the job. What did B think the job was going to be like? How long did she expect to work? Did the Ds tell B that they were employed full-time during the week?

- What are domestic servants in Bulgaria required to do? Does B know? Ask Sophia and Ivan.

- If possible, talk to the Ds and see what they believed the arrangement would be.

- Did B have a bed in the room with the child?

- Did B always have to wake up and take care of the child or did the Ds also do this?

- Other than the colicky child, did B have to wake up to assist the other children - did B have to sleep with one eye open?

- How frequent were B's interruptions at night? Ask B.

- What was the duration of the interruptions?

- How many hours of sleep did B get a night?

- Did B ever confide in the Ds regarding her fatigue or sleeplessness?

- Like Hultgren, did B have to wake up because of frequent noise, tantrums, wandering children, etc.?

- When B got the job, did Ds make it sound like it was on a "take it or leave it" basis?

- Ask B for her notebook so that we can determine how much she is owed according to her records.

- Did the child's colic improve? Ask Ds. If possible, subpoena medical records of the child. If the child's condition improved, how did that affect B's ability to sleep and enjoy the few moments she had to herself?

- Talk to former employees of Ds. Did they have former house servants? How were they treated? What kind of benefits did they receive? Did Ds deduct wages from their salaries?

4. Legal consequence of the Nadchevs providing Berov with a place to sleep, food, and cash payments?

In Ramos v. Partida, plaintiffs were given certain benefits in exchange for the work they did. In Ramos, the Ps were furnished with separate living quarters behind the Laundromat. Furthermore, the Ps received all income from the soap and soft drinks in the vending machines plus a percentage of the dry cleaning income.

In that case, the court found that despite all these incidental benefits, the plaintiffs in Ramos were still entitled to be compensated for the full amount of the time that they spend performing such tasks. However, the court did state that the defendant may be entitled to compensation for the time substitutes that took place - if any. However, the court made no mention of the other incidental benefits.

As in Ramos, here B can argue that the incidental benefits she received from the Ds do not excuse compensation. Here, B received a few benefits: namely, room and board, some food, some hand-me-down clothing, a few trips along with the Ds, and money when she asked for it. Additionally, B was given some books to read, although she had little time to read them.

B will argue that these benefits, while incidental, were nonetheless part of the time which predominantly benefited the Ds. B may show that she received these benefits solely because she was working at the home all the time. As such, the vacations were not really vacations since she had to work. Also, the room and board was necessary and benefited the Ds since both Ds worked full time. Thus, they needed someone at the house to watch the children. Therefore, even the room and board was for their benefit. Additionally, B will argue that she had to provide her own food at times since the Ds did not buy food for her. B can show that she, at times, had leftovers or stew but mostly the children would finish everything and she would have to go to the supermarket to purchase things for herself, which she paid for herself.

Thus, as in Ramos, the incidental "benefits" which B received were likely for the purpose of benefiting the Ds and not B.

FACTS WE NEED:

- What did the Ds tell B when the provided her with the "gifts?" Ask the Ds and ask B. Did they tell her it would be deducted from her salary or was it a gift?

- Did B ever request any benefits?

- What did B tell Sophia and Ivan? Talk to them and find out what she said.

- Since you live in the neighborhood, ask people in the neighborhood if they have seen or heard anything about the Ds' employment of B.

5. Any additional recovery that Berov may claim under the FLSA?

Under FLSA Section 216, an employer who violates provisions 207 or 206 will be liable to the employee for the amount of unpaid minimum wages or their unpaid overtime, in an additional amount and liquidated damages. Additionally, this section allows an employee to recover attorney's fees and costs of the action.

Furthermore, Section 216 states that an employee can recover in an action in either federal or state court.

Thus, if B is successful, she will be able to recover for overtime and attorney's fees.

ANSWER B TO PT-A

Memorandum

TO: Burke Willford

FROM: Applicant

RE: Berov v. Nedchev

DATE: July 25, 2000

1. Coverage Under Minimum Wage and Overtime Provisions of FLSA.

A. Minimum Wage Provisions

FLSA section 206(a) provides the minimum wage requirements for workers engaged in commerce. Section 206(f) applies the minimum wage provisions to employees in domestic service, if they are employed for more than 8 hours a week, aggregating all their domestic employment. Section 206(g) has a special provision that sets the minimum wage for newly hired employees under 20 years old at $4.25 per hour.

Based on information from the interview with Ms. Berov, the Nadchevs hired her to do domestic labor for them a little more than 2-1/2 years prior to the interview. At that time Berov (B) was less than 20 years old.

CFR section 552.3 defines domestic service employment to include "services of a household nature performed by an employee in or about a private home . . . of the person by whom she is employed." According to B's description of the services she provided, she was a domestic service employee of the Nadchevs.

B was hired to work for more than 8 hours during the week. Thus, the minimum wage provisions should apply, under FLSA section 206 sections described above, unless an exception applies.

There are exceptions to application of the FLSA in certain circumstances. Where the employee is engaged in "casual basis " babysitting, section 206 will not apply.

CFR section 552.5 defines "casual basis" babysitting. "Casual basis" babysitting is irregular or intermittent babysitting, and can include some household work if it is incidental and does not exceed 20% of the babysitting time.

Here, B did regular babysitting along with her other significant household duties.

Thus, the exception will not apply.

Additional Facts Needed:

We will need to obtain a list of daily duties to substantiate that she was not a "casual basis" babysitter.

Note that under CFR section 552.3, babysitting which is not casual is included as domestic service work.

B Overtime Provisions

Section 207 of the FLSA governs overtime provisions. The general rule provides 1-1/2 times pay for work over 40 hours per week. It also is applied to domestic service employees.

Exceptions: 1) Casual basis babysitting - which would not apply, for the reason stated above.

2) FLSA section 213(b)(21) provides that section 207 shall not apply to domestic service providers who reside in the household where they perform the overtime. Here, this exception would seem to apply and B would therefore not be entitled to the time-and-a-half pay. Rather, her overtime would be paid at the regular wage.

An additional consideration is the fact that she was more or less imprisoned at the Nadchevs' house and had no choice about staying there. Additional research will have to be done to see if the involuntary nature of the arrangement would change this result.

In conclusion on Question 1, it appears the FLSA minimum wage provisions (adjusted for under 20 year olds) will apply but the overtime provisions will probably not apply, based on research thus concluded.

2. Payment under the FLSA for all daytime work, early until late 7 days a week

A. Items needed to prove that all this time is compensable under the FLSA.

On-Duty v. Off-Dues

The CFR makes a distinction between "on duty" and "off duty." Time that is "on duty" is time during which the employee is unable to use the time effectively for his own purposes. (Section 785.15.)

For employees residing in the employer's home, the employee is not considered to be working during time he or she "may engage in normal private pursuits." (Section 785.23.)

The regulations go on to say that because this may be hard to determine, any reasonable agreement taking into account pertinent facts will be accepted.

In the Ramos case, the court discusses how to determine if time is compensable, The court concludes that time spent for the employer's benefit is compensable, even if "idle." The court quotes and affirms prior case law regarding application of the FLSA in situations where long hours are spent for the employer's benefit.

Burden of Proof

According to case law quoted in Ramos, the employee has the initial burden to prove she has indeed performed work for which she was not properly compensated, and produce evidence sufficient to show the amount and extent of such work. Here, B has records of what she has been paid over the years. Additionally, the amount of time per day times the number of days will provide approximate hours worked. This information can then be used to show the extent of the work by "just and reasonable" inference. After B has met this burden, the burden will then shift to the Nadchevs as employers. Under FLSA section 211, Employers are supposed to keep records. It is not evident that the Nadchevs' kept any records.

The burden on the employer is to show, based on records kept, the precise amount of work and pay, in order to negate the reasonableness of the inference from the employee's evidence. Unless the Nadchevs can provide such precise information, the court may award damages to the employee, based on the approximate information the employee has provided.

In order to prove the time compensable, we need a detailed listing of all of the work performed by B. Additionally, any corroborating evidence of her time spent working and lack of time off will be helpful.

We must be able to convince the trier of fact that she did indeed work all those hours and was inadequately compensated. To do so we need coherent records provided by the client.

B. The Nadchevs' Anticipated Assertions

That B had significant "off-duly" time.

Nadchevs (N) will assert B had significant off-duty time and was adequately compensated for the time she worked. Legally, off-duty time is not required to be compensated under FLSA and CFR.

Offset for Room, Board, etc

N will assert that the value of the room, board and other items, plus cash given, were adequate compensation. Thus FLSA rules which B is relying on above will not apply, since they only apply if B can show inadequate compensation.

