California Bar Examination

Performance Tests And Selected Answers

July 2010

THE STATE BAR OF CALIFORNIA
OFICE OF ADMISSIONS
180 HOWARD STREET • SAN FRANCISCO CALIFORNIA 94105 1639 • (415) 538 - 2303
1149 SOUTH HILL STREET • LOS ANGELES CALIFORNIA 90015-2299 • (213) 765 – 1500

PERFORMANCE TESTS AND SELECTED ANSWERS

JULY 2010 CALIFORNIA BAR EXAMINATION

This publication contains two performance test from the July 2010 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 answers were produced 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 the authors.

Contents

JULY 2010

California
Bar
Examination

Performance Test A

INSTRUCTIONS AND FILE

VASQUEZ v. SPEAKEASY, INC. AND NORTHERN CENTER OF WORSHIP

FILE

VASQUEZ v. SPEAKEASY, INC. AND NORTHERN CENTER OF WORSHIP

INSTRUCTIONS

1. You will have three hours to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional State of Columbia, one of the United States.
3. You will have two sets of materials with which to work: a File and a Library.
4. The File contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
5. The Library contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page citations.
6. You should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.
7. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to reading and organizing before you begin preparing your response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

Law Offices of Anatoly Krotov
645 Elvis Way
San Claritan, Columbia

MEMORANDUM

To: Applicant

From: Anatoly Krotov, Senior Partner

Date: July 27, 2010

Re: **Vasquez v. SpeakEasy, Inc. and Northern Center of Worship**

Our clients, Greg and Mary Vasquez, filed a complaint seeking to enjoin SpeakEasy, Inc., a cellular telephone company, from erecting a 50-foot cellular tower on property owned by Northern Center of Worship adjacent to the Vasquez' property. We have agreed to submit resolution of this matter to the judge based on the Stipulated Statement of Agreed Facts. Please draft the brief supporting our position. You need not include an additional statement of facts at the beginning of your brief.

Law Offices of Anatoly Krotov
645 Elvis Way
San Claritan, Columbia

MEMORANDUM

To: All Attorneys

From: Executive Committee

Re: **Persuasive Briefs and Memoranda**

In drafting persuasive briefs, the firm conforms to the following guidelines:

Except when there is already an agreed or stipulated identification of the facts, the brief should begin with a short statement of facts, using only those facts supported by the record. Include only those facts you need for your persuasive argument.

The firm follows the practice of writing carefully crafted subject headings which illustrate the arguments they cover. The argument heading should succinctly summarize the reasons the tribunal should take the position you are advocating. A heading should be a specific application of a rule of law to the facts of the case and not a bare legal or factual conclusion or a statement of an abstract principle. For example, **IMPROPER**: COLUMBIA HAS PERSONAL JURISDICTION; **PROPER**: DEFENDANT'S RADIO BROADCASTS INTO COLUMBIA CONSTITUTE MINIMUM CONTACTS SUFFICIENT TO ESTABLISH PERSONAL JURISDICTION. The analysis following each heading should flow logically from each heading.

The body of each argument should persuasively argue how the facts and law support our client's position. Contrary arguments and authority must be acknowledged and responded to rather than ignored.

In writing a first draft, the attorney should not prepare a table of contents, a table of cases, a summary of argument, or an index. These will be prepared, where required, after the draft is approved.

Anatoly Krotov, Esq.
Law Offices of Anatoly Krotov
645 Elvis Way
San Claritan, Columbia
Attorney for Plaintiff

Paul McDonald, Esq.
McDonald, Carpenter & Dean
98 Rebecca Lane
Francisco, Columbia
Attorneys for Defendants

SUPERIOR COURT OF THE STATE OF COLUMBIA
IN AND FOR THE COUNTY OF MICO

Greg Vasquez and Mary Vasquez,
Plaintiffs,
v.

Civil Action No. 03281955 DEB

Northern Center for Worship,
a Columbia Nonprofit Corporation,
and
SpeakEasy, Inc.,
a Columbia Corporation,
Defendants
_____ /

STATEMENT OF AGREED FACTS AND SUBMISSION OF THE CASE

INTRODUCTION

The Complaint filed herein by Plaintiffs on June 27, 2010 seeks a mandatory permanent injunction requiring Defendants to dismantle and demolish a 50-foot bell tower housing a cellular telephone transmission facility constructed on the property of Defendant Northern Center for Worship by Defendant Speakeasy, Inc. ("SpeakEasy"). The Complaint alleges that the tower violates the Covenants, Conditions and Restrictions ("CC&R's") limiting and restricting uses of the property within the Pinnacle Canyon Estates Subdivision. Pursuant to the Order of this Court, the parties have entered into this Statement of Agreed Facts and Submission of the Case, and shall each submit supporting briefs, after receipt of which this Court shall issue its decree.

JOINT STIPULATION OF FACTS

Plaintiffs and Defendants agree that:

1. Pinnacle Canyon Estates (the "subdivision") is a residential subdivision of 42 lots located in the City of San Claritan, Mico County, Columbia.

2. Plaintiffs Greg and Mary Vasquez own and reside in a detached one story single-family dwelling on Lot Two of Pinnacle Canyon Estates.

3. SpeakEasy is a Columbia corporation conducting a cellular telephone business in Mico County.

4. Northern Center for Worship (the "Church") is a Columbia nonprofit corporation and is conducting business in Mico County.

5. Covenants, Conditions and Restrictions, which limit and restrict uses of the property in the subdivision, are the agreement that is the subject of this litigation. These CC&R's were executed on December 9, 1960. Selected provisions of the CC&R's are attached as Exhibit "A."

6. The Church owns and occupies Lots Seven, Eight and Nine of the subdivision.

7. The Vasquez' property, Lot Two of the subdivision, shares a boundary line with the Church's Lot Seven.

8. On July 29, 2009, the Church entered into agreement with SpeakEasy for construction of a 50-foot bell tower on Lot Seven that would house a wireless telephone

facility. The terms of the agreement were that SpeakEasy would pay all costs for construction of the bell tower and a monthly rental of $1,000 for use of the property.

9. On September 27, 2009, a group of neighbors in the subdivision, including the Vasquezes, voiced objections to the construction of the tower. The Church convened a meeting to discuss the matter with the neighbors and advised each objecting neighbor that SpeakEasy had already expended $106,000 on the tower, and that the Church would be obligated to reimburse SpeakEasy for at least that amount were the Church to terminate its agreement with SpeakEasy for the construction of the bell tower. The Church told the neighbors that it had no real choice but to proceed with its agreement and so advised the complaining neighbors.

10. On January 27, 2010, the Vasquezes notified the Church and SpeakEasy in writing by letter that construction of the bell tower was in violation of the CC&R's. From the time of the meeting until the lawsuit was filed, there were no objections or complaints to the tower other than the letter from the Vasquezes.

11. On February 13, 2010, Defendant SpeakEasy completed construction of the bell tower housing the wireless telephone facility.

12. Prior to construction of the tower in Pinnacle Canyon Estates that is the subject of this lawsuit, the following potential violations of the subdivision's CC&R's existed:

(a) a two-story barn converted into living quarters;

(b) a two-story house addition;

(c) two amateur radio towers;

(d) a satellite dish on the peak of a house;

(e) a flagpole;

(f) a previously existing 40-foot bell tower at the Church;

(g) a steeple at the Church with a cross on the top, which extends nearly as high as the disputed tower;

(h) a flagpole at the Church;

(i) a large sign for the Church at the front entrance; and

(j) several large, wooden telephone poles and electric lines located throughout

the subdivision and between Plaintiffs' home and the Church.

13. Mr. and Mrs. Vasquez purchased their home on Lot Two in 2001 for $114,000. The highest recent sale of a comparable residence in the subdivision was for $360,000. The parties retained separate experts to determine the impact of the disputed tower on the value of Plaintiffs' property. The experts could not agree. However, they put the range of diminution of value between 0% and 5%.

14. On the date Plaintiffs filed their complaint and application for injunction, SpeakEasy had spent the following in resources concerning planning and construction of the bell tower: $106,000 for planning, architecture, and pre-construction permits and $148,000 for all aspects of construction, for a total construction cost of $254,000.

15. Demolition and removal of the tower from its present location would cost $50,000.

16. Thus the total loss to SpeakEasy should it be required to remove the tower would be $304,000, which is calculated as the $254,000 construction cost plus the $50,000 cost for demolition and removal.

17. A church, the present existing sign, and cross on the steeple have occupied Lot Nine for 25 years.

18. When Lot Nine was acquired by the Church in 1995, the lot was covered with weeds, the driveways were rough and dusty, and in general the property was in bad repair.

19. Over the years the Church has steadily improved their properties, expending more than $4 million. By the time the Plaintiffs acquired their property in the subdivision, the Church had already made substantial additions and improvements to Lots Eight and Nine.

20. In 2005 the Church acquired Lot Seven, and shortly thereafter designed and built the sanctuary with the same stucco walls and tile roof and covered porches as the other buildings, so as to blend in with the other buildings on the Church grounds. The Vasquez' lot had no rear fence, so the Church arranged for erection of a block wall at its own expense. Mr. and Mrs. Vasquez never complained about any of these improvements.

21. In the 50 years since the CC&R's were recorded, no action has ever been filed to enforce any of the provisions thereof.

22. No neighbor or lot owner in the subdivision has ever attempted to stop the operation or expansion of the Church or any sign, bell tower, cross or other church-related structure or improvement on Lots Seven, Eight, or Nine.

23. Plaintiffs allege that Defendants' proposed structure has disturbed, and will continue to disturb, the quiet enjoyment of Plaintiffs' property.

SUBMISSION OF THE CASE

The parties agree to submit for determination by this Court the following issues:

1. Do the CC&R's prohibit the construction of the disputed tower?

2. Has the CC&Rs' prohibition of the disputed tower, if found to exist, been waived or abandoned?

3. Are the Plaintiffs barred from obtaining the injunctive relief sought due to laches?

4. Does the balance of hardships dictate that the Plaintiffs' sought remedy of removal of the tower be denied?

Respectfully submitted,

Dated: July 27, 2010

Law Offices of Anatoly Krotov

by: *Anatoly Katov*

Anatoly Krotov, Esq.
Attorney for Plaintiff

McDonald, Carpenter & Dean

by: *Paul McDonald*

Paul McDonald, Esq.
Attorneys for Defendants

EXHIBIT “A”

Selected Provisions of the Declaration of Covenants, Conditions and Restrictions for Pinnacle Canyon Estates

* * *

General Provisions:

1. All of the lots in Pinnacle Canyon Estates shall be known and described as residential lots.

2. All structures on the lots shall be of new construction and no building shall be moved from another location onto any lot. At no time shall house trailers be allowed on the lots.

3. No garage or other building shall be erected on any of the lots until a dwelling house shall have been erected.

4. No structure shall be erected, altered, placed or permitted to remain on any of the lots other than one detached single-family dwelling not to exceed one story in height and a private garage not to exceed one story in height for not more than three cars, and a guest or servant quarters for the sole use of actual non-paying guests or actual servants of the occupants of the main residential building.

* * *

7. No fence or solid wall, other than the wall of the building, shall be more than 6 feet in height, nor any hedge more than 3 feet in height, or closer than 20 feet to front lot line.

* * *

15. No structure of any kind shall be erected, permitted or maintained on the easements for utilities as shown on the plat of Pinnacle Canyon Estates.

* * *

Enforcement: Upon the breach of any of the covenants or restrictions herein, anyone owning land in Pinnacle Canyon Estates may bring a proper action in the proper court to enjoin or restrain the violation, or to collect damages or other dues on account thereof.

Anti-waiver Provision: Failure to enforce any of the restrictions, rights, reservations, limitations and covenants contained herein shall not in any event be construed or held to be a waiver thereof or consent to any further or succeeding breach or violation thereof.

Choice Residential District: All deeds shall be given and accepted upon the express understanding that Pinnacle Canyon Estates has been carefully planned as a Choice Residential District exclusively, and to assure lot owners in Pinnacle Canyon Estates that under no pretext will there be an abandonment of the original plan to preserve Pinnacle Canyon Estates as a Choice Residential District.

* * *

JULY 2010

California
Bar
Examination

Performance Test A

LIBRARY

VASQUEZ v. SPEAKEASY, INC. AND NORTHERN CENTER OF WORSHIP

LIBRARY

Horton v. Mitchell

Columbia Supreme Court (2004)

The facts in this matter are largely undisputed. In June 2003, Michael and Gayle Horton (the “Hortons”) acquired Lot 1 in Erin Shannon Estates, a deed restricted nine lot subdivision in Mateo, Columbia, and constructed a home on the lot. Shortly after the Hortons acquired Lot 1, Zoe Mitchell (“Mitchell”), who owned lot 2, advised them that the Erin Shannon Estates community intended to seek construction of a roadway across Lot 2 that would connect to a main road. The Hortons objected to the plan, mainly because they would be backed into a corner and their home would be surrounded by asphalt. Nevertheless, over the Hortons' objections, Erin Shannon Estates property owners obtained approval and assistance for completion of the public roadway project. The Hortons then filed suit against Mitchell seeking a permanent injunction preventing the construction of the roadway and the dedication of Lot 2 to the City of Mateo for purposes of constructing the roadway. The Hortons based their complaint on Erin Shannon Estates' recorded Covenants, Conditions and Restrictions (“CC&R’s”) that forbid the construction of "any structure" on the lots except for one single-family dwelling. After a bench trial, the trial court summarily denied the Hortons' request for injunctive relief and dismissed their complaint, necessarily concluding that despite the language contained in the CC&R’s, Erin Shannon Estates could construct a roadway over Lot 2. The Hortons timely appealed.

DISCUSSION

Restrictive covenants such as the CC&R’s for this subdivision constitute a contract between the property owners as a whole and each individual property owner, pursuant to which each owner agrees to refrain from using his or her property in a particular manner. One purpose of restrictive covenants is to maintain or enhance the value of land by controlling the nature and use of lands subject to a covenant's provisions. Columbia law permits restrictive covenants but finds them disfavored; they are justified only to the extent they are unambiguous and enforcement is not adverse to public

policy. When courts are called upon to interpret restrictive covenants, they are to be strictly construed, and any ambiguities or doubts as to their effect should be resolved in favor of the free use and enjoyment of the property and against restrictions.

Because CC&R's are a form of express contract, we apply the same rules of construction. The covenanting parties' intent must be determined from the specific language used. Specific words and phrases cannot be read exclusive of other contractual provisions. The parties' intentions must be determined from the contract read in its entirety. We attempt to construe contractual provisions so as to harmonize the agreement and so as not to render any terms ineffective or meaningless.

The Hortons claim that the trial court abused its discretion because the CC&R's clearly preclude the construction of a roadway over Lot 2. The interpretation of the CC&R's presents a question of law. The Hortons took possession of Lot 1 with both actual and constructive knowledge of the CC&R's, and are therefore entitled to enforce the contractual obligations contained therein.

The provisions of the CC&R's on which the Hortons rely state:

> 4. No structure shall be erected, altered, placed or permitted to remain on any of the lots other than one detached single-family dwelling not to exceed two stories in height, or tri-level single-family dwelling and a private garage not to exceed one story in height for not more than three cars.

The controlling rule of contract interpretation requires that the ordinary meaning of language be given to words where circumstances do not show a different meaning is applicable. The CC&R's are clear and unambiguous. They state that all of the lots in Erin Shannon Estates are single-family residential lots and that no structure except for a single-family home shall be erected on or be permitted to remain on any of the lots. The relevant inquiry is whether the proposed roadway is a "structure."

We conclude that the roadway is a structure within the ordinary meaning of the word

and within the meaning of the CC&R's. Our review of the CC&R's does not evidence an intent to limit the term "structure" to anything other than its ordinary meaning. For example, paragraph 7 of the CC&R's states that "[a]ll structures of the Lots shall be of new construction and no building shall be moved from any other location onto any of the lots." Therefore, buildings are not the only structures that are anticipated on the lots. For example, driveways, fences, and gates are also contemplated. The CC&R's specifically provide for other structures such as attached garages, dwelling houses, open porches, pergolas, storage rooms, and basements. Moreover, paragraph 8 of the CC&R's indicates that "structure" was meant to be given its ordinary meaning by stating that "[n]o structure of any kind or nature shall be erected on the easements for public utilities shown on the plat of ERIN SHANNON ESTATES." Finally, paragraph 13 of the CC&R's states that "[n]o structure shall be commenced or erected on any of the lots" unless approved by the architectural committee, "[p]rovided ... that the building shall be in harmony with existing buildings and structures."

