THE MPT

MULTISTATE PERFORMANCE TEST

February 2009 MPTs and Point Sheets

ncbe

February 2009 MPTs and Point Sheets

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Preface

Multistate Performance Test (MPT) is developed by the (NCBE). includes the items and point sheets from the February 2009 MPT. Each test includes two items; jurisdictions that use the MPT select either one or both items for their applicants to complete. vmore,, available on the

The MPT point sheets describe the factual and legal points encompassed within the lawyering tasks to be completed by the applicants. They outline the possible issues and points that might be addressed by an examinee. They are provided to the user jurisdictions for the sole purpose of assisting graders in grading the examination by identifying the issues and suggesting the resolution of the problems contemplated by the drafters. Point sheets are not official grading guides and are not intended to be "model answers." Examinees can receive a range of passing grades, including excellent grades, without covering all of the points discussed in the point sheets. User jurisdictions are free to modify the point sheets. Grading of the MPT is the exclusive responsibility of the jurisdiction using the MPT as part of its admissions process.

Description of the MPT

MPT consists of two items, either or both of which a jurisdiction may select to include as part of its bar examination. Applicants are expected to spend 90 minutes completing each MPT item administered.

The materials for each MPT include a File and a Library. The File consists of source documents containing all the facts of the case. The specific assignment the applicant is to complete is described in a memorandum from a supervising attorney. The File might also include transcripts of interviews, depositions, hearings or trials, pleadings, correspondence, client documents, contracts, newspaper articles, medical records, police reports, or lawyer's notes. Relevant as well as irrelevant facts are included. Facts are sometimes ambiguous, incomplete, or even conflicting. As in practice, a client's or a supervising attorney's version of events may be incomplete or unreliable. Applicants are expected to recognize when facts are inconsistent or missing and are expected to identify potential sources of additional facts.

The Library may contain cases, statutes, regulations, or rules, some of which may not be relevant to the assigned lawyering task. The applicant is expected to extract from the Library the legal principles necessary to analyze the problem and perform the task. The MPT is not a test of substantive law; the Library materials provide sufficient substantive information to complete the task.

The MPT is designed to test an applicant's ability to use fundamental lawyering skills in a realistic situation. Each test evaluates an applicant's ability to complete a task that a beginning lawyer should be able to accomplish. The MPT requires applicants to (1) sort detailed factual materials and separate relevant from irrelevant facts; (2) analyze statutory, case, and administrative materials for applicable principles of law; (3) apply the relevant law to the relevant facts in a manner likely to resolve a client's problem; (4) identify and resolve ethical dilemmas, when present; (5) communicate effectively in writing; and (6) complete a lawyering

task within time constraints. These skills are tested by requiring applicants to perform one of a variety of lawyering tasks. For example, applicants might be instructed to complete any of the following: a memorandum to a supervising attorney, a letter to a client, a persuasive memorandum or brief, a statement of facts, a contract provision, a will, a counseling plan, a proposal for settlement or agreement, a discovery plan, a witness examination plan, or a closing argument.

Instructions

The back cover of each test form contains the following instructions:

1. You will have 90 minutes 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 fictitious state of Franklin, in the fictitious Fifteenth Circuit of the United States. Columbia and Olympia are also fictitious states in the Fifteenth Circuit. In Franklin, the trial court of general jurisdiction is the District Court, the intermediate appellate court is the Court of Appeal, and the highest court is the Supreme Court.

3. You will have two kinds of materials with which to work: a File and a Library. The first document in the File is a memorandum containing the instructions for the task you are to complete. The other documents in the File contain factual information about your case and may include some facts that are not relevant.

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

5. Your response must be written in the answer book provided. If you are taking this examination on a laptop computer, your jurisdiction will provide you with specific instructions. In answering this performance test, you should concentrate on the materials in the File and Library. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.

6. Although there are no restrictions on how you apportion your time, you should be sure to allocate ample time (about 45 minutes) to reading and digesting the materials and to organizing your answer before you begin writing it. You may make notes anywhere in the test materials; blank pages are provided at the end of the booklet. You may not tear pages from the question booklet.

7. This performance test will be graded on your responsiveness to the instructions regarding the task you are to complete, which are given to you in the first memorandum in the File, and on the content, thoroughness, and organization of your response.

FILE

MPT-1: *Phoenix Corporation v. Biogenesis, Inc.*

FORBES, BURDICK & WASHINGTON LLP
777 Fifth Avenue
Lakewood City, Franklin 33905

MEMORANDUM

To: Applicant

From: Ann Buckner

Date: February 24, 2009

Subject: *Phoenix Corporation v. Biogenesis, Inc.*

Yesterday, we were retained by the law firm of Amberg & Lewis LLP to consult on a motion for disqualification filed against it.