CFR section 785.30 provides that the reasonable cost of room and board, lodging, etc., may be considered part of the wages paid an employee.

To prevail here, N will also have to show that the acceptance of the facility is voluntary and uncoerced.

B will argue that her residence there was, in fact, not voluntary - that she wanted a wage sufficient to live somewhere else.

Factual information needed

Information as to conditions of other domestic workers, and realistic possibility of B affording to live outside of Ns' residence. This evidence would help support that the Ns were, in fact, not doing her a favor.

Also, information as to negligible room and board provided to her for 2-1 /2 years, to support the inference that she is owed compensation, regardless of the fact that they let her sleep and eat with the children.

3. Compensation for Nighttime Hours for Six Months

B's sleep was disrupted for six months after the birth of the new baby, according to B's interview. She also stated she slept in the same room with the baby and that the baby had colic during that time.

According to Beaston v. Scotland, sleep time can be work time if an employee is on duty during that time. The workweek is the time required to be there less time where the employee is free to engage in private pursuits. The court says, based on the FLSA and the CFR, sleep time is compensable unless the employee resides in the home. The sleep time pay must be determined by an agreement between the employer and the employee.

B's information indicates no agreement between them as to time off or sleep time off.

In fact, during those months, B was there specifically to take care of the crying baby at night.

The court in Beaston sets out a three-part test for determining compensable sleep time:

1) the parties agreement,
2) the degree to which the employee can do own activity, and
3) whether availability is for employer's benefit.

The court in Hulgtgren holds sleep time is compensable if it is frequently interrupted by duty. B's sleep during those 6 months was very frequently interrupted.

Based on these cases, and the CFR, all of B's sleeptime for those 6 months appears to be compensable. B may have an argument regarding the rest of the sleeptime. More facts are needed to determine whether her general sleeptime was uninterrupted or not.

4. Legal Consequences of Room. Board. Food and Cash Payments

As above stated, FLSA provides the fair value of these can be considered compensation. Thus, in an award of damages to B, the amount would by statute reduce the amount of the award - provided the Ns can prove that B was there voluntarily and uncoerced.

B claims she was coerced - if she prevails here, the Ns will not be able to offset the damages owed to her for minimum wage under the FLSA.

O/T Doesn't Apply

As stated above, in Question 1, the FLSA provision for overtime pay does not apply where a domestic employee resides with her employer. Again, this may apply even where B's residence was coerced.

5. Additional Recovery Under FLSA

FLSA section 216(b) provides that the court shall allow a reasonable attorney's fee to be paid by the defendant, as well as the costs of the action.

Under this section, B will be entitled to recover such attorney fees and costs of the action. In addition, she may be entitled to liquidated damages. She should also consider requesting interest on the unpaid compensation.

THURSDAY AFTERNOON
JULY 27, 2000

California
Bar
Examination

Performance Test B

INSTRUCTIONS AND FILE

ERRATUM TO JULY 2000 CALIFORNIA BAR EXAMINAPTION
PERFORMANCE TEST B - FILE

On Page 6, paragraph number "4" should be paragraph number "3"; there are no paragraphs missing from "Realty Transaction Consortium Partnership Agreement".

RTC PARTNERSHIP

RTC PARTNERSHIP
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 for the Eastern Judicial Circuit.

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

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

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

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

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

DONOHO, LANGSTAN, GILMORE & GOLDMAN
1212 Federal Highway - Suite 600
Fort Laurel, Columbia 55533

MEMORANDUM

TO: Applicant

FROM: Pearl Goldman

DATE: July 25, 2000

RE: RTC Partnership Representation

We have a potentially sticky matter involving the Realty Transaction Consortium (RTC), one of several partnerships we represent in the purchase and financing of real estate ventures. You may recall that we served as counsel for RTC when it acquired the Diplomat Resort a few years ago. We now represent the partnership in its attempt to purchase the adjoining beach property, the Sands Hotel and Country Club. We represent RTC only in transactional acquisition matters. RTC has a general counsel, Joe Jablonski, who did the legal work on the formation of the partnership and has done the legal work relating to all other aspects of partnership operations.

Our relationship with RTC was prompted by Michael Dale, the financier who is well known locally for his shrewd real estate investments. Dale is a partner in RTC and a member of the RTC Management Committee. The firm had represented Dale personally when he developed the hugely successful Four Corners Mall eight years ago. The next year, Dale recommended our services to another real estate venture group of which he is a partner, The Real Estate Team (TRET1. We successfully represented TRET during the highly competitive bidding for Sky Top Lodge, the historic resort in the Laurel Mountains.

Dale took an active role in the negotiations for the Mall and the Lodge. He worked closely with us in developing the bargaining strategy and tactics. Dale was particularly helpful in identifying the information we needed to acquire and to give during the negotiation sessions and was adept at reading the nonverbal communication of the opposing negotiators. Dale also

taught me the nuances of the "good guy/bad guy" team approach, one he employs regularly in his bargaining encounters.

Dale did not participate in the Diplomat Resort negotiation in 1993. He told me he was stretched too thin financially and needed to concentrate on his other enterprises. He said he'd brought our firm in because he felt that we had the skill and expertise to handle the deal without the active involvement of any RTC partners.

When RTC partners expressed interest in the Sands property, Dale voiced his strong opposition. Although he agreed the Sands was an attractive investment, one he would like to pursue through one of his other ventures, Dale did not believe RTC was properly positioned to take advantage of the opportunity.

When the RTC Management Committee voted, over Dale's objection, to acquire the Sands, Dale hired attorney Mike Flynn of Dobson to challenge the legitimacy of that vote. Joe Jablonski, as general counsel of RTC, is dealing with Mr. Flynn on the issues raised by Dale's challenge so we don't need to concern ourselves with those issues.

Dale has just written to us demanding that we cease representing RTC in the attempt to acquire the Sands property. It seems Dale is a partner in another venture group, Advantage Acquisition Associates (AAA), which is formally pursuing the Sands Hotel. Dale claims our representation of RTC would be a conflict of interest.

I'm very troubled by this matter. We certainly don't want to be engaged in unethical behavior. On the other hand, we have an obligation to be loyal to RTC and its interests. This disagreement also has the potential for hurting the firm's long-term relationship with both RTC and Dale. And, of course, the dispute between RTC and Dale could have serious consequences to the financial well-being of each of them. Also, because we represent a number of partnerships with overlapping memberships, the issues present potentially recurring problems to the firm.

I need your help in thinking through these issues. Please do the following:

1 . Write me a memorandum in which you analyze our representation of RTC and Dale and identify our obligations to each. Be sure to address:

(a) our firm's relationship with Dale in the Mall deal and the acquisition of the Lodge; and,

(b) our firm's relationship with Dale and RTC in the purchase of the Diplomat and the effort to acquire the Sands.

I want a thorough analysis in which you also reach specific conclusions.

2. Draft a second memo in which you:

(a) identify what actions we must now take as a result of Dale's allegation

of a conflict, and, for each action, explain why we must take it; and,

(b) identify what additional actions we should at least consider taking, and, for each of these actions, identify why it might be desirable to take that action and its likely consequences.

I've collected materials from the RTC file that may bear on the matter and legal authorities that should give you insight into the questions presented. Thanks for your assistance.

RTC
Realty Transaction Consortium
2714 Meadowood Drive
Ocean Point, Columbia 55303

May 12, 1997

Pearl Goldman, Esq.
Donoho, Langstan, Gilmore & Goldman, P.A.
1212 Federal Highway - Suite 600
Fort Laurel, Columbia 55533

Dear Ms. Goldman:

RTC is very anxious to secure your services and those of your firm. Indeed, one of our general partners, Michael Dale, made it a condition of his participation in our venture that Donoho, Langstan, Gilmore & Goldman serve as the partnership's counsel in negotiations to purchase and finance properties for RTC. In part because my colleagues were anxious to enlist Mr. Dale's participation and in part because of your outstanding reputation as a lawyer who makes real estate deals happen, we readily accepted this condition. Therefore, on behalf of our formed partnership, I am requesting your assistance in RTC's attempt to purchase the Diplomat Resort.

I will call your office to arrange a convenient time for you to meet with RTC's Management Committee: Alan Bleiweiss, Mary Buxton, Michael Dale, Lynn Price, and me. At that time, we hope to discuss bargaining strategies and authorize you to initiate negotiations to purchase the Diplomat for RTC.