The dictionary defines a "structure" as "[s]omething constructed." *The American Legacy Dictionary of the English Language*. 1782 (3d ed., 2002). A roadway is a structure — that is, "something constructed" — within the ordinary meaning of the term and within the meaning of the CC&R's.

Mitchell's argument that such an interpretation would preclude the construction of complementary or auxiliary structures does not convince us otherwise. In construing restrictive covenants, the intention of the parties to the instrument is paramount. The CC&R's provide that all of the lots in the subdivision are intended to be "residential lots," and that the "subdivision has been carefully planned as a Choice Residential District exclusively." Paragraph 4 of the CC&R's gives homeowners in the subdivision the ability to prevent structures on the lots that might compromise the aesthetics and general character of the neighborhood. Applying the provision as we interpret it furthers the goal of maintaining the subdivision as a "Choice Residential District." The fact that the homeowners may choose to allow complementary structures that do not negatively

impact the character of the neighborhood does not defeat the meaning of paragraph 4.

For the foregoing reasons, we reverse the trial court's judgment and remand with directions to grant the relief sought by the Hortons in their complaint.

Blaire v. Evans

Columbia Supreme Court (1999)

Dana and Ryan Blaire (the “Blaires”) and Laura and John Evans (the “Evans”) are residents and lot owners in Occidental, a residential community located in Soper County, Columbia. Covenants, Conditions and Restrictions (“CC&R’s”) were promulgated and adopted for Occidental and were recorded in the Soper County Recorder's Office. The Evans' lot currently contains a detached single-family dwelling, which includes an attached private garage for two cars, and they seek to build an additional detached private garage for two additional cars.

> CC&R No. 2 of the Occidental Restrictive Covenants provides:
>
> No structure shall be erected, altered, placed or permitted to remain on any residential building lot other than one detached single-family dwelling not to exceed two stories in height and a private garage for not more than three cars; carports shall be considered as garages.

The trial court issued an injunction prohibiting the Evans from erecting the additional detached private garage.

Waiver by Acquiescence

The Evans argue that in light of evidence that other property owners in Occidental have spaces for more than three cars, the Blaires have acquiesced in prior restrictive covenant violations of other Occidental landowners, have waived their ability to assert a violation and are therefore barred from challenging the Evans' building of the additional detached two-car garage.

The defense of waiver by acquiescence is raised when the restrictions sought to be enforced are not universally enforced or when there are frequent violations of the restrictions. A review of the relevant case law reveals three factors particularly significant to the analysis: 1) the location of the objecting landowners relative to both the property upon which the nonconforming use is sought to be enjoined and the property

upon which a nonconforming use has been allowed, 2) the similarity of the prior nonconforming use to the nonconforming use sought to be enjoined, and 3) the frequency of prior nonconforming uses.

Acquiescence by the complainant to violations of dissimilar restrictions cannot be a bar to enforcement where the restrictions are essentially different so that abandonment of one would not induce a reasonable person to assume that the other was also abandoned. Likewise, failure to sue for prior breaches by others where the breaches were noninjurious to the complainant cannot be treated as an acquiescence sufficient to bar equitable relief against a more serious and damaging violation. This situation may arise where the prior violations have been in a distant part of the subdivision while the present violation is immediately adjacent to the complainant's land.

In the past, there has been a marked lack of enforcement of the restrictive covenant in question. A significant number of Occidental properties have been permitted to maintain garage space for more than three cars (the trial court record indicates the number to be somewhere between 15 and 26), including several on the same block as the Blaires. Thus the location of the objecting landowner and the frequency of prior nonconforming uses suggests acquiescence. In addition, the evidence is that the violation is identical to the violation the Blaires seek to enjoin. The Evans thus appear to have established sufficient evidence that the Blaires should be held to having acquiesced to the Evans' building of the additional detached two-car garage.

The Non-Waiver Provision — Paragraph Number 27

The Blaires, however, argue that even if these facts indicate acquiescence, under paragraph No. 27 of the CC&R's the Blaires are still entitled to enforce CC&R paragraph No. 2, despite prior violations by other Occidental landowners. CC&R No. 27 of the Occidental restrictive covenants states:

> The failure for any period of time to compel compliance with any covenant, condition or restrictions shall in no event be deemed as a waiver of the

> right to do so thereafter, and shall in no way be construed as a permission to deviate from the covenants, conditions and restrictions.

The Evans are concerned that the enforcement of the non-waiver clause raises the specter of selective enforcement. Nevertheless, unambiguous provisions in restrictive covenants generally should be enforced according to their terms. Enforcement of the non-waiver clause allows prospective purchasers of property to rely on recorded CC&R's. Thus so long as the waiver clause is unambiguous and not adverse to public policy, it can be enforced.

CC&R No. 27 of the Occidental restrictive covenants is an unambiguous non-waiver clause. Indeed, the Evans do not dispute this, and instead argue that its enforcement would be adverse to public policy. They correctly point out that Columbia courts have the power to decline to enforce restrictive covenants. According to the Evans, application of the non-waiver provision would lead to "the entirely selective, random, arbitrary, capricious, and potentially discriminatory enforcement" of the CC&R's and thus would be adverse to public policy. They thus urge us not to enforce CC&R No. 27.

We conclude that the non-waiver provision in the CC&R's is reasonable. There is nothing arbitrary or capricious in homeowners seeking to prevent additional detached garages being erected on a neighboring lot. Without the non-waiver provision, the inaction of a homeowner on one side of the subdivision could result in a waiver of the right of a homeowner on the other side of the subdivision to enforce the CC&R's in regard to an adjacent lot.

Abandonment

The non-waiver provision would be ineffective if a complete abandonment of the entire set of CC&R's has occurred. The test for determining a complete abandonment of deed restrictions — in contrast to waiver of a particular section of restrictions — is whether the restrictions imposed upon the use of lots in this subdivision have been so thoroughly disregarded as to result in such a change in the area as to destroy the effectiveness of

the CC&R's, defeat the purposes for which they were imposed, and consequently amount to an abandonment thereof.

No evidence was presented, however, that Occidental is no longer a "Choice Residential District." The violations described by the Evans have not destroyed the fundamental character of the neighborhood. We conclude, as a matter of law on the record before us, that the non-waiver provision of the CC&R's remains enforceable and the subdivision property owners have not waived or abandoned enforcement of CC&R No. 2 even though they or their predecessors have acquiesced in several prior violations of its provisions.

As such, it was not error to conclude that the Evans are barred from raising the defense of acquiescence by the non-waiver provision.

Affirmed.

Lutz v. Gundersen

Columbia Court of Appeals (2000)

Kent Lutz, an owner of property in Honker Bay Estates (HBE), a subdivision in Madison, Columbia, brought suit against Peter Gundersen, seeking to have Gundersen vacate, abandon and remove his warehouse building in HBE that Lutz claimed was in violation of certain Conditions, Covenants and Restrictions ("CC&R's") for the subdivision. The Superior Court granted a mandatory injunction directing the removal of the building.

The Honker Bay Estates CC&R's provide:

> All the property shall be used for residential property only except that portion fronting on Gessler St. with a depth of 200 ft., which may be used for neighborhood retail business purposes.

Gundersen purchased lot Sixty-One in HBE and within a year commenced construction of a bowling alley and cocktail lounge on the lot. Gundersen stopped the construction after three weeks upon being informed by an attorney that the building was in violation of use and depth restrictions in the CC&R's. Gundersen recommenced construction about six months later, modifying the building to a warehouse he intended to lease, and completed the building at a cost of approximately $200,000.

Fundamental Change to the Neighborhood

Gundersen argues that rapid and radical changes in the character of the neighborhood adjacent to the restricted property preclude the homeowners from enforcing the restrictive covenant. This state follows the general rule that a court will enforce the terms of restrictive covenants unless the changes in the surrounding areas are so fundamental or radical as to defeat or frustrate the original purposes of the restrictions. It is true that across the street from the warehouse were a miniature golf course and a polka dance hall, that one block further east was a large shopping center, and that across Gessler to the north and approximately one block to the west was a large bowling alley and a veterinary hospital. While this appears to constitute substantial

change so as to render the restriction ineffective, in this case the changes from residential to business were not within the restricted area.

Laches

Gundersen also argues that Plaintiff Lutz is precluded from obtaining equitable relief on the ground of laches, due to the fact that Lutz was aware of Gundersen's commercial building construction plans a year before construction started yet did not file his complaint seeking permanent injunction until construction was completed. The trial court rejected his argument.

Courts may provide relief in whole or in part upon a finding of laches. In order to bar a claim on the basis of laches, a court must find more than mere delay in the assertion of the claim. The delay must be unreasonable under the circumstances, including the party's knowledge of his or her right, and it must be shown that any change in the circumstances caused by the delay has resulted in prejudice to the other party sufficient to justify denial of relief.

Here, the CC&R's do not require an enforcing landowner to seek injunctive relief prior to a violation of the CC&R's. Section 18 of the CC&R's authorizes a landowner to seek injunctive relief "in the event of a breach of any of the covenants and restrictions contained herein." It is not clear from the record the point at which a violation of the CC&R's was patently obvious to the Plaintiff Lutz, and, in any event, Plaintiff, to avoid laches, is not required to file a lawsuit as the very first course of action. Gundersen knew or should have known of the restrictive covenant because it appears in the deed, and nothing prevented him from filing a declaratory judgment action seeking a determination of its enforceability. Under such circumstances Gundersen acted at his own peril without first obtaining a resolution of the covenant. We conclude that Plaintiff Lutz is not precluded by laches from seeking injunctive relief.

Balance of Hardships

Gundersen also contends that the granting of injunctive relief results in damage and hardship to him out of all proportion to any benefits to be gained by the homeowners. It is true that in cases of this nature courts are motivated by such matters as comparative value and consider relative hardship by weighing the interest of both sides. But no court will allow an intentional violator of CC&R's to rely upon the contention of relative hardship. It would indeed be inequitable to permit a party who is fully cognizant of building restrictions and the opposition of at least some homeowners to changes in those restrictions to expend large sums of money on the gamble that the restrictions would not be enforced against him and then claim that enforcement of the restrictions works a hardship on him.

That Gundersen is an intentional wrongdoer for all expenditures that took place after he was informed of the deed restriction is clear from the following testimony:

Q: Were you aware that a warehouse was equally prohibited under the CC&R's?

A: I heard that they were.

Q: Knowing you couldn't build a warehouse there, why did you do it?

A: Because I had so much money in it that I couldn't do otherwise, I had to finish it. I had a terrific financial investment in that property and practically everything that I owned was in it. You are going to try to salvage and do something with that, are you not?

Q: So you were trying to make the most of a bad situation then?

A: That's right.

Were we to adopt Gundersen's argument, CC&R's would become difficult to enforce. Any owner of real property governed by CC&R's could claim that he had commenced construction in ignorance of the restriction or under a different interpretation of the restriction. The adjoining property owners would not have had an opportunity to object, but the violator could require a decision on relative hardships. This would erode the uniformity to which all owners of property covered by the CC&R's, including the violating owner, agreed.

Delay by homeowners will, in many instances, prevent injunctive relief to enforce deed restrictions. Our opinion should not be understood as suggesting that the homeowners of a subdivision could force removal of structures that have been uncontested and present for a lengthy period of time. Here, while it is correct that the suit came after construction was complete, it was not an unreasonable delay, in light of the wilful violation of covenants by the defendant.

Therefore, we find no abuse of discretion in the trial court's judgment.

Piedmont Valley Homes Association v. Walter

Columbia Supreme Court (2002)

The rear property line of Dr. Alexander Walter's property in Piedmont Valley abuts a parkland parcel owned by the City of Piedmont Valley. Because no homes can be built on the parkland parcel, Walter has an unobstructed ocean view from the back of his property. Property within Piedmont Valley is subject to Contracts, Covenants and Restrictions ("CC&R's"), and the Piedmont Valley Homes Association ("PVHA") has the authority to enforce these CC&R's. The CC&R's, which require prior written approval from PVHA's design review committee (the "committee") for all construction or alteration, dictate that the required minimum rear yard "setback distance between a structure and the parklands parcel is five feet."

When Walter originally bought his property, there was a wrought iron fence along the rear of his lot which he believed marked the line between his property and the parkland parcel. In 1983, Walter submitted plans, received approval, and completed construction of a deck, a breakfast nook, and other additions to the back of the house, spending about $176,000 on the project. The plans identified Walter's property line consistent with the location of that fence. However, in 1999 a neighboring homeowner complained that Walter was encroaching on city parkland, and a subsequent investigation and survey revealed that the fence had not properly marked Walter's property line. Thus the plans for the project, submitted by Walter's architect and approved by the committee, were erroneous. In fact, the breakfast nook and deck extended several feet onto the City's parkland.

PVHA sought declaratory relief and a permanent injunction against Walter. Walter argued that the parkland setback should not be enforced due to relative hardship.

Balancing the hardships

A court has discretion to balance the hardships and deny a mandatory injunction to

remove a building or structure that has encroached or otherwise violates an enforceable restriction, even in the absence of an affirmative defense such as laches. In exercising its discretion and in weighing the relative hardships to determine whether to grant or deny a mandatory injunction, a court should start with the premise that an owner who violates a restriction is a wrongdoer and that the interests of the plaintiffs have been impaired. Thus, doubtful cases should be resolved in favor of the plaintiff. In order to deny the injunction under a balance of hardships, a court must find certain factors to be present: 1) the Defendant must be innocent — the encroachment must not be the result of Defendant's willful act. In this same connection the court should also weigh Plaintiff's conduct to ascertain if he is in any way responsible for the situation. 2) The Defendant's acts must not cause irreparable harm to the Plaintiff. If the Plaintiff will suffer irreparable injury by the encroachment, the injunction should be granted regardless of the injury to the defendant. 3) The hardship to the Defendant by the granting of the injunction must be greatly disproportionate to the hardship caused to the Plaintiff by the continuance of the encroachment and this fact must clearly appear in the evidence and must be proved by the defendant.

1. Innocent Violation

Equitable discretion should not be used to protect an intentional wrongdoer. The case law both in Columbia and in other jurisdictions supports the conclusion that where a party has actual or constructive notice prior to actually violating a restriction that his structure will violate a restriction, and then completes construction of the structure, the party may not claim the benefit of relative hardships. Although the amount of hardship and the date it is incurred may be relevant if a court reaches the third step of determining the relative levels of hardships, those factors are not relevant to a determination of the intent of the violator.

The trial court concluded that Dr. Walter constructively knew of the restriction by virtue of being a landowner, was responsible for determining the boundary line for his property, and thus was precluded from arguing balance of hardships. The trial court stated:

> Dr. Walter's only excuse is mistake of fact. What is to stop all other property owners whose rear property line abuts City property from extending their homes past the boundary limits with an "I don't know" excuse? It was Dr. Walter's responsibility to confirm the property lines whether through his own efforts or that of his agents. Walter's remedy, if any, is against his architect or contractor.

We disagree, and find that the genuine mistake of fact is sufficient to enable Dr. Walter to argue balance of hardships. Landowners who live in a restricted subdivision receive constructive notice of the CC&R's when they purchase, rendering Dr. Walter aware of the restriction. Nevertheless Dr. Walter was not an intentional violator. Dr. Walter might well be held responsible were this a matter of contractual "mistake." But he is on different footing from the usual "wrongdoer" who is aware that the construction at least arguably violates the CC&R's but constructs anyway, in the hope that no one will notice or do anything about it or that an argument that the CC&R's do not apply or have been waived will succeed. The undisputed evidence demonstrates that Dr. Walter, his architect, and his contractor all honestly believed his construction complied with the CC&R's and was not an encroachment.

2. Irreparable Injury

The trial court found that regardless of whether Dr. Walter's encroachment was wilful, PVHA suffered irreparable injury. At trial, PVHA's counsel stated "We don't like being here but we're here because we have a duty to enforce the CC&R's against everybody. If we can't enforce them against everybody equally, we can't enforce them against anybody. And if we can't enforce our CC&R's, we are irreparably harmed." The trial court agreed, stating:

> This Court finds that PVHA would suffer great and irreparable injury if this Court did not enforce the CC&R's. Property owners purchase property here, in part, because of these very restrictions. To allow Dr. Walter a variance of his structures to the limit line of his property would violate all notions of light, air and space. This would be a harmful precedent,

> causing the harm which the PVHA seeks to prevent: a flood of setback variance requests or violations justified by other previously granted variances. There would be no end to the variances sought and the whole purpose of the minimum setback requirement would be undermined.