Sincerely,

Ann Reynolds, Chair
Management Committee

cc: Management Committee Members

REALTY TRANSACTION CONSORTIUM
Partnership Agreement

[Excerpts]

The parties; desiring to form a partnership for the purpose of buying, selling, and investing in real property interests, agree as follows:

1. **Organization of Partnership.** The parties, each of whom is a partner, do hereby form a partnership pursuant to the Partnership Law of the State of Columbia.. The firm name of the partnership shall be the Realty Transaction Consortium (hereinafter referred to as the "Partnership"). The office of the Partnership shall be located at 2714 Meadowood Drive, Ocean Point, Columbia or at such other place or places as may be determined from time to time by the Management Committee (as defined in paragraph 4(a) and hereinafter referred to as the "Committee").

2. Objects and Purposes; Investment Policies. The Partnership shall invest in, trade for its own account, improve, develop, lease, mortgage, acquire, dispose of, operate, and otherwise deal principally in interests in real property of every kind and nature, wherever located, whether within or outside the United States, and such personal or mixed property as may be appurtenant or used in conjunction with and any options or rights with respect to such property (any such interest being hereinafter referred to as "Real Property Interests"). In connection with such activity, the Partnership may borrow, incur other obligations, make commitments, and subject its assets to mortgages or other liens; and may make sort-term investments in debt obligations unrelated to real estate. It is understood that the Partnership does not intend to make an equity commitment in any Real Property Interest in an aggregate amount of less than $1,000,000. The Partnership's investments may be in the nature of capital venture investments; may be speculative and involve substantial risk; may be concentrated in one or more investments; may be made jointly with others or through a partnership or joint venture or association or other entity or arrangement of any kind in which the Partnership is a partner, joint venturer, member, or other participant or otherwise has an interest; and that it is possible that the Partnership may exercise control, alone or jointly with others, in property in which it makes investments.

* * * * *

4. **Management Committee**

a. The Committee shall consist of five partners selected by a vote of all partners. Committee members can serve only as long as they are partners of the Partnership.

b. Members of the Committee shall not be entitled to receive any compensation for their services other than reimbursement for reasonable and necessary out-of-pocket expenses incurred during the course of conducting Partnership business.

c. The Partnership will not knowingly sell any Real Property Interest to, will not purchase any Real Property Interest from, or will not lend any money or other property to any Committee member or any entity in which a Committee member has a direct or indirect ownership interest. No Committee member (or person or entity controlled by such Committee member) shall make any equity commitment in any Real Property Interest in an aggregate amount of $1,000,000 or more unless he first offers the opportunity to make such investment to the Partnership and the Partnership, through the majority decision of the members of the Committee who have no direct or indirect interest in such proposed investment, declines such opportunity.

d. Only the act of four of the five Committee members shall be the act of the Committee. Minutes shall be kept of all Committee action. Such minutes, as well as all other records of the Partnership, will be available at any reasonable time for inspection by any Partner of the Partnership.

e. Members of the Committee may have other business interests and engage in other business activities in addition to those relating to the Partnership, including the making and management of other investments. The pursuit of other interests and activities by Committee members, even if competitive with the business of the Partnership, is hereby consented to by the other Partners.

f. None of the Partners, other than a member of the Committee, shall draw, make, or endorse any notes or other evidences of debt, make any contract or commitment, borrow any money or otherwise incur any indebtedness, hire any employees, become surety for any person or organization, or sell; assign, transfer, encumber, pledge, or otherwise dispose of or lend any assets of the Partnership.

g. Accounting services for the Partnership (other than independent audits) are to be performed, and other administrative and similar services for the Partnership may be performed, by Pegge Graham Accounting Associates. Jablonski & Jones, P.A., shall serve as general counsel to the Partnership.

MICHAEL DALE
"The Ventures"
1 Sunnyplace Way
Ocean Point, Columbia

June 5, 1997

Dear Pearl,

Thanks for agreeing to represent my new partners and me in our search for exciting new properties/ I know RTC will be even more successful that you and I have been in the past. Our acquisition of the Diplomat will dwarf out accomplishments in closing deals on the Mall and the lodge. I will look forward to working with you again!
Warmest personal regards,

Mike

The Columbia Dispatch
"Business Briefs"
December 10, 1997

RTC PURCHASES DIPLOMAT; RENOVATIONS EXPECTED

OCEAN POINT, COLUMBIA -- Realty Transaction Consortium, a recently formed venture partnership that includes Michael Dale, the prominent local financier, has purchased the famed Diplomat Resort here.

The Diplomat transaction marked Dale's return to the region's high-end real estate market. In recent years, Dale had been rumored to have passed up several opportunities because he was financially overextended.

The purchase was negotiated by Pearl Goldman of Donoho, Langstan, Gilmore & Goldman, a local law firm that specializes in high-end real estate acquisitions. Goldman arranged financing with an investment team consisting of the Washington-based Union Labor Life Insurance Company and six union pension funds. RTC and the investment team put together a $54 million financing package that covers the purchase of the 1,009room hotel on prime oceanside property as well as the renovation of the historic main building.

Long-term plans for the hotel include construction of a beachfront tower. When the new tower is built, a conference center of up to 40,000 square feet will be added. More immediately, RTC will initiate a complete mechanical system overhaul as well as major guestroom and banquet facility renovations.

MINUTES OF RTC MANAGEMENT COMMITTEE
June 29, 2000

The Committee met to consider a proposal to purchase the Sands Hotel and Country Club, a facility directly north of our Partnership property, the Diplomat Resort. Buxton pointed out RTC could leverage its success with the Diplomat by acquiring the Sands. Bleiweiss added there would be economies of scale realized (e.g., in management services, food and banquet, convention booking, reservations and the like) because the properties were adjacent. Price noted that there are rumors the present owners of the Sands are hard pressed for cash and may be willing to sell at a great price.

Dale objected to the Partnership pursuing this property. He argued that RTC was not sufficiently capitalized to take on another resort property. Dale denied any economies in operation would be realized by ownership of adjoining properties. Instead, he said, the high quality service that marks RTC's management of the Diplomat Will be compromised and both hotels would become second-rate.

Reynolds responded that the partnership has sufficient capital since each partner has been assessed an additional $1,250,000. Moreover, there is a waiting list of others interested in being partners.

Dale argued RTC would be better served if it supported purchase of the Sands by another group with which it could develop a service alliance to attract convention and other business. Dale said he was a member of a group (Advantage Acquisition Associates) that would try to acquire the Sands and that would be willing to work with RTC.

The Committee voted 4 to 1 to invest up to $35 million in the purchase of the Sands Hotel. (Dale cast the lone negative vote.) Reynolds indicated she would authorize Pearl Goldman, Esq., to initiate contact with the Sands' owners.

MICHAEL DALE
"The Ventures"
1 Sunnyplace Way
Ocean Point, Columbia
July 10, 2000

Pearl Goldman, Esq.
DONOHO, LANGSTAN, GILMORE & GOLDMAN
1212 Federal Highway - Suite 600
Fort Laurel, Columbia 55533

Dear Ms. Goldman:

I hereby demand that you and your law firm cease any and all representation of Realty Transaction Consortium (RTC) in connection with RTC's attempt to purchase the Sands Hotel and Country Club, Ocean Point, Columbia. Such representation is in direct conflict with your past and present representation of me.

As you well know, for good and sufficient reasons I vigorously opposed RTC's plans to acquire the Sands. Indeed, I have formally complained to the other members of the RTC Management Committee about the propriety of the decision to go forward with the attempted purchase of the Sands. More important, as a partner in Advantage Acquisition Associates (AAA), I am pursuing ownership of the Sands property. Unlike RTC, AAA is well positioned to assume ownership and management responsibilities at the Sands.

You represented me long before you became associated with RTC. Continued representation of RTC by you and your firm is contrary to my interests. I expect you to terminate that representation immediately and to notify me by return mail that you will no longer be involved in the Sands deal on behalf of RTC.

Sincerely,

Michael Dale

cc: Michael Flynn, Esq.
Advantage Acquisition Associates

TELEPHONE MESSAGE

July 12, 2000

TO: Pearl

FROM: Mike Dale

I'm sorry for the harsh tone of my letter of July 10, 2000. I hope that we can resolve this impasse. I'd like to continue working with you.

THURSDAY AFTERNOON
JULY 27, 2000

California Bar Examination

Performance Test B

LIBRARY

RTC PARTNERSHIP

LIBRARY

COLUMBIA RULES OF PROFESSIONAL CONDUCT

Rule 3-310. Avoiding the Representation of Adverse Interests

(A) For purposes of this rule:

(1) "Disclosure" means informing the client or former client of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client or former client;

(2) "Informed written consent" means the client's or former client's written agreement to the representation following written disclosure;

(B) A lawyer shall not accept or continue representation of a client without providing written disclosure to the client where: ,.,

(1) The lawyer has a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; or

(2) The lawyer knows or reasonably should know that:

(a) the lawyer previously had a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; and

(b) the previous relationship would substantially affect the lawyer's representation; or

(3) The lawyer has or had a legal, business, financial, professional, or personal relationship with another person or entity the lawyer knows or reasonably should know would be affected substantially by resolution of the matter; or

. (4) The lawyer has or had a legal, business, financial, or professional interest in the subject matter of the representation.

(C) A lawyer shall not, without the informed written consent of each client:

(1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or

(2) Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict; or

(3) Represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter.

(D) A lawyer shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the lawyer has obtained confidential information material to the employment.

Rule 3-600. Organization as Client

(A) In representing an organization, a lawyer shall conform his or her representation to the concept that the client is the organization itself, acting through its highest authorized officer, employee, body, or constituent overseeing the particular engagement.

* * * * *

(D) In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a lawyer shall explain the identity of the client for whom the lawyer acts, whenever it is or becomes apparent that the organization's interests are or may become adverse to those of the constituents) with whom the lawyer is dealing. The lawyer shall not mislead such a constituent into believing that the constituent may communicate confidential information to the lawyer in a way that will not be used in the organization's interest if that interest is or becomes adverse to the constituent. (E) A lawyer, representing an organization may also represent any of its directors, officers, employees, members, shareholders, or other constituents. If the organization's consent to the dual representation is required, the consent shall be given by an appropriate constituent of the organization other than the individual or constituent who is to be represented, or by the shareholder(s) or organization member(s).

COLUMBIA STATE BAR
STATE ETHICS COMMITTEE

Informal Ethics Opinion 96-127

May 15, 1996

Dear Mr. Cunningham:

Thank you for your letter of October 2, 1995. The Committee is pleased to have you take advantage of its new expedited 90-day review process.

In your letter, you ask about the situation in which a layperson makes contact with you and makes an inquiry concerning a business transaction. You represent someone else involved in that business transaction. In your question, you indicate that you are aware that the lay businessperson who has contacted you is represented by counsel. You ask whether it is permissible for you to respond to the businessperson.

The situation you describe has been repeatedly addressed by the Columbia Courts. Columbia Rules of Professional Conduct 2-100 provides:

> While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer.

The discussion text following Rule 2-100 explicitly states that it is irrelevant that the 'attorney is contacted by the opposing party. Therefore, any response you make must be through the party's attorney or directly to the party only after opposing counsel consents.

As per State Bar policy, IEOs determined to be of value to the general public are periodically published with identifying material removed. If there is any reason that you believe such action is inappropriate in this situation based on issues of confidentiality, please inform the Committee within 30 days.
Sincerely,

Michael Rigsby
State Bar Ethics Counsel

Approved for Publication

WOODS v. WOODS

Columbia Supreme Court (1991)

The principal issue before us is whether an attorney, who for years has represented the interests of a family corporation, can represent one spouse against the other in an action for divorce when the family corporation, which was joined as a party to the action, is a primary focus of dispute in the dissolution.

Wife filed an action for dissolution of her marriage and retained Leonard Berman as her trial counsel. Shortly after, wife filed a motion seeking to disqualify husband's counsel, Arthur Kralowec, from-representing husband in the dissolution action. - Wife alleged in her declarations that Kralowec had been the family's business attorney for many years. Husband admitted that Kralowec had represented the family corporation since 1975. Husband conceded that Kralowec had represented him in 10 to 12 matters arising from corporate activities. Kralowec admitted that over the years he developed a strong loyalty to husband. Wife further alleged that she had several conversations with Kralowec in which she had revealed to him her opinion and feelings on matters that might have relevance to the dissolution action. For example, she told him her opinion as to the fair market value of the family home, her personal feelings about maintaining it as her home on a permanent basis, her position in a trade secret lawsuit by the corporation against an ex-employee, her views as to the economic viability of the business, and her belief that the business should survive the divorce.

Husband viewed the dealings between wife and Kralowec as not involving the shafing of confidential information. He stated that wife had no basic knowledge of the financial aspects of the corporate business and that she was a "mere functionary." Kralowec -characterized wife as a "go-fer" who made "no business decisions and provided no thinking, information or ideas." While Kralowec admitted he had drafted a will for wife, he declared that he would not have represented wife in the dissolution action even if she had asked him to do so because he had "... been the attorney for [husband] since approximately 1975 and [was] completely loyal to him."

The trial court denied the motion to disqualify Kralowec on the ground that nothing was contained in the declarations to suggest he ever acquired any "knowledge or information which would be injurious" to wife. We reverse.

The trial court, apparently concentrating on wife's role as a former client of Kralowec (through drafting wife's will, for example), ruled there must be an "actual" showing that. confidential information was obtained to decide in wife's favor on the disqualification motion. We conclude, however, that the ethical prohibition against acceptance of adverse

employment involving prior confidential information includes potential as well as actual use of such previously acquired information.[1] The test does not require the "former" client to show that actual confidences were disclosed. Such inquiry would require the very disclosure the rule is intended to protect. The possibility of breach of confidence, not the fact of the breach, should trigger disqualification.

Wife asserts the problem is amplified here in that she has joined the family corporation as a party to the dissolution proceedings. We believe there is merit to wife's contention that in representing the ongoing family corporation, Kralowec continues to represent wife.

The fact that Kralowec continues to represent wife's interest in a family business that will be the focus of the dissolution is sufficient to disqualify Kralowec from representing husband. Under such circumstances, Kralowec should be disqualified even in the absence of a showing that he has obtained confidential information.

It has long been recognized that where ethical considerations are concerned, disqualification should be ordered not only where it is clear that the attorney will be adverse to his former client but also where it appears that he might. The purpose of the rules against representing conflicting interests is not only to prevent dishonest conduct, but also to avoid placing the honest practitioner in a position where he or she may be required to choose between conflicting duties or attempt to reconcile conflicting interests.

We conclude that, absent consent or waiver, the attorney of a family-owned business, corporate or otherwise, should not represent one owner against the other in a marital dissolution action.

[1] See Rule 3-310 Columbia Rules of Professional Conduct.

RESPONSIBLE CITIZENS v. ASKINS

Columbia Supreme Court (1993)

On a motion made by the respondents, the trial court disqualified a law firm, Harriman & Gabrielli (H&G), from representing petitioner Responsible Citizens, a Columbia nonprofit public benefit association (Citizens), in a proceeding against Franklin County (County), and the real parties in interest David and Karen Askins (jointly, Askins). When H&G filed the underlying proceeding on behalf of Citizens, it also represented, in entirely unrelated matters, a general partnership in which Karen Askins was a member.

In 1989, H&G began representing Citizens in its efforts to oppose a sand and gravel surface mining project. By October 1991, H&G learned that Citizens planned to oppose another such project operated by David Askins, pursuant to a conditional use permit (CUP) approved by County. Also in October 1991, Richard Harriman of H&G was contacted by Karen Askins regarding a real estate issue unrelated to the CUP matter. Karen Askins sought legal services on behalf of Westside Land Office (Westside). Harriman claims Karen Askins told him she was "with" Westside. He assumed Karen Askins was an employee of Westside, although he does not deny that she may have referred to Westside as "my business."

In contrast, Karen Askins specifically avers that she told Harriman, during the course of their business relationship, that she was one of the owners of Westside. In fact, Westside was a general partnership composed of Karen Askins and Myrtice Wilson.

According to Harriman, when he learned in response to a question that David Askins was Karen's husband, he "felt uneasy about providing legal representation to her because of the potential conflict of interest" and explained to Karen Askins that H&G was representing Citizens in opposing the CUP. Harriman states that he "requested a waiver of the potential conflict before providing legal representation," but Karen Askins "assured [him] there was no basis for a conflict of interest" because her husband's business "was completely separate from her own activities with Westside." Based on this information, Harriman agreed to represent Westside.

Karen Askins concedes that she had a conversation with Harriman concerning his firm's representation of Citizens, but according to her, Harriman stated any legal action regarding CUP would be taken against the County and never advised her that she and her husband would be named as real parties in interest in any litigation filed by Citizens concerning the CUP matter, or that Citizens would seek attorney fees and other judicial relief from her and her husband. She further states that Harriman did not advise her to seek independent counsel, did not give her any written explanation of his firm's representation of Citizens

and the consequences it might have, and did not request or obtain a written consent from her regarding any possible dual representation.

During November and December 1991, H&G provided legal service to Westside regarding a disclosure, waiver, and hold harmless agreement in a pending real estate escrow. H&G billed Westside $105, plus out-of-pocket costs, for its services. The bill was paid by a Westside check signed by Karen Askins and Myrtice Wilson in December 1991.