We disagree. Despite the balance of hardship, injunctions will issue on behalf of a homeowner whose property is irreparably damaged due to a violation of the CC&R's. Irreparable damage occurs when a CC&R violation interferes with uses, views, or other quiet enjoyment of the property, or undermines property values, in a manner that cannot easily be ascertained and remedied. In those situations, despite the hardship suffered by the encroacher, an injunction is appropriate. On this record, however, there is nothing to support the PVHA's assertions that the parkland setback restrictions are inviolate or that it will be irreparably harmed if Walter's property is allowed to remain within the setback area. It has made allowances for other properties already built within the setback area, and has identified no principled distinction between the variances repeatedly granted and Walter's effective request for one here. Dr. Walter's encroachment does not impair a view, present a lot owner with an unsightly obstruction inconsistent with the neighborhood, or possibly affect the property values of the subdivision in any way. The city has allowed it without objection for 16 years. There is no irreparable injury.

3. Relative Hardship

When balancing hardships, it is important to note that the analysis is not merely a mechanical toting up of the dollar amount of the violator's losses compared to the dollar harms of the landowner(s) seeking to enforce the restriction. Such an "efficiency-style" balance would too often preclude an injunction, as construction and removal costs often are substantially greater than the diminished property value to an individual landowner affected by the violation of a restriction. A balance of hardships analysis appropriately may consider impairment of property values and other harms to the entire subdivision.

At trial, testimony revealed that it would cost $104,570 to remove the encroachments to within five feet of the property line. Combined with the amount spent on the project, the out-of-pocket loss to Dr. Walter would be roughly $280,000. Although he enjoyed the benefit of the 16 years, the removal likely will significantly reduce the value of his property. The disproportionate hardship borne by Dr. Walter is of considerable magnitude, because, as noted above, in this unusual case there is no apparent harm to the subdivision or the City of Piedmont Valley that owns the parkland. Finally the fact that the suit was brought years after the violation, rather than contemporaneous with the construction, is also a factor leaning strongly in the direction of giving relief to the homeowner.

Reversed.

Answer 1 to Performance Test A

Brief in Support of Plaintiffs' Motion Seeking Mandatory Injunctive Relief of the Form of Removal of the Defendant's Cell Tower From Pinnacle's Lot Seven

The Vasquezes took possession of Lot Two of Pinnacle Canyon Estates subdivision in 2001 with actual and constructive notice of the Pinnacle CC&R and are thus entitled to enforce the contractual obligations contained in the CC&R.

1. Defendant's Cellular Tower is a Prohibited Structure According to Ordinary and Plain Meaning and Provision 4 of the Pinnacle Canyon Estates CC&R.

a) Clear and Unambiguous Language in the Pinnacle CC&R Requires the Court to Construe Terms of the CC&R Using Their Ordinary and Plain Meaning.

The Columbia Supreme Court ("CSC") has held that the interpretation of CC&R's is a question of law to be determined by the court. Because CC&R's are express contracts (K's), the covenanting parties' intent is to be determined by the specific language used in the CC&R. Rules of K construction require the ordinary and plain meaning be used where circumstances do not show that a different meaning is applicable.

According to the Provisions of the Declaration of Covenants, Conditions and Restrictions ("CC&R") for Pinnacle Canyon Estates, Provision 4 clearly and unambiguously states that each lot in the Pinnacle Canyon Estates is a residential lot and that no structures, except for single-family dwellings not exceeding one story in height and one private garage not exceeding one story in height, shall be erected or permitted to remain on any of the lots. See Exhibit A, Provision 4. Such language has been held to be clear and unambiguous by the CSC. See Horton v. Mitchell.

Thus, the issue of whether SpeakEasy's cellular tower was prohibited by the Pinnacle CC&R will turn on whether or not the cellular tower is a "structure." See Horton.

b) Defendant's Tower is a Prohibited "Structure" According to the Pinnacle CC&R and the Ordinary and Plain Meaning of the Term.

The Pinnacle CC&R does not contemplate only buildings as structures, as can be seen by the CC&R's provisions for fences, solid walls, and hedges (see Provision 7). In addition, Provision 15 provides that "no structures of any kind shall be erected, permitted or maintained on the easements for utilities . . . ." Had the CC&R meant to include only buildings within its meaning of structures, it would not have qualified that provision with the language "no structures of any kind," nor would the CC&R have specifically mentioned or provided for fences, solid walls, hedges, private garages, dwelling houses, servant and guest quarters, etc. The CSC has held that similar language indicated that the word "structure" used in a CC&R contemplated for more than just "buildings." See Horton.

As the Court in Horton noted, once it becomes clear that the word "structure" is not used with a specific, different meaning in mind, the ordinary and plain meaning of the word should be applied as per the usual rules of K construction. See Horton. The Horton Court took judicial notice that the word "structure" is defined as "something constructed" by the American Legacy Dictionary of the English Language (3d ed. 2002). Thus, SpeakEasy's cellular tower is a "structure"--that is, something constructed--within the ordinary dictionary meaning of the term. Thus, applying Provision 4 of the Pinnacle CC&R, SpeakEasy's cellular tower is a structure that does not come within the definition of an allowed single-family, one-story dwelling, single-story garage not to exceed three car capacity, or a "guest or servant quarter" maintained for "sole use of actual non-paying guests or servants of the occupants of the main residential building. "See Exhibit A, Provision 4.

c) Intention of Parties to the CC&R in Planning Pinnacle as a "Choice Residential District" Is Paramount and thus Further Supports Its Prohibition Within the Pinnacle Subdivision.

The CSC has also held that the intention of the parties to an instrument is paramount in construing restrictive covenants. See Horton. Here, the "Choice Residential District" clause in the Pinnacle Canyon Estates CC&R provides that Pinnacle was "carefully planned as a Choice Residential District exclusively." See Exhibit A. Similarly, the Horton Court held that language in a CC&R providing that the "subdivision [was] carefully planned as a Choice Residential District exclusively" gave homeowners living in that subdivision the right to prevent the construction [and] maintenance of structures that might "compromise aesthetics and general character of the neighborhood" as an exclusive "Choice Residential District."

In conclusion, because of the clear and unambiguous language contained in the Pinnacle CC&R, the clear intent of the parties to the Pinnacle CC&R, and the plain and ordinary meaning of the word "structure" (which encompasses the defendants' cell tower), the Pinnacle CC&R clearly prohibited the construction and maintenance of the cell tower on Lot Seven.

2. The Vasquezes Have Not Waived or Abandoned Their Right to Prohibit Construction or Maintenance of the SpeakEasy Cell Tower.

The Columbia Supreme Court (CSC) defined both the doctrines of waiver by acquiescence and abandonment in Blaire v. Evans (1999). The Blaire court defined waiver by acquiescence as a defense to restrictions included in a restrictive covenant that arises when those restrictions plaintiffs seek to enforce have either: 1) not been universally enforced, or 2) when there have been frequent violations of the restrictions. See Blaire. The CSC uses three factors in determining whether waiver by acquiescence will permit a violator of a restrictive covenant to claim a defense. These three factors include: 1) the location of the objecting landowners relative to both the property upon which the nonconforming use is a sought to be enjoined and the property upon which a nonconforming use has been allowed, 2) the similarity of the prior nonconforming use to the nonconforming use sought to be enjoined, and 3) the frequency of prior nonconforming uses. Id.

a) Under the Blaire Three Factor Test, Plaintiffs Have Not Waived Their Right to Prohibit Construction of the SpeakEasy Cell Tower.

1) Only the Nonconforming Use of SpeakEasy's Cell Tower is Immediately Close Enough in Location to be Injurious to the Vasquezes.

The CSC has held that the relative location of the landowners who seek to enjoin the nonconforming use is important because when the previously allowed nonconforming use was far away from the plaintiff's land, that nonconforming use would be noninjurious to the plaintiff and thus the plaintiff would have no reason to sue--making the absence of a suit to enjoin such nonconforming but noninjurious uses insufficient to constitute acquiescence. See Blaire.

Here, the Vasquezes' property is located on Lot Two, which shares a boundary line with Lot Seven, owned by the church and on which the SpeakEasy Tower has been constructed. In the past, there were ten instances of nonconforming use amount the 42 lots constituting Pinnacle Canyon Estates. See Stipulated Facts Paragraph 12 (a) - (j). While the location of many of the nonconforming uses have not been stipulated, it is undisputed that the church owns Lots Seven, Eight, and Nine, of which Lot Seven is directly adjacent to the Vasquezes' property. Assuming that Lot Eight and Nine, which also belong to the Church, are directly adjacent to Lot Seven, this would put them in some proximity to the Vasquezes' land. The Church's nonconforming uses constitute the existence of a 40-foot bell tower on top of the Church, a steeple on the Church which extends nearly as high as the SpeakEasy tower, a flagpole at the Church, and a large sign for the Church at the front entrance. It is true that the Vasquezes have not objected to any of these other nonconforming uses of the Church's property. However, Lot Seven is the only lot that is directly adjacent to the Vasquezes' property, and thus the construction of the SpeakEasy cell tower is the most immediately and directly adjacent violation of Vasquezes' use of the land. Because it is directly adjacent to the Vasquezes' property, it is thus the most offensive to their use and enjoyment of their property because it most directly blocks the Vasquezes' view and right to light, air, and

scenery.

2) Prior Nonconforming Uses in the Pinnacle Estates Have Rarely, If Ever, Been Similar to Defendants' Nonconforming Cellular Tower.

The CSC has also held that the previous nonconforming uses which were not objected to must have been similar to the current nonconforming use being objected to in order for there to be waiver by acquiescence. See Blaire. This is because acquiescence by plaintiffs to dissimilar restrictions, which may constitute an abandonment of a right to object to the particular usage, would not induce a reasonable person to assume that the right to object to a completely dissimilar restriction was also abandoned. See Blaire.

The prior nonconforming uses within the Pinnacle Estates which the Vasquezes failed to object to are in many ways dissimilar to SpeakEasy's construction and maintenance of the cellular tower. The two story barn converted into living quarters and the two story house addition are different in nature from a cell tower since the two nonconforming uses are still residential in nature, and only exceed the maximum height of one story by a mere story. The flagpole mentioned in Paragraph 12(e) of the Stipulated Facts, as well as the flagpole located on Church grounds, is a staple of many American residential neighborhoods, even if they may be literal violations of Pinnacle's CC&R. Flagpoles exist for the purpose of displaying flags and patriotism, and are not commercial in nature like a cell tower. Nor do flagpoles tend to look anything like cellular towers or tend to be as high as them. In addition, the wooden telephone poles and electrical lines located on the road from the Vasquezes' property to the Church are dissimilar in nature to the SpeakEasy cell tower because electricity and land line telephone poles were already in existence when the Vasquezes moved to the neighborhood and are essential utilities. While cellular phones have become, in many ways, essential in modern life, they do not occupy the same sphere of necessity as electricity or telephone lines do. It may also have been possible for SpeakEasy to have built several relay stations instead of constructing one large tower directly abutting the Vasquezes' property. The satellite dish located on top of the peak of a house is also

dissimilar to the cell tower because it is at the peak of a one story house, thus being much closer to the ground than the cell tower and smaller in size as well.

The two most arguably "similar" nonconforming uses are the 40-foot bell tower and the Church steeple and cross, both of which are similar in height to the SpeakEasy cellular tower. However, while the cellular tower is a commercial use, the Church steeple tower and bell tower are within the character of a residential neighborhood. Schools, churches and hospitals tend to be located in residential neighborhoods and do not destroy the character of such neighborhoods because education, medicine and religion are regarded as essentials to a community. A cellular phone tower, while similar in height to the Church's steeple, cross and bell, is not a neighborhood essential that serves an educational, religious, or medical purpose.

As such, the Vasquezes' non-objections to dissimilar prior nonconforming uses would not induce a reasonable person to believe that they had abandoned their right to object to the SpeakEasy cell tower.

3) While Ten Nonconforming Uses May Constitute a Marked Lack of Enforcement, Dissimilarity of the Nonconforming Uses to the Cell Tower Should Prevent Finding of Waiver.

In the Pinnacle subdivision, there have been at least ten documented nonconforming prior uses that directly conflict with the CC&R provisions. The CSC in Blaire held that a trial record indicating somewhere between 15 and 26 prior nonconforming uses was sufficient to constitute a "marked lack of enforcement" of the restrictive covenant in question. Thus, the Blaire Court held that there had effectively been a waiver of the restrictions in the CC&R. Here, the ten nonconforming uses may constitute a "marked lack of enforcement" similar to that in Blaire. However, the Blaire Court stressed that the nonconforming use the Blaire [Court] sought to enjoin was an exactly identical violation that they had previously failed to object to. Here, the Vasquezes have never had the opportunity to object to the construction or maintenance of an unsightly cellular

tower, and thus, even if the ten prior nonconforming uses constitute a marked lack of enforcement, this alone should not be sufficient to find a waiver.

b) The Non-Waiver Provision in the Pinnacle CC&R Should Control Regardless of the Outcome of a Blaire Analysis.

Even if the three factor Blaire test were found in favor of defendants, the non-waiver provision included in the Pinnacle CC&R should control, thus allowing the Vasquezes to challenge the SpeakEasy tower even if they are found to have waived their right to object to similar, close, and frequent nonconforming uses.

In Blaire, the CSC held that as long as a waiver clause in a CC&R is unambiguous and not adverse to public policy, it can and should be enforced. See Blaire.

The Anti-Waiver Provision of the Pinnacle CC&R reads: “Failure to enforce any of the restrictions, rights, reservations, limitations and covenants contained herein shall not in any event be construed or held to be a waiver thereof or consent to any further or succeeding breach or violation thereof.” Similar language in an anti-waiver provision was held by the Blaire Court to have been completely unambiguous. The Court found that were the non-waiver provision held to be unenforceable, homeowners in the subdivision may be unable to enforce their rights if homeowners on the opposite side of the subdivision fail to act.

c) There Was No Abandonment of the CC&R as a Whole to Justify Nonenforcement of the Non-Waiver Provision of the Pinnacle CC&R.

The Blaire Court also held that a non-waiver provision would be ineffective if there were a complete abandonment of the entire set of CC&R. The test is whether the CC&R has been so thoroughly disregarded as to have resulted in such a change to the area that the effectiveness of the CC&R was completely destroyed, defeating the purpose for which they are imposed. See Blaire. Here, there has been no evidence presented in

the Stipulated Facts that Pinnacle is no longer a "Choice Residential District." Based on a similar absence of evidence, the Blaire Court held that abandonment of the CC&R had not occurred, and that the plaintiffs were entitled to enforce the non-waiver provision. Similar[ly], here the Vasquezes should be allowed to rely on the non-waiver provision.

d) The Fundamental Character of the Neighborhood Has Not Been Altered So as to Defeat Purpose of Original CC&R.

In Lutz, the Columbia Court of Appeals (CCA) held that where the fundamental character of a neighborhood has been so changed as to defeat or frustrate the purpose of the original CC&R, the original CC&R should be disregarded. Again, as shown above, there are no facts in the Stipulated Facts tending to prove that the Pinnacle Estates have been so changed in their fundamental nature that it is no longer a strictly Choice Residential District. The only evidence of nonconforming uses are based on amateur activities, residential activities, or church activities. No strictly commercial activity has taken place in the neighborhood aside from the SpeakEasy cell tower, and thus the original purpose of the Pinnacle CC&R has not been frustrated.

Because the Vasquezes have not waived their right to object to the defendants' construction by acquiescence according to the 3-factor Blaire test, nor is the non-waiver provision in the Pinnacle CC&R unenforceable either due to abandonment of the CC&R or a fundamental change in the character of the neighborhood, the Vasquezes have not waived or abandoned their right to seek injunctive relief against SpeakEasy or the Church.