In April 1992, Citizens, represented by H&G, filed the underlying litigation, naming Askins as real parties in interest. In addition to a writ of mandate, the pleading sought injunctive relief and an award of attorney fees. -

In May 1992, Karen Askins and Harriman had at least one telephone conversation regarding another real estate matter in which Westside was involved, and in early June 1992, Harriman received two fax transmissions from Karen Askins on Westside's letterhead. However, no further services were rendered. None of the matters about which ,Karen Askins consulted H&G on behalf of Westside was in any way related to the CUP matter.

Askins' motion to disqualify H&G from representing Citizens in the underlying litigation was .granted by the trial court, and Citizens sought relief from this court.

DISCUSSION

At the outset, we should stress what this case does not involve. There is no claim that H&G, in its representation of Westside, obtained any confidential information that is material to the CUP matter. Neither is there any claim that H&G ever rendered any service to Karen Askins regarding the CUP matter or any other matter involving her personal, as opposed to partnership, interests. The disqualification order rests solely on the lower court's determination that an attorney-client relationship existed between H&G and Karen Askins.

The issue presented is whether Karen Askins, by reason of H&G's representation of Westside, was a "client" of H&G when H&G concurrently represented Citizens. If the answer to this inquiry is affirmative, H&G was properly disqualified.

I. Disqualification of Counsel-General Considerations

A per se or automatic disqualification rule applies when the representation of one client is adverse to the interests of another current client. When the current representation is adverse to the interests of a former client, disqualification may be necessary only if the

attorney, by reason of the former representation, obtained confidential information material to the current representation.[2] If there is a "substantial relationship" between the two representations, a court will presume that confidences that may have value in the current representation were disclosed in the first representation.

Courts have frequently noted that disqualification motions may require a balancing of competing policy considerations. On the one hand, a court must disqualify an attorney who wrongfully acquires an unfair advantage that undermines the integrity of the judicial process because it will have a continuing effect on the proceedings before the court. On the other hand, a disqualification usually imposes a substantial hardship on the disqualified attorney's innocent client, who must-bear the costs of finding a replacement. Courts have also expressed concern that the disqualification procedure may be abused if it is invoked solely to gain some tactical or strategic advantage.

II. Attorney Representing a Partnership May, But Does Not Necessarily, Represent Individual Partners

Neither we nor the parties have located any decision clearly addressing the question of whether, within the conflict of interest context, an attorney representing a partnership necessarily has an attorney-client relationship with the individual partners extending beyond the partnership affairs. Citizens claims that a decision of this court, Woods v. Woods (1986), supports the trial court's ruling. Woods is so factually distinguishable from this case, however, that it offers little guidance here. Woods involved a controversy between the two owners of a closely held business, which was referred to as the focus of the marital dissolution, and which, for all intents and purposes, was very much like a partnership. Here the controversy is between one owner of the business and a third party, and the business itself is completely uninvolved in the controversy and the action.

On the other hand, in Wortham & Van Liew v. Clubb (1989), we observed:

> In the context of the representation of a partnership, the attorney for the partnership represents all the partners as to matters of partnership business. Legal counsel provided to the partnership is intended to and does assist each and every general partner to fulfill his joint management duties.

[2] See Rule 3-310(D) of the Columbia Rules of Professional Conduct. The ethical prohibition against acceptance of adverse employment involving prior confidential information includes potential as well as actual use of such previously acquired information. The test for a conflict of interest as to a former client involves finding: (1) a past attorney client relationship existed between the party seeking disqualification and the attorney whose disqualification is sought; (2) the subject matter of the relationship was/is substantially related; and (3) the attorney acquired confidential information from the party seeking disqualification.

Because the quoted language limits the attorney's representation of individual partners "to matters of partnership business" and to assisting the partner in fulfilling "his joint management duties," it does not support the disqualification order here. The CUP matter is not related to Westside business, and there is no conflict between Karen Askins' partnership management duties and H&G's representation of Citizens.

Citizens argues that a partnership is an "organization" within the meaning of Rule 3-600, Columbia Rules of Professional Conduct. Citizens urges that a partnership's attorney must treat the partnership itself as the client, and, therefore, the attorney need not also undertake the representation of the partner-members of the organization In. their individual capacities. Although the rules do not define the term "organization," its common, ordinary meaning is sufficiently broad to include partnerships. The pertinent dictionary definition of "organization" is "any unified, consolidated group, especially a body of persons organized for some specific purpose, as a club, union, or society" (Webster's New World Dictionary, 3d ed., 1988). The Columbia Corporation Code defines a partnership as "an association of two or more persons to carry on as co-owners a business for profit."

Without belaboring the point, we see nothing in the text of Rule 3-600(A) evidencing an intent to exclude partnerships from its ambit.3 We agree with Citizens that representation .of a partnership does not, by itself, create an attorney-client relationship with the individual partners. That conclusion, however, does not dispose of the issue raised here because it merely begs another question: does representation of a partnership necessarily preclude representation of the individual partners? If the answer to that question is negative, we must examine the circumstances under which an attorney may represent both the partnership and the partners and determine whether those circumstances are present here.

Paragraph (E) of Rule 3-600 addresses this inquiry. It provides that an attorney representing an organization may also represent any of its directors, officers, employees, members, shareholders, or other constituents, subject to the provisions of Rule 3-310. If the organization's consent to the dual representation is required, the consent shall be given by an appropriate constituent of the organization other than the individual or constituent who is to be represented, or by the shareholder(s) or organization member(s).

The rule also makes clear that concurrent representation of the partnership and one or more of the partners is possibly subject to the conflict of interest rules. The rule eschews a

[3] The primary concern of the drafters of Rule 3-600 was avoidance of conflicts of interest between the organization and one or more of its constituents, rather than conflicts which might arise between a constituent and third parties.

bright-line pronouncement that a partnership attorney always represents the partners, or that he or she never does.

A bright-line rule that an attorney representing a partnership automatically represents each individual partner as to the partner's personal interests would, when combined with the per se disqualification rule applied to concurrent representation of conflicting interests, cause unjust consequences when the individual partner had no reasonable expectation of the attorney's loyalty in matters unrelated to the partnership affairs. Disqualification in such cases would unfairly penalize third parties by depriving them of their chosen counsel, but we do not see any offsetting benefit to the public or the legal profession. On the other hand, a bright-line rule that a partnership attorney may never have a duty of loyalty to individual partners could, under some circumstances, undermine public confidence in lawyers by permitting an attorney to represent an adverse party when the individual partner had a reasonable expectation that the attorney would not do so.

Thus, while we can conclude that H&G's representation of Westside did not automatically make Karen Askins a client, additional facts and circumstances may have done so.

III. Representation of Individual Partners) Rests on an Express or Implied Contract

The attorney-client relationship is created by some form of contract, express or implied, formal or informal. If there is an express agreement by the partnership attorney to represent an individual partner, the attorney-client relationship is established and , application of the conflict of interest rules follows as of course. The difficult cases will be those, like this, in which the relationship can exist only if implied from the circumstances.

An implied contract is one, the existence and terms of which are manifested by conduct. The distinction between express and implied-in-fact contracts relates only to the manifestation of assent; both types are based upon the expressed or apparent intention of the parties. Without any attempt at being exhaustive, we can identify some factors that might support, or undercut, implication of an attorney-client relationship with an individual partner in any particular case. The type and size of the partnership obviously have a bearing, as already noted. So do the nature and scope of the attorney's engagement by the partnership. The kind and extent of contacts, if any, between the attorney and the individual partner might be important factors. The same is true as to the attorney's access. to financial information relating to the individual partner's interests. Other factors that may also be important are whether the lawyer affirmatively assumed a duty to represent the partner, whether the partner was separately represented by other counsel (at time partnership was created or in connection with its affairs), and .whether the attorney had represented the partner before undertaking to represent the partnership.

In determining the existence of an attorney-client relationship in cases like this, primary attention should be given to whether the totality of the circumstances, including the parties' conduct, implies an agreement by the partnership attorney not to accept other representations adverse to the individual partner's personal interests. A very important fact involved in finding an attorney-client relationship, therefore, is the expectation of the client based on how the situation appears to a reasonable person in the client's position.

IV. Application of Law to Case[4]

With the foregoing principles in mind, we now, turn to the record before us. The trial court's disqualification order indicates it was based on the-court's legal conclusion that Karen Askins was a client of H&G solely by reason of the firm's representation of Westside. In its order, the court referred to H&G's claim that Harriman believed Karen Askins was simply an employee, rather than an owner, of Westside. The order continues:

> The issue therefore revolves around Mr. Harriman's knowledge of whether Karen Askins had an ownership interest in the business. H&G concedes that its representation was concurrent.
>
> The test for disqualifying an attorney for concurrent representation is not the 'substantial relationship' test for former clients. Rule 3-310(B), Columbia Rules of Professional Conduct.[5]

The concession referred to in the order that H&G's "representation was concurrent," however, was only that H&G represented Westside and Citizens concurrently. H&G's concession that it represented Westside and Citizens concurrently would have significance only if its representation of Westside included representation of Karen Askins as a matter of law. The trial court's order gives it that significance by implying that if Karen Askins was a part owner of Westside, she was automatically a client of H&G notwithstanding Harriman's lack of knowledge concerning her status.

In light of our preceding discussion, we must, therefore, conclude that the court erred. Applying the legal principles we have discussed in this opinion, we conclude from the totality of circumstances that there was no attorney-client relationship between H&G and Karen Askins during the relevant period.

[4] The question of whether an attorney-client relationship exists is one of law. However, when the evidence is conflicting, the factual basis for the determination must be determined before the legal question is addressed.

[5] Ordinarily there is nothing improper about an attorney representing more than one interest so long as he or she discloses the consequences of the joint representation to all clients. In the context of partnerships, the failure to issue a conflicts letter to affected partners or to notify a partner who is no longer being represented by the lawyer may result in a finding of malpractice.

July 2000 California Bar Examination

ERRATUM - Performance Test B

APPLICANTS

THERE IS AN ERROR IN THE LIBRARY OF PERFORMANCE TEST B.

No Footnote 1 appears in Responsible Citizens v. Askins, which begins on Page 6 of the Library. All footnotes in this section begin with Footnote 2, on Page 8.

ANSWER A TO PT-B

1. Memo analyzing our representation of RTC and Dale and identifying our obligations to each

You asked me to analyze the representation of the Realty Transaction Consortium ("RTC") and Michael Dale ("Dale") by our firm, Donoho, Langstan, Gilmore & Goldman ("Donoho"). In particular, you wanted me to determine the ethical obligations Donoho is under with regards to RTC and Dale based upon our prior representation. I will analyze the prior representations first, and then identify our current obligations to RTC and Dale.

Representation of Dale during the purchase of the Four Corners Mall Duty of Confidentiality

Donoho represented Dale personally when he developed the Four Corners Mall ("Mall") several years ago. He took an active role in the negotiations and worked closely with us in developing the bargaining strategy and tactics. This representation created an attorney client relationship with Dale, and places an ongoing duty of confidentiality on Donoho with regard to any confidential information we received from Dale during that period, in accordance with Rule 3-310(D) of the Columbia Rules of Professional Conduct. This Rule forbids an attorney from taking a case adverse to a current or former client in which confidential information obtained from the client is material to the representation. This ethical duty may be waived by the informed written consent of the client.

Duty of loyalty

If Dale is a current client as well, we are under a duty of loyalty to him. One of the rules addressing this duty is Rule 3-310(C). This rule prohibits acceptance of a case in which the interests of the (new) client would conflict with an existing client. The Columbia Supreme Court has said that disqualification is automatic when the representation of one client is adverse to the interests of another current client. *Responsible Citizens. As* with the duty of confidentiality, this duty may be waived by the informed written consent of the client.

Representation of Dale and TRET during the purchase of the Sky Top Lodge Identity of client

The next time we worked with Dale was when he recommended us for the work on the Sky Top Lodge ("Lodge") the next year. Here, though, we were not working for Dale directly, since we were contacted by, and negotiated on behalf of, Dale's partnership The Real Estate Team ("TRET"). This conclusion follows directly from Rule 3-600 of the Columbia Rules of Professional Conduct, which states that in representing an organization, a lawyer shall consider the organization itself to be the client, not the individual directors, officers, or employees. In *Responsible Citizens,* the Columbia Supreme Court held that "organization" as used in this rule includes partnerships.

Possible representation of the TRET partners

Responsible Citizens is also instructive for another issue - whether we were necessarily representing all of the partners of TRET when the partnership retained us. The court in Citizens held that a lawyer may, but does not necessarily, represent the individual partners in a partnership. An earlier case, Wortham, held that the attorney for the partnership represents all the partners as to matters of partnership business, since the legal advice given is meant to assist the partners in fulfilling their management duties. But Citizens read the Wortham rule rather narrowly - if the adverse representation against the partner is outside the scope of the business representation, there is no conflict. The Citizens court stated that a broader interpretation - creating a representation of each partner's personal interests - would "cause unjust consequences when the individual partner has no reasonable expectation of the attorney's loyalty in matters unrelated to the partnership affairs." Citizens.

Citizens used a totality-of-the-circumstances test to determine whether there was an implied contract between the lawyer and the purported partner-client. The factors it relied upon were the type and size of the partnership; the nature and scope of the attorney's representation by the partnership; the kind and extent of contacts with the partner; the attorney's access to the individual partner's financial information; whether the attorney affirmatively assumed a duty to represent the partner; whether the partner was separately represented by other counsel; and whether there were prior representations of the partner by the attorney.

Applying this test to the TRET situation seems to give the impression that we did not undertake any representation of individual partners apart from the negotiations we agreed to do on behalf of the partnership. The representation was limited in scope; we do not appear to have had much access to any partner's financial information, or to have assumed a duty to represent a partner. Dale did work closely with us and he took an active role in the negotiations. We had also represented him before in the Mall negotiations. But given the totality of the circumstances, we were not representing him personally through this negotiation.

So, in representing TRET with the purchase of the Lodge, we were, in fact, representing Dale and the other TRET partners with respect to the purchase of the lodge. But absent any additional facts that would show that Dale (and the other partners) had a reasonable expectation of Donoho's loyalty in matters unrelated to the Lodge purchase, we did not undertake any separate representation of Dale or his TRET partners.

Representation of Dale and RTC during the purchase of the Diplomat and the effort to acquire the Sands

A similar analysis can be made for our representation over the past three-plus years of RTC. We were approached by Ann Reynolds, Chair of the RTC Management Committee, in May of 1997 to represent them in the purchase of the Diplomat Resort ("Diplomat").

While Dale had recommended you for the job, and apparently made RTC's hiring of you and Donoho a condition of his involvement in RTC, we were still hired by RTC. Dale was not personally involved in this negotiation, as he was with the previous two. He sent a letter to you, thanking you for "agreeing to represent" RTC. It was, of course, RTC that purchased the Diplomat, not Dale - in fact, a news article from the *Columbia Dispatch* after the purchase closed clearly mentions RTC as the owner of the Diplomat (as well as you and Donoho as the negotiating attorneys).

After the success of the Diplomat deal, RTC recently decided to negotiate to purchase the Sands Hotel and Country Club ("Sands"). Since he disagreed with the decision to purchase the Sands, Dale has sought to prevent Donoho from continuing to represent RTC in this matter. .

As with TRET and the Lodge, Donoho's representation of RTC is limited to the negotiations we have undertaken for them. They have a general counsel, Joe Jablonski, and there is no indication that RTC ever considered us as having undertaken additional representation. Therefore, any implied representation we have of the individual partners of RTC is limited to the negotiations we have undertaken, within the scope of their partnership business affairs. Especially since Dale took no part in the Diplomat negotiations, there is little reason to think we represented him personally through our representation of RTC.

Current obligations to Dale

We have, in the past, represented Dale personally in the purchase of the Mall. If Dale is a current client, and does not waive the conflict, we would not be able to represent RTC now that their interest in purchasing the Sands is in conflict with Dale's interest in purchasing the Sands. We also cannot represent RTC if we have confidential information of Dale's from the purchase of the Mall that would adversely affect him in the purchase of the Sands.

Is the representation current?

Whether Dale is a current client depends on whether the representation is ongoing. While we have worked with Dale frequently since the Mall purchase, we have not been retained by Dale personally. There does not appear to be any ongoing work we have done for Dale on the Mall project since that transaction closed; in fact, we appear to have dealt with only the purchase and financing of all of the properties mentioned in this memo. With the Mall transaction complete years ago, and no personal representation of Dale in the intervening years, Dale is most likely not a current client. We are therefore free to represent RTC, even if their interests are adverse to Dale's, so long as we have no confidential information of Dale's that could be adversely used against him.

Can any information we do have be used against Dale?

RTC wants to buy a property that Dale wants to buy as part of another partnership. Any financial information we have on Dale, then, could potentially be used against him to show that his partnership could not possibly finance the purchase. So we must be sure we have no confidential information.