3. The Vasquezes Are Not Barred from Relief Due to the Doctrine of Laches.

The CCA has held that in order to prevent plaintiffs from enforcing a mandatory injunction under the doctrine of laches, plaintiffs must have delayed bringing the action to the point where there is a substantial prejudice to the other party sufficient to deny

relief in equity. See Lutz. The Lutz court held that "mere delay of the assertion of the claim" was insufficient to constitute a laches defense. The Lutz court held that an enforcing landowner is not required to seek injunctive relief prior to a violation of the CC&R. In fact, the Lutz court held that a plaintiff need not pursue a legal claim as its first course of action once the plaintiff has learned of the potential violation of the CC&R. Here, the Vasquezes, upon learning of the potential violation by defendants, first objected to the nonconforming use at the community meeting held by the Church. They then again objected to the construction in a formal letter sent to defendants. Thus, the Vasquezes, once they were informed of the "patently obvious" intention of defendants to breach the CC&R, took appropriate measures to object. They then filed suit for injunctive relief once the CC&R was violated--that is, once construction of the cell tower was complete. Because the defendants were on notice that residents objected to the plan (as evidenced by the several residents objecting at the church meeting, and by the letter sent by the Vasquezes), they were not prejudiced. In fact, defendants could have filed a declaratory judgment action in order to seek determination of whether Pinnacle's CC&R would be enforced, much like the court in Lutz held that the defendants in Lutz should have done.

Had the Vasquezes waited a much longer period of time to enjoin the activity, such as the City of Piedmont did in Piedmont Valley v. Walter, by waiting sixteen (16) years before trying to enjoin Dr. Walter's activities, it would be much more appropriate for the court to find that the Vasquezes are barred by the doctrine of laches from injunctive relief. Here, the construction of the SpeakEasy tower was completed in February 2010, while the Stipulated Facts were filed in June of 2010. Thus, the Vasquezes brought action within less than half a year. A mere delay of several months after the completion of construction to the filing of a lawsuit for injunctive relief is insufficient to find that plaintiffs waited an inordinate amount of time to sue in order to cause prejudice to defendants.

Thus, the Vasquezes' action should not be barred by the doctrine of laches.

4. As Wrongdoers, SpeakEasy and the Church Are Not Entitled to a Balancing of Hardships, and Thus Balancing Does Not Preclude the Vasquezes' Relief.

a) A Pure Economic Balancing Test May Favor the Defendants, But It Is Not Dispositive According to Columbia Case Law.

Were a balancing test adopted, the balance of hardships would indeed tip in favor of the defendants SpeakEasy and the Church. SpeakEasy has already spent more than $250,000 in constructing the cell tower, and tearing it down would cost an additional $50,000. Thus, the loss SpeakEasy would suffer would be more than $300,000. The Church has also spent more than $4 million improving its properties, and should it be forced to terminate its agreement with SpeakEasy, it would suffer losses in the form of damages it would need to pay to SpeakEasy for breach of contract. When compared to the 0-5% loss of property value the Vasquezes would face due to the construction of the tower on a property that ranges in value from $114,000 to $360,000, or a total of $0 to $13,000, the pure economic balance of hardships tips in defendants' favor.

b) Because Defendants Are Wrongdoers with Unclean Hands, the Vasquezes Are Entitled to Relief Even if the Balance of Hardships Would Normally Tip in Defendants' Favor.

However, the CSC has held that a court has discretion to balance the hardships and either deny or grant a mandatory injunction. See Piedmont Valley Home Association v. Walter; Lutz. Where the defendant is a wrongdoer, Columbia courts have held that intentional violators of CC&Rs should not be allowed to rely on a balancing of hardships, since it would be inequitable to allow a party who is fully aware of building restrictions in a CC&R and the opposition of at least some homeowners to take a gamble that the restrictions either would not be enforced against him or that a court would balance hardships in the wrongdoer's favor. Ultimately, Columbia courts will refuse to balance the hardships where the defendant has "unclean hands."

In Lutz, the court held that it would be inequitable where a party, who is both fully aware of restrictions placed on its construction in a CC&R and also aware of the opposition of at least some homeowners, to go ahead and spend large amounts of money in the hopes that the restrictions will not be enforced. Here, not only did the Vasquezes object to SpeakEasy's tower, but other residents also objected to the tower in the community meeting held by the Church. See Stipulated Facts. In Lutz, Defendant Gundersen said in his testimony that because he had invested so much money into his project, he could not abandon it and felt compelled to finish it. See Gundersen's Testimony in Lutz. Here, defendant Church told the objecting residents at its community meeting that because SpeakEasy had already expanded more than $100K in planning the tower it had to go through with it, and that the Church had no choice but to go through with it as well because it would be forced to cough up the $100K+ in damages to SpeakEasy. Such an argument was not enough to trigger a balancing of the hardships in Lutz, and neither is it a sufficient trigger in balancing the hardships in the instant case. While many of the homeowners stopped objecting after the Church meeting, the Vasquezes did not give up and sent a letter to defendants, again making their objection to the tower known.

In fact, defendants SpeakEasay's and Church's conduct is more similar to that which the CSC found was a "usual wrongdoer"--that is, one who is aware that construction at least arguably violates the CC&R's prohibitions but constructs anyway, in the hope that either: a) no one will notice, b) no one will object, c) an argument that the CC&R does not apply will succeed, or finally 4) that an argument that the CC&R has been waived will succeed. Here, SpeakEasy and Church no doubt counted on all of the above when they started the construction. As such, instead of being an "innocent violator," as the Piedmont Valley Court defined, the defendants here are "usual wrongdoers" as both the Piedmont Court and the Lutz court have defined.

<u>c) The Vasquezes Will Suffer Irreparable Injury if the Injunction Is Not Granted, and Thus Should be Afforded Relief Regardless of Balancing.</u>

In Piedmont Valley, the CSC stated that an injunction is appropriate, even if the balance of hardships tips in defendants' favor, if the CC&R violation will interfere with the plaintiffs' uses, views, or other quiet enjoyment of their property in a manner that cannot be easily ascertained and remedied. While economically the experts agree that plaintiffs' property value will only fall from 0 to 5%, the injury plaintiffs will suffer when their right to have the view from their home unobstructed by an ugly cell tower is hard to measure in economic terms. The sentimental value of the Vasquezes' real property will certainly be diminished to a great extent, and because that extent cannot be easily ascertained or remedied with money damages, the Vasquezes should be afforded mandatory injunctive relief regardless of how the court may balance the hardships.

d) Public Policy Favors a Disallowance of a Balancing of Hardships in Defendants' Favor.

The Court in Lutz noted that, were arguments such as Gundersen's adopted (see above), CC&R's would become difficult to enforce. The court reasoned that any owner of real property could feign ignorance of restrictions under a CC&R, start construction, and then rely on a favorable balancing of hardships by the trial court. The court reasoned that this would erode the uniformity with which owners of property are covered by CC&R's, thereby making them useless (or at least, less useful). See Lutz.

In addition, the Piedmont Valley Court stated that a pure "efficiency-style" balancing of hardships, which would mechanically tally up the total dollar amount of the violator's loss as compared to the dollar amount of the harm the landowners seek to enjoin, would too often preclude granting of an injunction because defendants' costs of construction and removal will almost always be greater than the property value damage suffered by plaintiffs seeking to enjoin the construction. Thus, the Piedmont Court concluded that a balancing of hardships should not merely include monetary damages, but that it should also consider impairment of property values as well as other harms to the entire subdivision. Here, there is evidence that many residents of the subdivision objected to the construction of the SpeakEasy cell tower on Church's land prior to the meeting, and

thus a finding that other, nonmonetary harms to the entire subdivision may result in refusing to grant the Vasquezes injunctive relief could easily be supported.

In conclusion, because defendants SpeakEasy and the Church had unclean hands as wrongdoers (with sufficient notice of the CC&R's prohibition against the construction of the cell tower), in addition to the irreparable nonmonetary damage the Vasquezes would suffer and public policy favoring the plaintiffs, the court should grant injunctive relief to the Vasquezes regardless of the results of a pure "efficiency-style" balancing.

Answer 2 to Performance Test A

Law Offices of Anatoly Krotov
645 Elvis Way
San Claritan, Columbia

To: Anatoly Krotov, Senior Partner
From: Applicant
Date: July 27, 2010
Re: **Vasquez v. SpeakEasy, Inc. and Northern Center of Worship**

MEMORANDUM

Parties have submitted to the court for determination the following issues: (1) Do the CC&R's prohibit the construction of the disputed tower? (2) Has the CC&R's prohibition of the disputed tower, if found to exist, been waived or abandoned? (3) Are the Plaintiffs barred from obtaining the injunctive relief sought due to laches? (4) Does the balance of hardships dictate that Plaintiffs' sought remedy of removal of the tower be denied?

The CC&Rs Prohibit Construction of the Disputed Tower Because the Tower is a Structure Within the Meaning of CC&R General Provision 4 Under the Rules of Contract Interpretation.

Columbia law permits restrictive covenants "to the extent they are unambiguous and enforcement is not adverse to public policy." Mitchell. In interpreting these covenants, courts will strictly construe them and resolve any ambiguities or doubts in favor of the "the free use and enjoyment of the property and against restrictions." Mitchell. The meaning of a specific word will be interpreted by reference to other parts of the contract and by reliance on the plain meaning of the word.

In Mitchell, the parties argued about the meaning of the word "structure" in a CC&R with provisions substantially the same as those found in our case. The court interpreted the meaning of the word in the context of the following covenant: "No structure shall be erected, altered, placed or permitted to remain on any of the lots other than one detached single-family dwelling not to exceed two stories in height, or one tri-level single-family dwelling and a private garage not to exceed one story in height for not more than three cars." In interpreting this provision, the court noted that other provisions in the restrictive covenant at times distinguished buildings from structures where a narrower interpretation was appropriate. The court inferred that the drafters therefore intended for the word "structure" to encompass more than simply a building. Furthermore, the court turned to the American Legacy Dictionary of the English Language to define structure as "something constructed." The meaning in both cases is clear: the intent of the parties was to define "structure" broadly.

In our case, the same is true. Our covenant provides, in general provision 4, that "[n]o structure shall be erected, altered, placed or permitted to remain on any of the lots other than one detached single-family dwelling not to exceed one story in height and a private garage not to exceed one story in height for not more than three cars, and a guest or servant quarters for the sole use of actual non-paying guests, or actual servants of the occupants of the main residential building." The relevant part of this language is substantially similar to that found in Mitchell, which there indicated an intent to define "structure" broadly.

Furthermore, the CC&R draws a distinction between "structure" and "building" where appropriate. In provision 2, the CC&R states that "[a]ll structure on the lots shall be of new construction and no building shall be moved from another location onto any lot. At no time shall house trailers be allowed on the lots." This provision makes clear that a "structure" is not simply a "building" or a "house trailer." Indeed it is something more broad, likely in keeping with the dictionary definition of "something constructed."

Under this interpretation, a 50-foot bell tower counts as a "structure" under the CC&R. Although it is not a building, the meaning of "structure" is broader than that. It is a tower, which was something constructed on the property, and given the drafter's broad intent when purposefully using the word "structure," even a strict construction would put the tower within the purview of the CC&R. Accordingly, the CC&R applies to the building of the bell tower, and Columbia law will honor its enforcement.

The Vasquezes May Enforce the Covenant Because It Has Not Been Waived Due to the Construction of Other Violative Structures, And the Deed of Restrictions Has Not Been Wholly Abandoned.

Notwithstanding the initial applicability of the CC&R, the Vasquezes may be unable to enforce the CC&R if the court determines that enforcement has been waived or that the deed or restrictions has been abandoned.

The Vasquezes Have Not Waived Their Rights To Enforce the Covenant By Acquiescence to Other Structures Because These Structures Are Sufficiently Far, Dissimilar, or Infrequent So As Not to Apply to the Instant Case.

A homeowner in a covenanting development may not enforce a restrictive covenant if he or she has waived his or her rights by acquiescence. "The defense of waiver by acquiescence is raised when the restrictions sought to be enforced are not universally enforced or when there are frequent violations of the restrictions." Blaire. The court considers three factors when determining whether there has been a waiver: "1) the location of the objecting landowners relative to both the property upon which the nonconforming use is sought to be enjoined and the property upon which a nonconforming use has been allowed, 2) the similarity of the prior nonconforming use sought to be enjoined, and 3) the frequency of prior nonconforming uses." Blaire.

The Northern Center of Worship (NCW) and the Vasquezes agree as to the following prior violations:

(a) a two-story barn converted into living quarters;

(b) a two-story house addition;

(c) two amateur radio towers;

(d) a satellite dish on the peak of a house;

(e) a flagpole;

(f) a previously existing 40-foot bell tower at the Church;

(g) a steeple at the church with a cross on the top, which extends nearly as high as the disputed tower;

(h) a flagpole at the Church;

(I) a large sign for the Church at the front entrance; and

(j) several large, wooden telephone poles and electric lines located throughout the subdivision and between Plaintiff's home and the Church (para 12).

Several of the violations took place sufficiently far from the Vasquezes' home that it would be inappropriate to interpret lack of enforcement to be a waiver. The "failure to sue for prior breaches by others where the breaches were noninjurious to the complainant cannot be treated as an acquiescence sufficient to bar equitable relief against a more serious and damaging violation. This situation may arise where the prior violations have been in a distant part of the subdivision while the present violation is immediately adjacent to the complainant's land." Blaire. The joint stipulation of facts fails to include any information regarding the location of these prior violations. However, some of the items, such as the conversion of a two-story barn into living quarters (12(a)) and the two amateur radio towers (12(c)) may be sufficiently far so as not to have been injurious to the Vasquezes. Those violations that occurred near to the Vasquezes, principally those involving the Church, are not waive[d] for other grounds. However, on its face, the joint stipulation of facts does not succeed in demonstrating waiver without a showing that those violations took place near enough to the Vasquezes so as to constitute an injury. The mere fact that other homeowners did not previously enforce the CC&Rs when violations affected them, as agreed to in paragraph 21, does not affect the Vasquezes' rights to bring suit when a violation specifically affects them.

Furthermore, the violations do not constitute a waiver because they were sufficiently dissimilar from the construction of the bell tower. In several instances, these violations were actually beneficial to the Vasquezes. This would not include the construction of the wall to the rear of the Vasquezes' property (para 20) which would also violate general provision 7, and the improvement of lot Nine by the Church, which, though occurring before the Vasquezes purchased their home, would have affected the Vasquezes' predecessor in interest (para 18). Many of the items listed in paragraph 12 are in no way similar to the current case: the barn into living quarters (a), the two-story house addition (b), the satellite dish on the peak of a house (d), the flagpoles (e and h), the large sign for the Church (i), the telephone poles located throughout the subdivision (j). These violations are relatively minor and would not indicate an acquiescence to a large, potentially dangerous violation such as the bell tower.

Other items are more similar. These include the two amateur radio towers (c), the previously existing 40-foot bell tower at the Church (f), and the steeple with the cross at the top of the Church which extends nearly as high as the disputed tower (g). These violations are more similar to the alleged violation, and, with the exception of the two amateur towers, they are located near the Vasquezes. However, at least with regard to the amateur towers, a commercial company's leasing premises for use for commercial radio waves is much more of a burden than 2 radio towers. Moreover, the church steeple would not have emitted the potentially dangerous cell phone waves that may cause grief to the Vasquezes. The biggest burden is the 40-foot tower, which is both similar in height and close by. Even this, though, is dissimilar because the facts do not indicate that this served as a tower for a cellular telephone provider, which may cause adverse health effects that none of the prior violations did.

However, prior violations will still not constitute waiver if they are infrequent. The only violation that defendants have alleged that is both similar in part to the instant violation and close to the Vasquezes is the 40-foot bell tower. The construction of this was a onetime only thing. The facts do not allege whether or not the tower was in existence before the Vasquezes moved in, but if it were, then the Vasquezes' failure to

act upon something that was built during the time of a prior occupier should not be held against them. If they did not acquiesce, and the one sufficient prior violation happened a single time, then the Vasquezes' failure to enforce the covenant against prior restrictions should not be held to be waiver by acquiescence.

Because all of the other violations occurred far enough so as not to constitute an injury to the Vasquezes, were sufficiently dissimilar to the violation at issue, or were infrequent, the Vasquezes' failure to enforce prior violations of the CC&R do not amount to waiver by acquiescence.

In the Event the Court Determines the Vasquezes Have Waived Their Right To Enforce the Covenant By Acquiescence, the Alleged Waiver Fails Because of the Anti-Waiver Provision in the Covenant.

Even if the court finds that the actions of the Vasquezes would be a waiver, the restrictive covenant makes clear that such actions will not be a waiver. Following the general rule that "unambiguous provisions in restrictive covenants generally should be enforced according to their terms," a court will enforce a non-waiver clause "so long as the waiver clause is unambiguous and not adverse to public policy…." Blaire.

In Blaire, the non-waiver provision at issue stated that "The failure for any period of time to compel compliance with any covenant, condition or restrictions shall in no event be deemed as a waiver of the right to do so thereafter, and shall in no way be construed as a permission to deviate from the covenants, conditions and restrictions." The court interpreted that provision so as to be non-ambiguous, also finding that it was reasonable to enforce it because enforcement in that instance was not arbitrary or capricious.