Do we have confidential information from Dale?

There is a presumption that confidential information was taken from a former client when a current client's case is "substantially related" to the prior representation. Citizens. If there is confidential information taken, the attorney may not undertake the current representation if there is merely a possibility for a breach of confidence. Woods. So, if the Sands matter is substantially related to the Mall purchase, the merest possibility of use of confidential information would disqualify us.

However, the matters do not appear substantially related and so this presumption does not apply. Both matters are both real estate ventures, but of completely different properties in different locations. The simple purchase of property likely does not make a matter substantially related; there is no case on this subject. So, we will have to look to see whether we actually do have confidential information.

The Mall purchase was several years ago; while we certainly have information about Dale from that time period, it is likely out of date and therefore would be of no use against him. We may also have information about him from the other two real estate transactions, which would be treated as confidential. However, the information received from a partner is likely very specific to the transaction at issue. We will have to investigate our files of these other transactions to find out what we do, in fact, know about Dale's finances.

There is another possible defense here, though. If we do have current information about Dale's finances, it is probably from the last RTC transaction about the Diplomat. And we may have information from the current Sands transaction. But this information may not be considered "confidential" in the same sense that information received outside of a partnership setting would be confidential. Dale was required to give this information to RTC to participate; now he has gone against his partners. The partnership, as a legal entity, would have the right to use this information against Dale. We, as the partnership's attorney, would have that right, too.

Current obligations to RTC

The Management Committee of RTC, by a 4-1 vote, authorized you to initiate contact with the Sands' owners and negotiate for its purchase. This 4-1 vote is a valid approval of the proposal under the RTC Partnership Agreement. We accepted the representation. Assuming that we have no conflicts with confidential information from Dale, we will be able to continue our representation of RTC in the Sands matter. We may be obligated to, if our withdrawal would prejudice the client.

If we do have a conflict with Dale, we will have to withdraw from representing both RTC and Dale unless we obtain waivers from both.

2. Memo discussing actions to take now

You have asked for this memo identifying what actions to take, and what actions we should consider taking, given Dale's allegations of conflict.

Actions we must undertake

Search for confidential information

We must determine whether we do hold confidential information (about Dale that could be used against him in this matter. He is a former client of ours, and so we owe him a continuing duty of confidentiality; we cannot determine whether we have a conflict until we know we have confidential information of his.

Respond to Dale

We must respond to Dale's accusations and determine whether we will disqualify ourselves or continue the RTC representation. If we know that a client is represented by counsel, we must go through that counsel or obtain consent of counsel, even if the client initiated contact with us directly, according to IEO 96-127. Dale is represented by counsel with regard to RTC's Sands vote. It is unclear whether Mike Flynn represents Dale as to the disqualification matter. The safest course is to contact Flynn to see whether he would object to us speaking to Dale directly regarding disqualification. If yes, then we go through him. If he doesn't object (or states that he does not represent Dale on the disqualification), then we may contact Dale directly.

If we find confidential information in our files, we will have to disqualify ourselves from RTC representation in the Sands matter unless we receive a waiver. If we do not find confidential information, we can decide to continue to represent RTC, or could withdraw to simply prevent the appearance of a conflict. These are our options; obviously you and the partners will need to discuss the best course of action, given the various business considerations the firm has.

Notify RTC

We must notify RTC as to Dale's accusations and our (at least preliminary) response to them. RTC must determine whether they wish to continue to have us represent them in this negotiation, or whether it would be in their best interests to have someone else represent them. RTC may wish to settle this matter with Dale amicably, or it may wish to fight him with counsel who doesn't have a long-term relationship with Dale. We must, at the very least, keep RTC notified of what is happening and let them know that they have the right to obtain other counsel if they so choose.

Actions to consider undertaking

Seeking a waiver

Given his telephone message to you on July 12, Dale appears to be willing to work with us here. He might be willing to grant us a waiver for any potential confidentiality breaches. We would have to, according to the Rules of Professional Conduct, give Dale written disclosure of the circumstances and the actual and reasonably foreseeable adverse consequences to him of consenting; he could waive the conflict only by giving us written consent after the disclosure. Since the likelihood of a real breach is low, he may be willing to grant the waiver to allow us to continue representing RTC.

On the other hand, Dale seems to be seeking this disqualification more from a hurt sense of loyalty than from a concern that confidential information may be used. He may also not want us on the job because of the good results we have gotten in the past. He may simply deny the request for a waiver which would require us, if we want to continue representation of RTC, to go to court.

Put an ethical wall in place

If Dale's actual concern is the disclosure of confidential information, we may be able to assuage his concerns (and obtain the needed waiver) by screening you and any other attorneys who worked on Dale's prior deals from the Sands deal. This, though, would likely anger RTC and cause them to drop us as their counsel; after all, you are the reason they chose the firm to represent them. Without you, they may not want to use the firm. But it is a possibility if we want to keep good relations with Dale yet still work with RTC.

Take the matter to court

If we want to keep RTC as a client, and Dale is unwilling to grant a waiver, we will have to go to court to allow us to continue to represent RTC. If Dale is serious about taking us off the matter, he will bring an action to have us disqualified (as well as refer the matter to the state bar). We will have to be prepared to fight Dale in court over our ability to represent RTC, which would likely destroy our relationship with Dale. If RTC seems to be a better long-term client than Dale, this may well be worth the effort. But RTC may also dissolve over this squabble with Dale.

Drop RTC as a client

We may decide that it is best to maintain a good relationship with Dale. He is a prominent local real estate purchaser, and may bring in a lot more business to the firm in the future than RTC will. For instance, we have already worked with two of his partnerships, as well as him directly. If he persists in having us drop RTC, and we feel that Dale will likely be better for the firm in the future, we could drop RTC as a client, so long as it will not prejudice them. (Given that the negotiations have only recently started, there would not seem to be this kind of prejudice.)

Make elicit who the client is in the future

This claim of conflict by Dale appears to be based, at least partially, on an erroneous assumption as to who our client was when we represented TRET and RTC. In order to minimize the possibility of this type of occurrence in the future, we may want to make it clear to all of the partners in partnerships we represent when we do these negotiations. Certainly, nothing bad could come from implementing this policy, and we may be able to prevent future incidents such as this from occurring.

ANSWER B TO PT-B

Memorandum Number 1:
Analysis of Representations of RTC, M. Dale.

TO: P. Goldman and the DLG&G Claims Counsel

CONFIDENTIAL: ATTORNEY-CLIENT PRIVILEGE

MAIN ISSUE: Is DLG&G in a conflict of interest if it continues to represent RTC?

Answering this question requires answers to the following questions:

(1) Is RTC a present client of DLG&G? (Obviously it is - no reason to discuss this extensively.)

(2) Is M. Dale a present client of DLG&G?

2A - Did DLG&G's former representation of M. Dale ever terminate?

2B - Is M. Dale a present client of DLG&G solely by reason of his partnership status in RTC alone?

2C - Does M. Dale's involvement (or not) in the Mall deal and the Lodge deal change the analysis?

(3) Did DLG&G obtain confidential information in its representation of M: Dale individually that would allow him to disqualify us from representing RTC?

General rules on conflicts -

We are in a conflict where we represent one present client in a matter where that client is directly adverse to another client of the firm. CRPC 3-310(c)(2) and (3). We are in a conflict where we represent a client against the interest of a former client and we have obtained confidential information material to the current representation. CRPC 3-310(D).

Discussion

I. RTC is a client. We have been retained to represent RTC in connection with its purchase of the Sands. Our representation is limited to transactional acquisition matters, and we do not serve as its general counsel.

II. M. Dale is not a present client of the firm (although he will say he is).

A. It appears that the last work the firm did for Mr. Dale individually was eight

years ago; since then all our work has been for TRET and the RTC partnership. I don't find in the file a conclusion of representation letter, and Mr. Dale's role in obtaining the RTC work for the firm could be argued as in some way enlarging the firm's role without necessarily severing the attorney-client relationship with Dale. The close cooperation in the TRET deal is also troubling; if the client on the Lodge deal had been RTC, not TRET, this question might be much closer. That's because our conduct, analyzed under the factors in Citizens would be much more like representing both Dale as an individual partner and the partnership. Nevertheless, eight years is a long time, and Dale has obviously been working with other lawyers personally in the interim.

The Diplomat deal was our first (and only) previous deal with RTC. Dale played no individual role in the work other than in bringing the work to us. Indeed, no individual RTC partner is shown as having worked closely with us on that one. So I conclude that our representation of M. Dale as an individual ended with the Mall deal, and that we might have represented him as an individual partner of TRET based on his role in the negotiations. (Actually it's more like he worked for us on that one, given his role in the negotiations.) But there has been no individual representation of Dale since 1992.

I also note that the nature of transactional work is that it's sporadic. There is not the day-to-day give and take of general representation. It is as though we take on the representation anew each time there's a deal. Moreover, information about the last deal is essentially irrelevant to the next one, either because they are so different or because the information is dated. This also undercuts any argument of continuous representation.

B. Dale is not a "client" of DLG&G by reason of our representation of RTC in and of itself.

The Citizens case held specifically that representation of a general partnership does not require disqualification every time the firm finds another client is adverse to one of the partners. There would have to be something more about the relationship (or the representation itself) which would lead to the implication of an attorney-client relationship with Dale.

C. Under Citizens, the firm does not represent Dale as an individual partner.

RTC (the partnership) is the client. CRRC3-600(A). In the Citizens opinion, the court enumerated factors which would support or undercut a finding of an attorney-client relationship. It is helpful to go through them as applicable to our facts.

1. Size and type of partnership.

Unspecified, but RTC is large enough to have a management committee. It is primarily an investment vehicle, and there is little management involvement by most individual partners. This is a good factor; the fact that Dale is on the management committee is less favorable.

2. Nature and scope of engagement .

Our limited engagement- negotiating with current Sands owners for an acquisition - is a favorable factor, in that the scope of engagement is limited.

3. Kind and extent of contacts with the individual partner.

On this deal (and the last), contacts have been limited - in fact, the only substantive contact has been Dale's communications about our alleged conflict.

4. Access to information about the partners' individual interests.

I don't see evidence that we know anything more than what appears in the minutes as to Dale's current interests. This is good in that it eliminates a claim that we have material confidential information.

5. Whether we affirmatively assumed a duty to represent Dale.

To my knowledge, we have not.

6. Whether Dale was separately represented by other counsel when the partnership was formed - (we didn't represent him on that; I'm not sure if he was represented separately) or in connection with its affairs (we have not done so; again he may have separate counsel in other matters, but we know he's retained the Dobson firm in connection with the Sands deal). This factor favors no individual representation.

7. Whether the attorney had represented the partner before undertaking to represent the partnership.

This is the only negative factor, but its weight is diminished by passage of eight years (see above).

Based on the Citizens factors, I do not believe the totality of the circumstances implies that DLG&G has impliedly agreed not to accept representations adverse to M. Dale's interests. While M. Dale may indeed think we have, based on his role in getting this work and his (ongoing) personal relationship with you, I do not believe a reasonable person in RTC's position (the client) would feel that way.

Incidentally, the Woods case is factually quite distinguishable, in that the "family" corporate lawyer there had been retained to sue the wife. We have not been retained to sue Dale; we have been asked to negotiate the sale of property to RTC that Dale also happens to be interested in..

III. We do not have confidential information from or about Dale that is material to the Sands deal.

From your memo, it appears we picked up on some of Dale's negotiating techniques (good guy/bad guy - reading body language). While Dale may be a master negotiator, he is not the only one, and these techniques can be acquired through numerous continuing legal education courses and through experience. This is not the sort of information that the rules of professional conduct were meant to protect. We do not have specific information from Dale that is (a) confidential, and (b) pertinent to the Sands deal. (Obviously, this needs to be investigated more fully; see Memo #2.)

I therefore conclude that Dale's status as a former client is not sufficient to disqualify us..

Conclusion : DLG&G is not presently in a conflict situation.

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Memorandum Number 2:
Recommended Immediate Actions and Possible Additional Actions.

CONFIDENTIAL: Subject to Attorney-Client Privilege

TO: P. Goldman and to DLG&G Outside Claims Counsel

1. You asked for what actions we must now take as a result of Dale's allegation of conflict. I have a few recommendations.

A. Hire outside counsel. We need good independent advice. While I believe the analysis I have done in Memo #1 is sound, we should get a second opinion.

You note that I have addressed both of these memos to outside claims counsel. That is to preserve the privilege as it pertains to these discussions.

I recognize that Mr. Dale is a personal friend, but when a former client sends a letter it's time to start thinking like a litigant, not just like a lawyer. And a litigant needs to have his own lawyer.

B. Do not contact Dale personally

Dale is represented by counsel. Even though he has contacted you informally, it would be a possible ethical violation. See CRPC 2-100 and IEO 96-127. If you truly believe that talking to Dale personally would help (and, you consult our claims counsel on the subject), then you should contact Dale's lawyer for consent to a personal contact.

C. Communicate clearly what is going on to RTC. We owe our client a clear obligation to fully disclose all development which affect, or could affect, our representation. RTC is entitled to know that Dale has alleged a conflict here, if only to give RTC the opportunity to seek counsel that is not subject to Dale's charge.

In the letter which should convey this information you should also let RTC know that you have and have had in the past a personal relationship with Dale as a person who may be affected by this engagement. That disclosure is, I believe, mandated by CRPC 3-310(B).

Your letter should also clarify that DLG&G regards the organization RTC as its client, so as to comply with CRPC 3-600(D). .

D. Notify our carrier.

We should view Mr. Dale's letter as at least a potential claim and put our insurance carrier(s) on notice of it.

E. Continue to act diligently on the Sands Deal.

Even if the client decides to shift lawyers eventually, we must be sure we are not distracted into doing less than we should to zealously represent our client (RTC) on this matter until or unless relieved of duty.

2. Possible additional actions.

Here are some longer-term strategic possibilities for your consideration:

A. Respond (via counsel) in writing to Mr. Dale's letter.

Politely inform Mr. Dale that we disagree with his conclusion that we are in a conflict and intend to continue to represent RTC on the Sands deal until or unless otherwise directed by RTC. Throw in a lot of regrets about this having come up and put in your personal hope, that regardless of how this deal goes, you retain him in high personal regard, etc., etc.

B. Deal with a possible violation by Dale of the RTC Partnership Agreement.

By being part of a competing bid for the Sands property, Dale may have violated Paragraph 3.c. of the RTC Partnership Agreement. If it turns out that Dale has more than $1,000,000 in AAA, then Dale was supposed to have offered this opportunity to RTC first. I would anticipated that RTC will want to move against AAA and Dale, especially if AAA lands the deal instead.

We need to be prepared if RTC asks us to help on this. This put us up against Dale directly as an adverse party, and heightens the scrutiny on the conflict situation. It also may trigger some analysis apart from conflicts as to what course is in DLG&G's best interest.

In any event, we need to be sure to go over this with claim's counsel.

C. Long-Term Probabilities -

I see the clear likelihood that Dale and RTC will part ways in the relatively near future. Many people may lose money in the process. People who lose money look for deep pockets - like law firms with insurance companies - to get that money back. Thus far, we can credibly say we have stayed out of the thick of things, but it will get stickier and stickier as we go forward.

Therefore, I put forward the possibility of voluntarily withdrawing from further representation of RTC or Dale, after, of course, ensuring that RTC obtains competent replacement counsel which is up to speed on the relevant issues.

I emphasize that I raise the possibility not because I believe there is an actual conflict. The question comes down to the best interests of the firm -will we be able to do our best work if we face the prospect of continuing to be caught in the crossfire? Will thinking like a litigant so negatively impact our judgment as to impair our performance?

Again, a topic to discuss with claims counsel.

D. Defensive Precautions

Dale may sue us. We should institute some precautions now to effectuate our defense. I'm sure this is what our claims counsel will tell us to do:

1. Collect our files on all earlier Dale/TRETIRTC representations for independent review. We need to be sure that no confidential information will be in there waiting to bite us later.

2. Make sure that no written communication on this subject occurs that is not addressed to our outside claims counsel. If DLG&G is going to be using me in that capacity, make sure I am designated as such by our Management Committee. This is necessary to preserve our privileges.

3. Suppress the urge to send your partners written explanations of the situation. They are not privileged, and would be discoverable.

E. Written Consents.

If we elect to continue to represent RTC, and if, after disclosure, they elect to continue our engagement, we may want to obtain a precautionary consent.

The downside is, when you ask for a consent, people will take it as an admission that you need it - even if you say you don't. Also, if you get a consent from RTC, the question is whether you also need one from Dale, RPC 3-310(C) requires consents from each client, after all. And asking for one from Dale further strengthens the perception that we need one - that there must be a real conflict. Moreover, Dale will refuse, and we'll be in a situation where we asked him to consent and we didn't get one.

I believe that the solution is not a "consent" by RTC but a written acknowledgment of having received the letter I discussed above disclosing the whole Dale situation and acknowledging RTC's agreement that no conflict exists and no consent is needed.