The court should enforce this covenant for the same reasons. In relevant part, the CC&R states: "**Anti-waiver Provision**: Failure to enforce any of the restrictions, rights, reservations, limitations and covenants contained herein shall not in any event be construed or held to be a waiver thereof or consent to any further or succeeding breach

or violation thereof." Even given a strict construction, this provision would make clear that actions which by themselves might imply a waiver will not do so.

In addition, enforcement is reasonable and not arbitrary or capricious. The Vasquezes have acquiesced to previous violations if they were minor and affected only a few parties. This new violation is large in scale, inviting in a commercial provider to their residential community, and potentially hazardous to health. In addition, not simply the Vasquezes but a group of neighbors voiced their concerns (para 9). This indicates that the complained-of violation was large enough to warrant such a response. Such a response would not be likely if there were not reasonable concerns behind the construction. The showing of reasonable negates the implication that the response is arbitrary or capricious.

Accordingly, notwithstanding any waiver that might have been implied by the Vasquezes' actions, the anti-waiver provision in the CC&R will be enforced, and the Vasquezes may proceed with their suit.

The Deed of Restrictions Has Not Been Abandoned Because the Effectiveness of the Covenants and the Purpose for Which They Were Created Have Not Been Defeated.

Notwithstanding the existence of any waiver provision, opposing counsel may argue that the deed of restrictions has been abandoned. The will argue that there have been so many violations as to indicate an intent to abandon the restriction.

"The test for determining a complete abandonment of deed restrictions … is whether the restrictions imposed upon the use of lots in this subdivision have been so thoroughly disregarded as to result in such a change in the area as to destroy the effectiveness of the CC&R's, defeat the purposes for which they were imposed, and consequently amount to an abandonment thereof." Blaire. Evidence tending to show that the development is no longer a Choice Residential District or that the fundamental nature of

the character has been changed will indicate an abandonment. Blaire; Lutz.

The restrictions have not been disregarded. The proposed construction of the tower elicited such a response from the neighbors so as to cause them to approach Church about the covenants. It is true that the Vasquezes were the only family to subsequently write a letter of complaint; however, this may well be due to a belief that there were no recourses or that such recourses would be futile to pursue given the Church's early dismissal of their complaints. Furthermore, the Vasquezes were the most affected by the tower. It does not indicate an intent to abandon.

Moreover, there is no showing that there has been a fundamental change in the nature of the neighborhood. The CC&R still contains the provision understanding the development to be a Choice Residential District. And recent house sales in the neighborhood have been into the $300,000s. This indicates a premium neighborhood, with no intent to abandon the restrictions.

In Lutz, the court held that changes in the surrounding area that included a golf course, a polka dance hall, a shopping center, a bowling alley, and a veterinary hospital would have been "so fundamental or radical as to defeat or frustrate the original purpose of the restrictions." However, that case ultimately concluded that they did not apply in the instant case because the property affected was not part of the development. In our case, we do not need to consider the locations of the violations. The presence of some converted barns and telephone poles is not the same kind of changed circumstances that the facts of Lutz would contemplate. This is a much more minor change, indicating no intent to abandon.

Finally, the clause describing the development as a Choice Residential District contained in the CC&R also includes the "understanding . . . that under no pretext will there be an abandonment of the original plan to preserve Pinnacle Canyon Estates as a Choice Residential District." This should be interpreted according to the provisions on non-waiver clauses described above to negate a claim of abandonment in the unlikely

event that defendants can show that the deed of restrictions was abandoned.

The Doctrine of Laches Does Not Bar Plaintiffs' Claim for Relief Because Their Delay in Filing Suit Was Reasonable and Caused No Undue Prejudice to Defendants.

Under the doctrine of laches, a court may bar all or part of a plaintiff's claim for relief. "In order to bar a claim on the basis of laches, a court must find more than mere delay in the assertion of the claim. The delay must be unreasonable under the circumstances, including the party's knowledge of his or her right, and it must be shown that any change in the circumstances caused by the delay has resulted in prejudice to the other party sufficient to justify a denial of relief." Lutz.

The contract between NCW and Speakeasy, Inc. (SE) was entered into on July 29, 2009. However, it is unclear when construction began. At any rate, defendants received notice as early as September 27, 2009 that the neighborhood residents were not in favor of the proposed bell tower. NCW dismissed their claims on the grounds that SE had already spent a significant amount in construction. On January 27, 2010, the Vasquezes informed NCW that it was violating the CC&R. Notwithstanding this notice, SE continued the construction and completed it on February 13, 2010.

The Vasquezes' delay here was not unreasonable. Within 2 months of the contract being entered into, defendants received notice of discontent. There is no evidence that plaintiffs even knew of the construction before this time. This should have been enough to encourage NCW and SE to file a declaratory judgment of their rights under the CC&R at that point. Any further construction they completed they did knowing full well of the risk of a response from the neighborhood. The Vasquezes were not required to immediately file suit. Rather, the burden was on NCW and SE to investigate the legality of their actions.

In addition, SE continued to build after receiving more formal notice from the

Vasquezes. This notice came closer to the completion of the construction. SE and NCW may argue that the Vasquezes should have filed suit before this much construction
had been completed. However, a plaintiff is "not required to file a lawsuit as the very first course of action." Lutz. NCW and SE had notice of the CC&R through the covenant, through the neighborhood response, and through the Vasquezes' letter. Any action they took notwithstanding these warnings was their assumption of the risk, and defendants cannot now claim an unreasonable delay or unfair prejudice to the Vasquezes bring suit. Accordingly, the Vasquezes' suit is not barred under the doctrine of laches.

The Court Should Grant the Vasquezes' Injunction Because Defendants' Actions Were Intentional or the Balance of Hardships Favors the Granting of the Injunction.

When determining whether or not to grant an injunction, the court should first determine whether the violative act was committed intentionally. If so, the court should grant the injunction without considering the relative hardships. Lutz; Piedmont Valley. If the act was committed unintentionally, the court should grant the injunction if the balance of hardships favors the plaintiffs.

The Court Should Grant the Injunction Without Considering Hardships Because Defendants Acted Intentionally.

In granting injunctions, courts are often "motivated by such matters as comparative value and consider relative hardship by weighing the interest of both sides." Lutz. However, "no court will allow an intentional violator of CC&R's to rely upon the contention of relative hardship. It would indeed be inequitable to permit a party who is fully cognizant of building restrictions and the opposition of at least some homeowners to changes in those restrictions to expend large sums of money on the gamble that the restrictions would not be enforced against him and then claim that enforcement of the

restrictions works a hardship on him." Lutz. "[W]here a party has actual or constructive notice prior to actually violating a restriction that his structure will violate a restriction, and then completes construction of the structure, the party may not claim the benefit of relative hardships." Piedmont Valley. The amount expended is not relative to the determination of intent. Piedmont Valley.

In the instant case, NCW and SE were on constructive notice as early as July 2009 that their tower would violate the prohibition on structures contained in the CC&R. They were put on actual notice of neighborhood opposition at least as early as September 2009.

Their actions only can be construed as willful. In Piedmont Valley, the defendant's conduct was deemed unintentional when the defendant had knowledge of the CC&R but had a good faith belief that he was complying with the terms of the CC&R. This case is not the same here. NCW and SE knew full well of the unambiguous ban on structures contained in the CC&R. There was no mistake of fact that what they were building was not actually a structure. The defendants acted willingly, with constructive and eventually actual notice. Thus, the court should grant the injunction without balancing the hardships.

Defendants may argue that they knew that they were violating the CC&R but that they did not do so willfully because they believed that the residents would waive enforcement of the CC&R. However, this is exactly the course of conduct that this line of law is designed to prevent. As Lutz makes clear, a defendant cannot take its chances on the fact that no suit will be brought against it and then subsequently gain from the balance of hardships by completing construction if suit is later brought. The fact that SE had spent $106,000 before September did not affect its intent to violate the terms of the CC&R when it began construction.

If the Court Determines that Defendants Acted Unintentionally, It Should Still Grant the Injunction Because the Balance of Hardships Favors Plaintiffs.

In the event that the court determines that defendants acted unintentionally, the court will grant the injunction if the balance of hardships favors plaintiffs. The court will consider the following factors: "1) the Defendant must be innocent – the encroachment must not be the result of Defendant's willful act. In this same connection the court should also weigh Plaintiff's conduct to ascertain if he is in any way responsible for the situation. 2) The Defendant's acts must not cause irreparable harm to the Plaintiff. If the Plaintiff will suffer irreparable injury by the encroachment, the injunction should be granted regardless of the injury to the defendant. 3) The hardship to the Defendant by the granting of the injunction must be greatly disproportionate to the hardship caused to the Plaintiff by the continuance of the encroachment and this fact must clearly appear in the evidence and must be proved by the defendant." Piedmont Valley.

Defendants will have a difficult time proving that they were innocent. As the previous analysis demonstrates, defendants' actions were intentional and not a good faith mistake of fact. Therefore, defendants will lose on this prong.

As to the second prong, plaintiffs must allege a concrete irreparable injury, more than just a lessened ability to enforce future violations of the CC&R. See Piedmont Valley. "Irreparable damage occurs when a CC&R violation interferes with uses, views, or other quiet enjoyment of the property, or undermines property values, in a manner that cannot easily be ascertained and remedied." Piedmont Valley. In Piedmont Valley, the court found against plaintiffs when it considered that many other allowances had been made and defendant's encroachment had been allowed without objection for 16 years.

In the instant case, the Vasquezes are not sitting on their rights but are rather bringing suit immediately, informing defendants of the CC&R violations before construction had even been complete. It is unclear what damages the Vasquezes are claiming based on the Joint Stipulation of Facts. However, part of their complaint must be based on a decreased view. In addition, the harm from cellular telephone transmissions to health cannot be easily quantified financially, and so it is hard to

ascertain. Indeed, the experts' projected diminution of value was only between 0% and 5% (para 13). Harm to the Vasquezes' health is difficult to quantify and would be irreparable. It constitutes an interference with the quiet enjoyment of property in a manner that cannot easily be ascertained and remedied. Because this is the case, the injunction should be granted regardless of injury of the defendants.

With regards to the third prong, the balance of hardships favors defendants on an economic level. Although the Supreme Court has cautioned that "the analysis is not merely a mechanical toting up of the dollar amount of the violator's losses compared to the dollar harms of the landowner(s) seeking to enforce the restriction," such evidence is certainly relevant. Piedmont Valley. Total loss to SE from having to tear down the structure would be $304,000 ($254,000 to construct, and $50,000 to tear it down) (para 16). Meanwhile, the decrease in property value would be only 0 to 5%. On a purely economic level, the balance of hardships favors defendants. The court may consider harm to other plots in the subdivision, but as the Vasquezes' lot is the most affected, the harm to the subdivision as a whole probably would not favor the plaintiffs. Plaintiffs may argue that intangible losses, such as loss of view or harm to health, would tip the balance in their favor. This is a close call, but given the certainty of the defendants' hardship and the speculative nature of plaintiffs', the court may well find in favor of defendants on this prong.

Overall, though, the court must grant the Vasquezes' injunction even under the balance of hardships test. In the first case, defendants' conduct was intentional, which automatically leads to an injunction. In the second, plaintiffs will suffer irreparable injury if there is no injunction, which again leads to an injunction without considering hardship to defendants. Although the balance of economic hardships may favor defendants, the court cannot consider these grounds if the first two prongs are not satisfied.

Conclusion

In conclusion, the court should grant the Vasquezes' injunction. The bell tower is a "structure" within the meaning of the CC&R and so may be enforced by any of the

residents. Enforcement of the CC&R has not been waived by acquiescence, and if it has, the non-waiver provision negates any alleged waiver. In addition, the deed of restrictions has not been abandoned, and the Vasquezes' claim is not barred by the doctrine of laches. Finally, the court must issue the injunction because the defendants acted willfully and the plaintiffs will suffer irreparable injury if it is not granted.

JULY 2010

California
Bar
Examination

Performance Test B

INSTRUCTIONS AND FILE

IN RE BLACK

FILE

IN RE BLACK

INSTRUCTIONS

1. You will have three hours to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional State of Columbia, one of the United States.
3. You will have two sets of materials with which to work: a File and a Library.
6. The File contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
7. The Library contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page citations.
6. You should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.
7. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to reading and organizing before you begin preparing your response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

Smith & Wong, LLP

Attorneys at Law
897 Claire Avenue
Bodie, Columbia 99922
(555)602-1959

MEMORANDUM

To: Applicant

From: Donna Granata

Date: July 29, 2010

Re: **In re Black**

We represent Amanda Black, a local attorney, who has retained us for consultation in a fee dispute with one of her clients, Brian Lester.

Black was retained by Lester eight months ago under a contingent fee agreement to resolve a matter involving a parcel of real property located at 42 Valle Vista Drive here in River County just outside Bodie. Under the agreement, Black is entitled to fees if Lester obtains a recovery. Black has retained us to prepare an opinion letter to guide her in seeking fees from him.

Please draft an opinion letter, in accordance with our guidelines, addressed to Black, answering the questions she asked in the interview.

Smith & Wong, LLP
Attorneys at Law
897 Claire Avenue
Bodie, Columbia 99922
(555)602-1959

MEMORANDUM

To: Associates
From: Executive Committee
Date: October 29, 2007
Re: **Opinion Letters**

The firm follows these guidelines in preparing opinion letters to clients:

- State the questions asked by the client.

- Following each question, provide a concise statement giving a short answer to the question of no more than a few sentences.

- Following the short answer, write an explanation of the issues raised by the question, including how the relevant authorities combined with the facts lead to your conclusion.

TRANSCRIPT OF INTERVIEW WITH AMANDA BLACK

July 28, 2010

DONNA GRANATA (DG): Amanda, it's good to meet you in person. As I mentioned on the phone, we're glad to be able to take your case. Do you mind if I tape-record our conversation, to free me from the distraction of taking lots of notes?

AMANDA BLACK (AB): No, Donna, that's perfectly fine with me.

DG: You told me a bit about the case when we talked on the phone. Why don't you fill me in on the details?

AB: Sure. It's a fee dispute with a client. No fireworks, but I know he doesn't want to pay and I need an opinion letter on how to try to get my fees, legally and ethically.

DG: Fine. Go ahead.

AB: My client, a fellow named Brian Lester, owned a piece of property here in River County as a joint tenant with a woman named Joyce Tunnell. The property is located at 42 Valle Vista Drive just outside Bodie. Lester said he thought it was worth between $1 million and $2 million. Lester wanted to sell, but Tunnell didn't. That meant, as a practical matter, Lester's interest was unmarketable. Lester retained me to resolve the matter in some way—one way, of course, was to bring an action against Tunnell to partition the property.

DG: When did Lester retain you?

AB: On December 1, 2009.

DG: Hourly?

AB: No, contingent fee. I brought a copy of the fee agreement with me. I also brought copies of all the other documents I have that relate to it in any way—a lien agreement, a notice of lien, an e-mail Lester sent me, and a notice I sent him of his rights under the Mandatory Fee Arbitration Act.

DG: Thanks. Are there any other papers relating to the fee agreement or the lien agreement?

AB: No, none.

DG: Going back to the beginning, what happened right after Lester retained you?

AB: I started work on the matter immediately, and made some overtures to Tunnell,

who hadn't hired a lawyer yet, but had no luck in resolving the matter. I then brought an action for partition.

DG: When did you do that?

AB: On December 21, 2009. I filed a notice of lien that same day. Lester was in a hurry. We served Tunnell and commenced what would turn out to be extensive discovery within a relatively brief period of time. I took Tunnell's deposition, and was quite happy with the outcome. That proved to be the turning point.

DG: Why do you say that?

AB: Shortly after Tunnell's deposition, Lester told me it was over. That's what he said, "It's over."

DG: What did he mean?

AB: He said he and Tunnell settled the matter between themselves, "privately," he said. He said he just decided to "give up," in his words, and that was that.

DG: When was that?

AB: On June 29, 2010.

DG: You didn't believe Lester?

AB: No, I didn't.

DG: Why?

AB: It's a complicated story. Let me start at the beginning. For starters, Lester wasn't the sort just to "give up," and I suspected that he might have been the sort to *"say"* he gave up to avoid paying my fees.

DG: You pursued the matter, I suppose.

AB: Right. I called Tunnell's lawyer, but he said he didn't have a clue what had happened. Over a period of about two weeks, I called Lester repeatedly, but he never answered. We finally connected, though.

DG: When was that?

AB: On July 14, 2010. We talked at some length; he knew I had worked hard on this case, and had to forego other opportunities, and his conscience seemed to bother him; he said he'd be willing to pay me for my services at the hourly rate I had quoted him originally—$300—as soon as I brought the case to a close by filing a dismissal with prejudice. I wasn't very happy about that, and I said so. I had expected that my fees

under the contingent fee agreement would be much higher. But some fees were better than no fees. I told him I had put in 120 hours, yielding fees of $36,000. I guess he hadn't expected the number to be that high, and said he'd have to think about it and then ended the call.

DG: Did you speak with him again after that?

AB: No. But on July 17, 2010, I received an e-mail from him, reminding me that I should file the dismissal with prejudice and that the representation would then end.

DG: Have you done so?

AB: Not yet. I didn't want to end the representation before talking to you.

DG: Have you done anything else?

AB: About the case, no. About my fees, yes—I sent him a written notice of his right to arbitration under the Mandatory Fee Arbitration Act.

DG: I was going to ask about that. When did you send the notice?

AB: On July 19, 2010, ten days ago.

DG: Have you heard anything about it from Lester?

AB: You mean, has he requested arbitration? No; he certainly hasn't told me he has. I'd like to avoid arbitration under the Mandatory Fee Arbitration Act if I can, in favor of the sort of arbitration provided for in the contingent fee agreement—you know, standard arbitration under the Columbia Arbitration Act. Can I do that?

DG: I'll take a look at that. Just to clarify, you haven't brought any claim against Lester yet, either in court or in arbitration?

AB: No.

DG: Thanks. Now, going back to Lester's "private" settlement with Tunnell—do you know anything about it?

AB: Yes, I heard that Lester and Tunnell have made some kind of deal. On July 18, 2010, I heard from a real estate broker who's a mutual acquaintance of Lester and me that the Valle Vista property was about to be sold for $1.4 million, and that the sale was set to close in a week, on August 5, 2010.

DG: Did you hear how much Lester was going to get?

AB: That's a bit uncertain. But it seems that under the "private" settlement, Tunnell had either bought Lester out already, at Lester's asking price of $600,000, or had

agreed to pay him half the $1.4 million once the sale closed.

DG: How sure are you that this real estate broker got it right?

AB: Pretty sure, but who can really tell?

DG: Interesting. Well, that gives me enough information to begin my research for the opinion letter. What's your time-frame? I assume you want the opinion letter as soon as possible.

AB: Please. When we talked on the phone, you estimated that your fee would be about $1,500, isn't that right?

DG: That's right, barring any unforeseen difficulties—which, of course, I'd bring to your attention.

AB: Fine. In preparing the opinion letter, could you take a look at the fee agreement to see if I'd be entitled to obtain reimbursement from Lester for your fees as costs under the agreement?

DG: Will do. By the way, does he owe you anything for costs?

AB: No, thank goodness, he kept current with my billings for costs.

DG: Anything else you'd like me to address?

AB: No.

DG: So, let me summarize what you want to know. First, can you bring a claim against Lester under your fee agreement, whether in court or in arbitration? Second, can you bring a claim against him under your lien agreement, whether in court or in arbitration? Third, can you arbitrate under the Columbia Arbitration Act rather than the Mandatory Fee Arbitration Act? Fourth, how much are you entitled to in fees? And fifth, can you get reimbursement of the fees you're paying us for the opinion letter as "costs" under your fee agreement with Lester?

AB: That's it.

DG: I should have a draft ready in a day or two.

AB: Great. Thanks so much.

ATTORNEY-CLIENT CONTINGENT FEE AGREEMENT

AMANDA BLACK ("Attorney") and BRIAN LESTER ("Client") hereby agree that Attorney will provide legal services to Client on the terms set forth below:

SCOPE OF SERVICES. Client is hiring Attorney to represent Client in the matter of Client's claims relating to Client's dispute with one Joyce Tunnell regarding a parcel of real property located at 42 Valle Vista Drive in River County, Columbia.

FEES. Attorney will be compensated for services from any recovery in the matter, whether by judgment or settlement or otherwise. If recovery occurs during Attorney's representation, Attorney's fees shall be calculated as follows: (1) If recovery is obtained without the filing of a complaint on behalf of Client, Attorney's fees will be equal to 25% of the amount recovered; (2) if recovery is obtained within 30 days after the filing of a complaint, Attorney's fees will be equal to 33% of the amount recovered; and (3) if recovery is obtained beyond 30 days after the filing of a complaint, Attorney's fees will be equal to 40% of the amount recovered. If a real property interest is recovered, the value of such real property interest shall be the basis for the amount recovered as described in this paragraph. For example, if Client owns real property as a joint tenant worth $100,000 and the result of the matter is an equal partition, Client would own a share of real property worth $50,000. Client would then owe Attorney either 25% or 33% or 40% of that resulting share, meaning $12,500 or $16,500 or $20,000, respectively. If recovery occurs after Attorney's representation has terminated, Client agrees that, upon recovery, Attorney shall be entitled to be paid by Client a reasonable fee for the services rendered at an hourly rate of $300.00.

COSTS. Attorney will incur various costs in performing services for Client under this Agreement. Client agrees to reimburse Attorney for all such costs.

DISPUTES. If any dispute arises between Attorney and Client as to fees or costs, Attorney and Client agree to submit the dispute to binding arbitration before the

Columbia Arbitration and Mediation Service pursuant to the Columbia Arbitration Act (Columbia Code of Civil Procedure, §1280), with the expenses of arbitration shared equally by Attorney and Client.

ACCEPTED AND AGREED TO:
December 1, 2009

By: *Brian Lester*

BRIAN LESTER

ACCEPTED AND AGREED TO:
December 1, 2009

By: *Amanda Black*

AMANDA BLACK

LIEN AGREEMENT

AMANDA BLACK ("Attorney") and BRIAN LESTER ("Client") hereby agree as follows:

LIEN. Client grants, and Attorney accepts, a lien on any amount recovered pursuant to the Attorney-Client Contingent Fee Agreement entered into by Client and Attorney on this date in order to secure payment and reimbursement for any fees Attorney has earned and any costs Attorney has incurred under that agreement.

DISPUTES. If any dispute arises between Attorney and Client as to fees or costs, Attorney and Client agree to submit the dispute to binding arbitration before the Columbia Arbitration and Mediation Service pursuant to the Columbia Arbitration Act (Columbia Code of Civil Procedure, §1280), with the expenses of arbitration shared equally by Attorney and Client.

ACCEPTED AND AGREED TO:
December 1, 2009

By: *Brian Lester*

BRIAN LESTER

ACCEPTED AND AGREED TO:
December 1, 2009

By: *Amanda Black*

AMANDA BLACK

Amanda Black, Esq.
LAW OFFICES OF AMANDA BLACK
500 Ruxton Street
Bodie, Columbia

Attorney for Plaintiff Brian Lester

IN THE SUPERIOR COURT OF THE STATE OF COLUMBIA
FOR RIVER COUNTY

BRIAN LESTER,	)	No. Civ. 103007
Plaintiff,	)	
v.	)	**NOTICE OF LIEN**
JOYCE TUNNELL,	)	
Defendant.	)	
	)	

TO ALL PARTIES AND THEIR ATTORNEYS AND TO OTHERS INTERESTED:

PLEASE TAKE NOTICE THAT Amanda Black, of the Law Offices of Amanda Black, attorney of record for Plaintiff Brian Lester, has and claims a lien ahead of all others on any recovery that Plaintiff may obtain in this matter in order to secure payment for fees earned and costs incurred.

Date: December 21, 2009

Amanda Black

Amanda Black, Esq.
LAW OFFICES OF AMANDA BLACK
Attorney for Plaintiff Brian Lester

E-MAIL MESSAGE

From: Lester, Brian

Sent: July 17, 2010 at 11:27 AM

To: Black, Amanda

Subject: Lester v. Tunnell

Dear Amanda:

This is just a reminder for you to file the dismissal with prejudice we talked about within the next week or two. Once you've done so, I won't have any further need of your services, and the representation will be over.

I appreciate all the work you've put into this. I wish it could have turned out better for both our sakes, but I guess it wasn't meant to be.

Sincerely,

Brian

Amanda Black, Esq.
LAW OFFICES OF AMANDA BLACK
500 Ruxton Street
Bodie, Columbia
(555)303-1955

July 19, 2010

Brian Lester
67 Clarendon Avenue
Bodie, Columbia 99911

Re: Notice of Rights Under Mandatory Fee Arbitration Act (Lester v. Tunnell)

Dear Brian:

I hereby give you written notice of your right to arbitration under the Mandatory Fee Arbitration Act (Columbia Business & Professional Code, §6200) with respect to our dispute about attorney's fees in this matter. If you wish to exercise your right, you must send (1) a written request to the Office of Mandatory Fee Arbitration, State Bar of Columbia, 555 Franklin Street, Bodie, Columbia 99902, and (2) a copy of that request to me. If you fail to do so within 30 days, you will waive your right.

Very truly yours,

Amanda Black

Amanda Black

JULY 2010

California
Bar
Examination

Performance Test B

LIBRARY

IN RE BLACK

LIBRARY

SELECTED COLUMBIA STATUTORY AND RULE PROVISIONS

Section 1280 of the Columbia Code of Civil Procedure

(a) This section shall be known as the Columbia Arbitration Act.

(b) A written agreement to submit to arbitration an existing controversy or a controversy thereafter arising is valid, enforceable, and irrevocable, save upon such grounds as exist for the revocation of any contract.

(c) Any party to an arbitration in which an award has been made may petition the court to confirm, correct, or vacate the award.

* * *

Section 6200 of the Columbia Business and Professions Code

(a) This section shall be known as the Mandatory Fee Arbitration Act.

(b) The State Bar of Columbia shall offer to conduct arbitration of disputes concerning fees, costs, or both, charged for professional services by attorneys, under rules that the Board of Governors of the State Bar of Columbia may, from time to time, determine, with the costs borne solely by the attorney.

(c) This section shall not apply to any of the following:

(1) Claims for affirmative relief against the attorney, for damages or otherwise, based upon alleged malpractice or professional misconduct.

(2) Disputes where the fees or costs to be paid by the client, or on his or her

behalf, have been determined pursuant to statute or court order.

(d) Arbitration under this section shall be voluntary and non-binding for a client and shall be mandatory and binding for the attorney.

(e) An attorney shall send a written notice to the client prior to or at the time of service of summons or claim in an action against the client, or prior to or at the commencement of any other proceeding against the client under a contract between attorney and client which provides for an alternative to arbitration under this section, for recovery of fees, costs, or both. The written notice shall include a statement that (1) the client has a right to arbitration under this section and (2) the client shall be deemed to waive that right if, within 30 days, he or she fails to send (a) a written request for arbitration to the State Bar of Columbia and (b) a copy of such request to the attorney. The sending of the written notice provided for in this subsection shall not be deemed to commence any action or other proceeding against the client. The attorney's failure to send the written notice provided for in this subsection shall be a ground for the dismissal of the action or other proceeding.

(f) Within 30 days of the written notice provided for in subsection (e), a client must send:

(1) a written request for arbitration to the State Bar of Columbia and (2) a copy of such request to the attorney, in order to preserve the client's right to arbitration under this section. Failure to do so shall be deemed a waiver of such right by the client.

(g) A client's right to request or maintain arbitration under this section is waived by the client commencing an action or filing any pleading seeking either of the following:

(1) Judicial resolution of a fee dispute to which this section applies.

(2) Affirmative relief against the attorney, for damages or otherwise, based upon

alleged malpractice or professional misconduct.

* * *

Rule 3-300 of the Columbia Rules of Professional Conduct

An attorney shall not knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client, unless each of the following requirements has been satisfied:

(a) The acquisition and its terms are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which should reasonably be understood by the client; and

(b) The client is advised in writing that the client may seek the advice of an independent attorney of the client's choice and is given a reasonable opportunity to seek that advice; and

(c) The client thereafter consents in writing to the terms of the acquisition.

Discussion

Rule 3-300 is intended to apply to any agreement through which an attorney seeks to acquire any ownership, possessory, security, or other pecuniary interest adverse to the client. The rule regularly comes into play when an attorney seeks to acquire a security interest—that is, a lien—in order to secure the payment of his or her fees.

Columbia law provides that any agreement between an attorney and a client involving the acquisition of an interest adverse to the client is unenforceable, as is the interest purportedly acquired, if the attorney has not complied with Rule 3-300.

Fracasse v. Brent

Columbia Supreme Court (1972)

Plaintiff George Fracasse, an attorney, was retained by defendant Renee Brent to prosecute a claim for personal injuries on her behalf. Fracasse and Brent entered into a written contingent fee agreement, under which Brent agreed that Fracasse's compensation would be one-third of any recovery. Sometime thereafter, but before any recovery had been obtained, Brent informed Fracasse that she wished to discharge him and retain another attorney, and did so. Fracasse then filed the present action seeking declaratory relief. Alleging that his discharge was without cause, and that Brent had breached the agreement and had refused to give him the fees to which he would have been entitled, Fracasse prayed for a declaration that the agreement was valid and that he had a one-third interest in any recovery ultimately obtained. Brent demurred to the complaint. The trial court sustained the demurrer without leave to amend and dismissed the action. The Court of Appeal affirmed. We granted review.

At the threshold, Brent claims that we should affirm the judgment without reaching the merits. She argues that Fracasse was ethically prohibited from bringing this action against her in the first place by the duty of loyalty imposed on him by the Columbia Rules of Professional Conduct. To be sure, during his or her representation of a client, an attorney is indeed ethically prohibited by the duty of loyalty from asserting any claim against a client, whether in or out of court. But the ethical prohibition dissolves once the representation has terminated. Here, of course, prior to suing Brent, Fracasse's representation had in fact terminated—when he was discharged by Brent. Under the law of Columbia, a client, like Brent, has an absolute right to discharge an attorney, at any time and for any, or no, reason—a right the attorney may not interfere with to protect his or her fees. But once the client exercises that right, he or she releases the attorney from the ethical prohibition in question.

Brent goes on to claim that, in any event, we should affirm the judgment on the merits. Under a contingent fee agreement, an attorney is not entitled to fees, and hence does

not have a cause of action against the client for breach arising from failure to pay fees, unless and until the contingency specified has occurred. And if the contingency specified occurs after the representation has terminated, the attorney's right to, and cause of action for, fees is limited to the reasonable value of the services rendered during the representation, and does not extend to the full fees that would have been due under the agreement. Otherwise, the client's absolute right to discharge the attorney might be unduly burdened by the prospect of paying the discharged attorney's full fees plus fees to a successor attorney as well. We find no injustice in limiting the fees of a discharged attorney to an amount consisting of the reasonable value of the services rendered during the representation. In doing so, we preserve, as noted, the client's absolute right to discharge the attorney without undue burden. We also preserve the attorney's entitlement to fair fees for part performance—albeit not to full fees, which would have been earned only by full performance.

In light of the foregoing, Fracasse's action is premature. Since Brent has yet to obtain any recovery in her personal injury action, the contingency specified in the contingent fee agreement has yet to occur. Indeed, Brent may end up obtaining no recovery at all—in which case, Fracasse would be entitled to no fee whatsoever. One thing, however, is sure: Fracasse does not yet have any entitlement to fees, and hence does not yet have a cause of action against Brent for breach arising from failure to pay fees.

Affirmed.

Carroll v. Interstate Brands Corporation

Columbia Court of Appeal (2002)

In this action for employment discrimination against defendant Interstate Brands Corporation ("Interstate"), plaintiff Daniel Carroll was originally represented by Allen & Allen, LLP. Allen & Allen in turn hired William McMahon, an attorney, to perform certain legal work on the case. When McMahon left the Allen firm's employ, Carroll discharged the firm and substituted McMahon in its place, entering into a contingent fee agreement with McMahon based on obtaining a recovery against Interstate through settlement or judgment, and also agreeing to a lien in McMahon's favor against any recovery he might obtain against Interstate. Through McMahon's services, Carroll did indeed obtain recovery, via settlement, against Interstate. Simultaneously with obtaining the recovery, Carroll refused to pay McMahon any fees. Prior to dismissal of the action pursuant to the settlement, McMahon filed a motion to enforce his lien against Carroll to obtain his fees. The trial court granted McMahon's motion. Carroll filed an appeal. We reverse.

In order to obtain his or her fees, an attorney may assert a cause of action for breach of contract based on the underlying fee agreement. To prevail on the claim, the attorney must prove that the client breached the fee agreement by failing to pay fees to which the attorney was entitled, and thereby caused the attorney damages in the amount of the fees in question. To the same end, the attorney may also assert a cause of action to enforce a lien. To prevail on this claim, the attorney must prove the same facts as for breach of contract, but must also prove that the lien is enforceable as authorized by the law of contract and also compliant with Columbia Rule of Professional Conduct 3-300. The attorney is not compelled to choose between these causes of action, but may bring both at the same time in the alternative—although, of course, if the attorney should prevail on both, he or she may not obtain double recovery.

That said, it is the rule that the attorney may not seek to obtain his or her fees in the same action in which he or she is representing the client, but must bring a separate action against the client. Because that is so, the trial court should have denied

McMahon's motion at the threshold without considering the merits. McMahon argues that this rule is subject to exceptions. True, but none of the exceptions helps McMahon, since all of them require the client's consent—which is altogether lacking here.

Reversed.

Aguilar v. Lerner

Columbia Supreme Court (2004)

Plaintiff Raul Aguilar hired defendant Esther Lerner, an attorney specializing in family law, to represent him in a marital dissolution proceeding. Aguilar explained to Lerner that he desired the matter to be resolved quickly and inexpensively. Lerner agreed to represent him and produced a written fee agreement that included the following arbitration provision:

> In the event that there is any dispute between CLIENT and ATTORNEY concerning fees, this Agreement, or any other claim relating to CLIENT'S legal matter which arises out of CLIENT'S legal representation, CLIENT hereby agrees to submit such dispute to binding arbitration, pursuant to the Columbia Arbitration Act (Columbia Code of Civil Procedure, §1280). Any such arbitration shall be conducted before the Columbia Arbitration and Mediation Service, with CLIENT and ATTORNEY sharing the costs of such arbitration equally.

Aguilar signed the fee agreement and initialed the arbitration provision.

After a dispute arose, Aguilar discharged Lerner and filed a complaint for damages in Sommerview County Superior Court, alleging Lerner had committed malpractice. In response, Lerner petitioned to compel arbitration of these claims pursuant to the Columbia Arbitration Act (Columbia Code of Civil Procedure, §1280); she also added her own claim for unpaid attorney fees and costs. The Superior Court granted the petition to compel, stating that the results of the arbitration would be binding, and that Aguilar's "claim for malpractice falls within the scope of the arbitration provision he initialed." Lerner prevailed in arbitration, the arbitrator granting her judgment against Aguilar on his complaint for damages. On Lerner's claim for unpaid legal fees and costs, the arbitrator awarded her $32,710. The costs of arbitration amounted to $3,000, with Lerner and Aguilar each paying $1,500. Aguilar paid under protest. The Superior

Court denied Aguilar's motion to vacate the arbitration award and granted Lerner's motion to confirm it. The Court of Appeal affirmed. We granted review, and now affirm.

Aguilar contends the parties' agreement to arbitrate was invalid and unenforceable because it was contrary to the Mandatory Fee Arbitration Act (Columbia Business & Professional Code, §6200), which makes arbitrating attorney fee disputes voluntary for a client and non-binding as well, thereby giving the client the option of rejecting the arbitrator's decision and proceeding to trial. Moreover, he contends that although he filed a lawsuit against Lerner for malpractice, he is entitled to rely on the protections of the Mandatory Fee Arbitration Act. In response, Lerner invokes the Columbia Arbitration Act, pursuant to which the parties arbitrated their dispute.

The Columbia Arbitration Act represents a comprehensive statutory scheme regulating arbitration in this state. Through this statutory scheme, the Legislature has expressed a strong public policy in favor of arbitration, as agreed to by the parties themselves, as a speedy and relatively inexpensive means of dispute resolution.

By contrast, the Mandatory Fee Arbitration Act constitutes a separate and distinct arbitration scheme. The nature of the obligation to arbitrate under the Mandatory Fee Arbitration Act differs from that under the Columbia Arbitration Act in important ways. First, the arbitration obligation under the Mandatory Fee Arbitration Act is limited to disputes between attorneys and clients about fees and/or costs. Second, the arbitration obligation under the Mandatory Fee Arbitration Act is based on a statutory directive and not the parties' agreement. Third, although a client cannot be forced under the Mandatory Fee Arbitration Act to arbitrate a dispute concerning legal fees or costs, at the client's election an unwilling attorney can be forced to do so. Fourth, whereas an attorney is bound by an arbitration award under the Mandatory Fee Arbitration Act, a client is not bound, but may seek a trial *de novo*. Fifth, the Mandatory Fee Arbitration Act specifies conditions under which the client can waive its protections, including by commencing an action or filing any pleading seeking either judicial resolution of a fee dispute or affirmative relief against the attorney based on malpractice or professional

misconduct. The Mandatory Fee Arbitration Act thus provides the client with an *alternative* method of resolving a dispute with his or her attorney about fees or costs, *not one in addition* to traditional litigation.

As indicated, the parties in this case arbitrated their dispute pursuant to the Columbia Arbitration Act, not the Mandatory Fee Arbitration Act. Although Aguilar never sought to arbitrate the fee aspect of the dispute under the Mandatory Fee Arbitration Act, he seeks to invoke the Act's protections in order to invalidate the parties' agreement.

This case thus poses the question whether the parties' agreement to arbitrate is enforceable or is superseded by the Mandatory Fee Arbitration Act.

Lerner contends Aguilar waived his statutory rights under the Mandatory Fee Arbitration Act because he sued her for malpractice. That Aguilar filed a lawsuit against Lerner alleging malpractice is undisputed. Consequently, pursuant to the plain language of the Act, he waived his rights thereunder.

Aguilar's counterargument is unavailing. He argues that a client does not waive his or her rights under the Mandatory Fee Arbitration Act by entering into a fee agreement with an arbitration provision invoking the Columbia Arbitration Act *before* a dispute arises. We agree. The Mandatory Fee Arbitration Act does not provide for the pre-dispute waiver of its protection. Phrased positively, the Mandatory Fee Arbitration Act renders an arbitration provision invoking the Columbia Arbitration Act unenforceable unless and until the Mandatory Fee Arbitration Act's protection is waived. Our agreement with Aguilar on this point benefits him not at all. Our conclusion that he waived his rights under the Mandatory Fee Arbitration Act rests not on the arbitration provision in his fee agreement with Lerner, but, rather, on the malpractice lawsuit he filed against her.

Affirmed.

Answer 1 to Performance Test B

Amanda Black, Esq.
Law Offices of Amanda Black
500 Ruxton Street
Bodie, Columbia

July 29, 2010

Dear Ms. Black:

Thank you for taking the time to meet with Ms. Granada in our office yesterday. I am assisting her with your case. The information you provided was comprehensive and helpful. We have researched the five questions you posed during the meeting yesterday, and this opinion letter contains the answers to your questions, along with the legal and factual bases for them.

1. <u>Can you bring a claim against Lester under your fee agreement, whether in court or arbitration</u>?

Answer:
You may bring a claim against Lester under your fee agreement; however, you may not do so until your representation of him has ended. *Brent*. Once the representation has ended, you may bring a breach of contract action based on the fee agreement so long as the contingency in the fee agreement has occurred, making you entitled to the fees. *Carroll; Brent*.

Explanation:
An attorney is ethically prohibited by the duty of loyalty from asserting any claim against a client, whether in or out of court, during his representation of a client. *Brent*. This ethical prohibition ends once the representation has terminated. *Brent*. Here, it

appears that you and Lester agree that your representation of him is continuing until you file the dismissal of his case against Tunnell. Lester's e-mail to you acknowledges this, as he states therein that once you file the dismissal with prejudice, he will no longer need your services and the representation will end. You also acknowledged that you have not filed that dismissal yet because you wanted to seek our legal opinion. Therefore, you may not ethically bring a claim against Lester under the fee agreement until you terminate your representation of him.

Once your representation of Lester is terminated, you may bring a claim under the fee agreement for breach of contract. In order to obtain his fees, an attorney may assert a cause of action for breach of contract based on the underlying fee agreement, and he must do so in a separate [claim] against the client. *Carroll.*

However, under a contingent fee agreement, an attorney does not have a cause of action for breach of contract arising from failure to pay fees unless and until the contingency specified has occurred. *Brent*.

Here, the contingency in your fee agreement with Lester is that a recovery must occur in the matter, whether by judgment or settlement or otherwise. Once a recovery has occurred, then your fee is calculated based on when the recovery occurred. You were advised by Lester himself that he settled the matter with Tunnell "privately" and that Lester decided to "give up." Also, a real estate broker told you that Lester's and Tunnell's property was about to be sold for $1.4 million, and that the sale was to close in a week on August 5, 2010. Lester apparently was either bought out by Tunnell already for $600,000, or Tunnell agreed to pay him half of the sale proceeds once the sale closes. If Lester and Tunnell have agreed to a settlement between them, whether Lester has been paid yet or not, we have a good argument that the contingency of recovery has occurred. However, a court could find that recovery does not occur until Lester is actually paid by Tunnell. Either way, though, it appears recovery is imminent or happened already, but we should confirm this.

Therefore, once you terminate representation of Lester and recovery is confirmed to have occurred, you can bring a claim against Lester under your fee agreement.

2. <u>Can you bring a claim against Lester under your lien agreement, whether in court or arbitration</u>?

Answer:

You cannot bring a claim against Lester under your lien agreement because it does not comply with Rule 3-300 of the Columbia Rules of Professional Conduct. Failure to comply with Rule 3-300 renders a lien agreement between attorney and client unenforceable. *See Discussion of Rule 3-300*.

Explanation:

An attorney may bring a cause of action against a client to enforce a lien. *Carroll*. To do so, however, the attorney must not only prove that the lien agreement has been breached, but she must also prove that the lien is enforceable as authorized by the law of contract and also compliant with Columbia Rule of Professional Conduct 3-300 (CRPC 3-300). *Carroll*.

CRPC 3-300 applies to any agreement through which an attorney seeks to acquire any ownership, possessory, security, or other pecuniary interest adverse to the client, and it includes liens which the attorney acquires in order to secure payment of his fees. *See Discussion of CRPC 3-300*. CRPC 3-300 requires that a security interest, like a lien, meet three requirements: (a) its terms must be fair and reasonable to the client and fully disclosed and transmitted to the client in writing in a manner which should reasonably be understood by the client; (b) the client must be advised in writing that he may seek the advice of an independent attorney of his choice and is given a reasonable opportunity to do so; and (c) the client thereafter consents in writing to the terms of the lien.

In your case, you and Lester signed the written Lien Agreement on December 1, 2009.

By its terms, the Lien Agreement states that Lester accepts your lien on any amount recovered, pursuant to the fee agreement, in order to secure payment and reimbursement for your attorney fees. It also contains an arbitration clause. There is nothing on the face of the Lien Agreement to indicate that its terms are not fair and reasonable to Lester, and the terms are disclosed to Lester in writing in this Lien Agreement, which should reasonably have been understood by him. Lester signed the agreement, so he consented in writing to its terms.

The problem, however, is the requirement that Lester be advised in writing that he may seek advice of an independent attorney, and be given a reasonable opportunity to do so, before entering into the Lien Agreement. You began representation of Lester on December 1, 2009, and you both also signed the Lien Agreement on the same date. There is no evidence that Lester was advised in writing of his right to seek independent counsel with respect to the Lien Agreement, and even if we could somehow show that he was, he was likely not given the time to do so because he signed the Lien Agreement at the time he retained you.

Therefore, you likely cannot bring a claim against Lester under the lien agreement.

3. <u>Can you arbitrate under the Columbia Arbitration Act (CAA) rather than the Mandatory Fee Arbitration Act (MFAA)</u>?

Answer:

You cannot arbitrate your claim under the CAA until Lester has waived the MFAA's protection. *Aguilar*. The MFAA renders an arbitration provision invoking the CAA unenforceable unless and until the MFAA's protection is waived by the client. *Aguilar*. A client does not waive his rights under the MFAA by entering into a fee agreement with an arbitration provision invoking the CAA before a dispute arises. *Aguilar.*

Explanation:

The CAA and MFAA are separate and distinct arbitration schemes, and they have

several differences. *See Columbia Code of Civil Procedure Section 1280; Section 6200 of the Columbia Business and Professions Code; Aguilar*. It is settled Columbia law that the MFAA renders an arbitration provision invoking the CAA unenforceable unless and until the MFAA's protection is waived by the client. *Aguilar*.

A client does not waive the MFAA's protection by entering into a fee agreement with an arbitration provision invoking the CAA before a dispute arises. *Aguilar*. (This, of course, is the situation between you and Lester: you entered into a CAA arbitration provision by way of the fee agreement, before any dispute arose between you.) Rather, a client may waive the protection of the MFAA in two ways. First, he may do so by failing to properly respond within 30 days to an attorney's written notice of the client's right to arbitrate. *Section 6200 (f)*. Second, a client may waive the protection by commencing an action or filing any pleading against the attorney seeking either: (1) judicial resolution of a fee dispute or (2) affirmative relief against the attorney based upon malpractice or professional misconduct. *Section 6200 (g); Aguilar*.

As to the first method of waiver, you mailed Lester written notice of his right to arbitrate the fee dispute under the MDAA on July 19, 2010. The written notice met the requirements for such a notice under Section 6200 (e), as it notified Lester of his right to arbitration under the MFAA, and that he would waive the right if he failed to send a written request to the State Bar, and a copy of that request to you, within 30 days. However, 30 days have not yet elapsed since that July 19 notice was given to Lester, so he has not yet waived his rights under the MFAA.

As to the second method of waiver, based on the information you have provided, Lester has not yet filed any type of judicial action or other claim against you to resolve the fee dispute, or to claim malpractice or professional misconduct. Therefore, he has not waived his rights under the MFAA under this method.

In conclusion, then, you cannot arbitrate your claim under the CAA unless and until Lester waives his rights under the MFAA. If we wait until 30 days from July 19, 2010

and Lester fails to properly respond to your written notice of his rights, then he will be deemed to have waived the MFAA's protections and you may proceed with arbitration under the CAA. Likewise, if he files an action for fee dispute, malpractice, or professional misconduct, he will have waived his right, and you can similarly proceed under the CAA.

4. <u>How much are you entitled to in fees</u>?

Answer:

If the contingency on which your contingent fee arrangement is based occurs (or has occurred) before your representation of Lester is terminated, you are entitled to seek the full amount of your contingent fee owed. *Brent.* However, if the contingency occurs after your representation of Lester is terminated, you will be limited to recovery of the reasonable value of the services rendered during the representation. *Brent.*

Explanation:

As discussed above under question 1, how much you are entitled to recover in fees depends in part on whether recovery (settlement) has already occurred. It also depends on whether that recovery occurs before or after termination of your representation of Lester. *Brent.* Under a contingent fee agreement, an attorney is entitled to fees, or a cause of action for fees, once the contingency has occurred. *Brent*. If the contingency does not occur until after the representation has terminated, the attorney's right to, and cause of action for, fees is limited to the reasonable value of the services rendered during the representation. *Brent*.

In your case, you have not yet terminated your representation of Lester because you have not filed the request for dismissal of his case against Tunnell. However, we are uncertain whether recovery has occurred between Lester and Tunnell yet, although the facts seem to imply that it has, or that it is at the very least imminent. Assuming recovery occurs before you terminate representation, then under the fee agreement, you will be entitled to 40% of the amount Lester recovered from Tunnell, because you

already filed a complaint on Lester's behalf and more than 30 days will have elapsed between December 21, 2009, the date on which the complaint was filed, and June 29, 2010, when Lester told you he had privately settled the matter with Tunnell.

Alternatively, if recovery is determined to have not occurred until after you terminate your representation of Lester, then you will be limited to the reasonable value of your services rendered during the representation. A court is likely to agree that $36,000 is a fair and reasonable fee for your 120 hours of service to Lester, given the filing of the complaint, the heavy account of discovery propounded, including Tunnell's deposition, and your fee of $300, which Lester himself offered to pay you on July 14, 2010, and which was referenced in the fee agreement he signed.

Therefore, provided that recovery occurs or has occurred in Lester's case against Tunnell, you are either going to be entitled to 40% of Lester's recovery based on the fee agreement, or reasonable fees for your services rendered during representation, depending on whether recovery occurred before or after termination of representation.

5. <u>Can you get reimbursement of the fees you're paying us for the opinion letter as "costs" under your fee agreement with Lester</u>?

Answer:

No. Your fee agreement states the following with respect to costs: "Attorney will incur various costs in performing services for Client under this Agreement. Client agrees to reimburse Attorney for all such costs." The fees you are paying us for this opinion letter are not "costs" as costs are defined within the fee agreement.

Explanation:

In the fee agreement, Lester agreed to reimburse you for all costs that you would incur in performing services for him under the fee agreement. Under the "Scope of Services" section of the fee agreement, Lester agreed to hire you to represent him in the matter of his claims relating to his dispute with Joyce Tunnell regarding the piece of real property

they co-owned. You are paying us to seek payment of your legal fees owed by Lester arising out of representation of him in that case. Because you are not incurring our attorney's fees as part of your performance of services for Lester in connection with the Tunnell case, but rather to enforce your own right to payment, our attorney's fees would not likely be considered "costs" as that term is defined within the fee agreement.

After you have had the opportunity to review this letter, please contact me or Ms. Granada to discuss your case further. If you have any questions or concerns regarding my answers to your questions, please contact me so that we can discuss those as well. We look forward to working with you to resolve this matter.

Sincerely,

Applicant

Answer 2 to Performance Test B

Amanda Black, Esq.
Law Offices of Amanda Black
500 Ruxton Street
Bodie, Columbia

July 29, 2010

Dear Ms. Black:

It was a pleasure meeting you yesterday, and I am pleased that we are able to assist you with your fee dispute with your client, Brian Lester. You asked [me] to prepare an opinion letter to you on the subject of how you can obtain your fees from Mr. Lester legally and ethically. We are pleased to provide you with the following analysis, organized by each question you asked us.

I. Bringing a Claim Under Your Fee Agreement

You asked if you can bring a claim against Mr. Lester under your contingency fee agreement, either in court or in arbitration.

Brief Conclusion

You may not file a claim against Mr. Lester so long as you continue to represent him in any capacity. Further, you may not file a claim against Mr. Lester until he has obtained recovery, as contemplated in the fee agreement. Once your representation of Mr. Lester comes to an end and he obtains recovery, you may assert a cause of action for breach of contract based on the contingency fee agreement in a new and separate action. You may not file a claim in arbitration unless and until Mr. Lester waives his rights to arbitrate under the Mandatory Fee Arbitration Act (MFAA). If such waiver does occur, your judicial action would likely be stayed due to the arbitration provision in the

fee agreement.

Analysis

Duty of Loyalty Prohibits Claims During Representation

As you know, an attorney owes a duty of loyalty to her client. The Columbia Supreme Court held in Fracasse v. Brent that during the representation of a client, an attorney is ethically prohibited by the duty of loyalty from asserting any claim against the client in or out of court. You noted in our meeting yesterday that you have not yet ended the representation with Mr. Lester, preferring to wait until you had met with us. Per your phone call with Mr. Lester and the e-mail he sent you on July 17, 2010, your representation with Mr. Lester will come to an end once you have filed a motion to dismiss with prejudice the matter of Lester v. Tunnell. As soon as that happens and the representation is over, you may pursue a claim for breach of contract in Columbia court. While it is therefore in your interests to end the representation, it is also worth recalling that clients have an absolute right to discharge their attorney without any undue burden, and this right may not be interfered with by an attorney in order to protect his or her fees. Fracasse.

Breach of Contract

To prevail on a claim of breach of contract based on the contingency fee agreement, you will have to prove that Lester breached the fee agreement by failing to pay fees to which you were entitled, and thereby causing you damages in the amount of the fees in question. Carroll. You must bring this claim in a separate action against the client; that is, it cannot be part of the same action in which you have been representing Mr. Lester. Carroll. The facts are in your favor. You have invested 120 hours of work on this case. In addition, it is possible Mr. Lester has already obtained recovery, and if not, is highly likely to do so on August 5, when the sale of the Valle Vista property is completed. You will have to prove that once Mr. Lester has obtained recovery that he has not paid you any fees. Since he has not yet paid you any fees (only your costs), and has ended the representation, it seems unlikely that he will pay you. We discuss your fees in Part IV of

this letter, below.

In addition, the Columbia Supreme Court held in Fracasse that an attorney does not have a causation of action against a client for breach arising from failure to pay fees, "unless and until the contingency specified has occurred." Fracasse. In your case, the contingency specified, of course, is Mr. Lester obtaining recovery through the sale of his interest in the real property located at 42 Valle Vista Drive in River County, Columbia. Until Mr. Lester obtains recovery, you do not have a claim for breach of contract, either in court or in arbitration. If Mr. Lester has already been bought out by Tunnell through private settlement, then he has obtained recovery. If Tunnell has agreed to pay him half of the sale price once the sale of the property closes on August 5, 2010, that is when Mr. Lester will obtain recovery and your claim for breach of contract will ripen.

Preclusive Effect of Arbitration Provision

There is also the issue of the provision in the contingency fee agreement by which you and Mr. Lester agree to submit any disputes over fees or costs to binding arbitration before the Columbia Arbitration and Mediation Service (CAMS) pursuant to the Columbia Arbitration Act (CAA). The CAA itself provides in Columbia Code of Civil Procedure Section 1280(b) that such an agreement is valid, enforceable, and irrevocable, excluding any grounds as exist for the revocation of the contract. However, as we discuss in greater length in Part III of this letter, the Columbia Supreme Court ruled in 2004 that "the Mandatory Fee Arbitration Act renders an arbitration provision invoking the [CAA] unenforceable unless and until the [MFAA's] protection is waived." Aguilar v. Lerner. It is our opinion that the Supreme Court's ruling on this issue is controlling, and accordingly, until such time as Mr. Lerner has waived his MFAA protections, it is our opinion that you may see judicial remedy for your fee dispute.

While discussed in greater detail below, there are multiple ways by which Mr. Lester can waive his MFAA rights, one of which is the passing of 30 days without action on his part. Once the MFAA rights have been waived, the CAA provision in the fee agreement will be fully enforceable, and a court would likely find it controlling. Once again, however,

we do believe that while the MFAA option exists for Mr. Lester, you have the right to file a claim for breach of contract after your representation has ended and before the CAA provision is enforceable.

II. Bringing a Claim Under Your Lien Agreement

You asked us if you can bring a claim against Mr. Lester under your lien agreement, either in court or in arbitration.

Brief Conclusion

Based on the information you provided us and our review of the relevant statutes and case law, your lien agreement is unenforceable. Lien agreements must be compliant with Columbia Rule of Professional Conduct (CRPC) 3-300. It is our opinion that your lien agreement unfortunately does not meet the requirements of Rule 3-300, and therefore your lien is unenforceable and you cannot bring a claim against Mr. Lester under it, either in court or in arbitration.

Analysis – Lien Agreements Must Comply with CRPC 3-300

An attorney may assert a cause of action to enforce a lien. Carroll. This action may be brought at the same time as a cause of action for breach of contract on an underlying fee agreement, in the alternative. Carroll. Were the attorney to win on both the breach of contract claims and the claim to enforce the lien, the attorney is of course not permitted to obtain double recovery. Carroll.

To prevail on a cause of action to enforce a lien, the attorney must prove the same facts as required for breach of K, as we discussed above in Part I of this letter, and must also prove that the lien is enforceable as authorized by contract law, and is compliant with CRPC 3-300. Carroll. CRPC 3-300 prohibits an attorney form knowingly acquiring a security interest adverse to a client unless the following three requirements are met:

"a) The acquisition and its terms are fair and reasonable to the client, and are fully

disclosed and transmitted in writing to the client, in a manner which should reasonably be understood by the client; and

b) The client is advised in writing that the client may seek the advice of an independent attorney of the client's choice and is given a reasonable opportunity to see that advice; and

c) The client thereafter consents in writing to the terms of the acquisition." CRPC 3-300.

The discussion included with the rule specifically provides that the rule is applicable when an attorney seeks a lien in order to secure the payment of fees, as is the case here, between you and Mr. Lester. The discussion continues to state that any lien and/or interest acquired via lien is unenforceable unless it complies with Rule 3-300. In reviewing the lien agreement into which you and Mr. Lester ended, it is clear that requirement (c), client consent in writing, has been obtained, as Mr. Lester signed the agreement. While the terms of the agreement are fair as required, it is arguable whether the writing is a manner which Mr. Lester should reasonable have understood; the language could have been clearer. It is not necessary to further examine this issue, however, because it is clear that requirement (b) has not been met and therefore the lien agreement is unenforceable.

In your lien agreement, there is no written advice to Mr. Lester that he may seek the advice of independent counsel of his choosing to review this agreement, and no indication that Mr. Lester had a reasonable opportunity seek that advice. You told us during our meeting yesterday that there are no other papers relating to the fee agreement or lien agreement, other than those you have given to us. Accordingly, it is our conclusion the Mr. Lester was not advised in writing that he may seek independent counsel before signing the lien agreement, and therefore, under Columbia law, the lien agreement is unenforceable and you may not bring any claims thereunder.

III. Arbitration Under the CAA Rather than the MFAA

You asked us if you can arbitrate under the Columbia Arbitration Act (CAA) rather than

the Mandatory Fee Arbitration Act (MFAA).

Brief Conclusion

Mr. Lester has the right to force you to arbitrate your dispute under the MFAA. If Mr. Lester waives his rights under the MFAA either by filing for judicial resolution of the fee dispute, by seeking affirmative relief against you for alleged malpractice or professional misconduct, or be passage of time, you may enforce the arbitration provision in your fee agreement and arbitrate under the CAA.

Analysis

The MFAA Bars a CAA Provision Until Waived.

The MFAA is a statutory alternative to litigating disputes over fees or cost for clients. Lerner. The Columbia Supreme Court held in Aguilar v. Lerner that a client does not waive his rights under the MFAA by agreeing to a fee agreement with an arbitration provision invoking the CAA, before any dispute arises. Lerner. Or, reworded and as we stated above, "the [MFAA] renders an arbitration provision invoking the [CAA] unenforceable unless and until the [MFAA's] protection is waived." Lerner. Should Mr. Lester wish, he has the right to force you into MFAA arbitration. Lerner. MFAA arbitration is limited to disputes between attorneys and clients about fees and/or costs, which of course covers your dispute with Mr. Lester. Lerner. Under the MFAA, you would be bound by the arbitrator's ruling, while Mr. Lester could seek trail de novo. Lerner. In addition, you would have to cover all costs of the MFAA arbitration. Columbia Business & Professional Code (CBPC) 6200(b).

There are three ways by which Mr. Lester can waive his rights under the MFAA. First, he can file an action or any pleading against you, seeking judicial resolution of the fee dispute, or second, seeking affirmative relief against you based on malpractice or professional misconduct. Lerner; CBPC 6200(g). Third, failure to invoke MFAA arbitration by sending a written request to the State Bar and a copy to you within 30 days of the written notice you sent constitutes waiver. CBPC 6200(f). Once Mr. Lester

has waived his rights by any of these three methods, he may no longer utilize the MFAA, and you are free to enforce the arbitration provision in your fee agreement.

To bring an action against Mr. Lester, you must comply with CBPC 6200(e), the written notice requirement. We have reviewed the written notice you sent to Mr. Lester, and it fully complies with the requirements of the MFAA, by notifying him of his right to arbitration under the MFAA, of his filing obligations within 30 days, or waiver. Since you sent Mr. Lester written notice on July 19, he has thirty days in which to invoke those rights. Accordingly, on or about August 19, 2010, depending on when he received the notice, his rights under MFAA will be deemed to have been waived and the CAA arbitration provision in the fee agreement will be enforceable.

IV. Total Fees

You asked us to determine how much you are entitled to in fees.

Brief Conclusion

Payment of your fees is contingent upon Mr. Lester's recovery in his efforts to sell his real property interest. Unless and until Mr. Lester obtains recovery, you are not entitled to any fees. If Mr. Lester has obtained recovery prior to the end of your representation, then you are entitled to 40% of the value of the real property interest he received. If Mr. Lester obtains recovery after the representation has ended, you are entitled to the reasonable value of the services you rendered during the representation, most likely at the $300 per hour rate included in the contingency fee agreement.

Analysis

As we discussed in Part I, a client must obtain recovery before an attorney is entitled to fees under a contingent fee agreement. Fracasse. The Columbia Supreme Court further held that if the contingency specified occurs after the representation has ended, the attorney's right to fees is "limited to the reasonable value of the services rendered during the representation, and does not extend to the full fees that would have been due

under the agreement." Fracasse.

The amount of fees to which you are entitled depends upon when the representation ends, and when and how much Mr. Lester obtain recovery.

When did the representation end?

Mr. Lester informed you by e-mail on July 17, 2010, that you should file a dismissal with prejudice and that the representation would then end. In his e-mail, he requested that you file the dismissal within a week or two. To date, you have not yet filed the dismissal. Per his request, you are supposed to file the dismissal by approximately July 31, 2010. The representation would then come to an end. Any unreasonable delay by you in filing the dismissal would likely lead to a determination that the representation ended within the time period requested by Mr. Lester, as he has an absolute right to end the representation at any time. As such, it is our opinion that the representation cannot continue into the month of August.

When and how much did or will Mr. Lester obtain recovery?

Mr. Lester informed you on June 29, 2010, that he and Tunnell had privately settled the matter, and that he had decided to "give up." This is the first indication that Mr. Lester had obtained some recovery, and your contingent fee agreement provides you are entitled to fees from any recovery, "whether by judgment of settlement or otherwise." The determination of when Mr. Lester obtained recovery, however, is almost certainly dependent on when he is actually paid. On July 18, you were told by a mutual acquaintance of you and Mr. Lester, a real estate broker, that the Valle Vista property was about to be sold. Further, you believe from the real estate broker that Tunnell has either already bought out Lester for a price of $600,000 under the private settlement mentioned on June 29, or will be paid half of the sale price of $1.4 million when the sale closes on August 5, 2010 for a total recovery of $700,000.

How much are you entitled to in fees?

There are two possible outcomes. We assume for the purpose of this discussion as we discussed above, that the representation will end no later than July 31, 2010.

1) Prior to the End of Representation. If Mr. Lester obtained recovery in the amount of $600,000, prior to the end of the representation, then you are entitled to 40%. This is per the contingent fee agreement, which provides that if recovery is obtained beyond 30 days after the filing of a complaint, your fees will be equal to 40% of the amount recovered. You brought an action for partition on December 21, 2009; if the private settlement occurred at its earliest possible date, June 29, that is much more than 30 days later.

2) After the End of Representation. If Mr. Lester obtained or obtains recovery in the amount of $600,000, or in the amount of $700,000, after the representation has ended, then you are entitled to the reasonable value of the services you rendered during the representation, but not the total fees envisioned by the complaint. Your services extend through the filing of the dismissal with prejudice. Your contingent fee agreement provides that if recovery occurs after the end of representation, you will be paid for your services at an hourly rate of $300. Assuming the court or arbitrator upholds this figure, as well as your calculation of 120 hours of work, plus the time you need to file the dismissal, you will be entitled to fees of approximately $36,000.

V. Reimbursement for Our Services

You asked us whether you can obtain reimbursement of the fees you are paying us for this opinion letter as costs under your fee agreement with Mr. Lester.

Brief Conclusion

Our research did not discover any provision by which you can obtain reimbursement for attorney fees incurred in the course of determining your rights in pursuing a fee dispute with a client. Further, it is our opinion that your seeking counsel in regards to this fee dispute does not qualify as “performing services” for Mr. Lester under your contingent fee agreement. Accordingly, it is our opinion that you cannot seek reimbursement of the fees you are paying our firm as costs under your fee agreement with Mr. Lester.

Analysis

Your contingent fee agreement provides: “Attorney will incur various costs in performing services for Client under this Agreement. Client agrees to reimburse Attorney for all such costs.” Our research did not produce any statutes or case law that specifically addressed whether an attorney can obtain reimbursement for attorney costs she incurs in pursuing a fee dispute with a client. Nor did any of our research address how a court or arbitrator would define the scope of series for the Client. That said, it is our opinion that seeking our counsel does not constitute services performed for Mr. Lester. The scope of your contingent fee agreement is Mr. Lester seeking recovery for his real property interest against Tunnell. Our services do not fit within the scope of your duties or services performed for Mr. Lester.

Our opinion is that your best option is including the costs of our services in any claim you decide to file with a Columbia Court, CAA or MFAA arbitrator. It would then be up to the judge or arbitrator to decide whether you are entitled to reimbursement from Mr. Lester for the costs you incurred in obtaining our counsel. Our opinion is that your chances of success are limited.