Amberg & Lewis represents Biogenesis, Inc., in a breach-of-contract action brought by Phoenix Corporation seeking $80 million in damages. The lawsuit has been winding its way through state court for almost six years. Phoenix is represented by the Collins Law Firm. There have been extensive discovery, motion practice, and several interlocutory appeals over the years, but the matter is now set for jury trial in a month and is expected to last six weeks. Two weeks ago, however, Phoenix filed a disqualification motion after Amberg & Lewis obtained one of Phoenix's attorney-client privileged documents—a letter from Phoenix's former president to one of its attorneys. Yesterday, I interviewed Carole Ravel, an Amberg & Lewis partner. During the interview, I learned some background facts; I also obtained a copy of the letter and Phoenix's brief in support of its disqualification motion.

Please prepare a memorandum evaluating the merits of Phoenix's argument for Amberg & Lewis's disqualification, bringing to bear the applicable legal authorities and the relevant facts as described to me by Ms. Ravel. Do not draft a separate statement of facts, but instead use the facts as appropriate in conducting your evaluation.

Transcript of Client Interview (February 23, 2009)

Buckner: Good to see you, Carole.

Ravel: Good to see you too, Ann. Thanks for seeing me on such short notice.

Buckner: My pleasure. What's the problem?

Ravel: The problem is a motion for disqualification. Here's the supporting brief.

Buckner: Thanks. Let me take a quick look. I'm unacquainted with the science, but the law is familiar. How can I help?

Ravel: To be candid, we've made a few mistakes, and I thought it would be prudent to consult with someone like you with substantial experience in representing lawyers in professional liability and ethics matters.

Buckner: Tell me what happened.

Ravel: Sure. Six years ago, Phoenix Corporation sued Biogenesis for breach of contract in state court, seeking about $80 million in damages. Phoenix is a medical research company; the Collins Law Firm represents it. Our client Biogenesis is one of the largest biotechnology companies in the world. Phoenix claims that Biogenesis breached a contract they entered into in 1978. There's a lot about this case that's enormously complicated and technical—all that science that you said you're unacquainted with—but the dispute is fairly simple. Under the agreement, Phoenix granted a license to Biogenesis to use a process that Phoenix invented for genetically engineering human proteins. In exchange, Biogenesis was obliged to pay Phoenix royalties on sales of certain categories of pharmaceuticals that were made using the licensed engineering process. Here is the dispute: While Biogenesis has taken the position that its royalty obligation is limited to the categories of pharmaceuticals specified, Phoenix claims that it extends to other categories of pharmaceuticals as well. If the jury agrees with Biogenesis, it owes nothing more. If the jury agrees with Phoenix, Biogenesis owes about $80 million beyond what it has already paid in royalties.

Buckner: That's how the brief sums it up, too.

Ravel: Right. The factual background and procedural history set out in the brief are accurate—but of course we disagree with Phoenix's argument about Biogenesis's royalty obligation.

Buckner: Fine. But what about this Phoenix letter that's allegedly protected by the attorney-client privilege?

Ravel: Here it is, a letter to Peter Horvitz, a Collins partner, from Gordon Schetina, who was then Phoenix's president.

Buckner: Thanks. It certainly looks privileged.

Ravel: It is. I can't deny it. But it's important. Let me go back to the 1978 agreement. Discovery in Phoenix's breach-of-contract action has established to our satisfaction that, by their conduct from 1978 to 1998, Biogenesis and Phoenix revealed that they understood that Biogenesis's royalty obligation was limited to the categories of pharmaceuticals specified in the agreement. During that period, Biogenesis made a lot of money and paid Phoenix a great deal in royalties. It was only in 1998 that Phoenix began to claim that Biogenesis's royalty obligation extended to other categories of pharmaceuticals—when it saw how much more in royalties it could obtain and became greedy to get them.

Buckner: And the Schetina letter . . .

Ravel: And the Schetina letter amounts to an admission by Phoenix that Biogenesis was correct in its understanding of its limited royalty obligation.

Buckner: So how did you get it?

Ravel: Phoenix's lawyers assume that the Schetina letter was disclosed to us inadvertently during discovery, but they're wrong. The letter arrived on February 2, 2009, by itself, in an envelope with the Collins Law Firm's return address. My assistant opened the envelope and discovered the letter all by itself, with a note reading "From a 'friend' at the Collins Law Firm."

Buckner: Do you know who the "friend" was?

Ravel: No. But it's not hard to guess. Collins is in the process of laying off staff in an effort to increase profits. The letter was obviously sent by a disgruntled employee.

Buckner: That makes sense. But what happened next?

Ravel: When the letter arrived, my team and I were in full trial-preparation mode. Of course, I recognized that the letter appeared privileged on its face; it's a classic confidential communication from a client to an attorney. In our eyes, the letter was a smoking gun. It made our case and we wanted to use it.

Buckner: So what happened?

Ravel: We were pretty sure that we were within the ethical rules. But that same day, two of the associates on my team went out for lunch. As they were discussing the impact of the Schetina letter in what turned out to be too much detail, a man at a neighboring table asked whether they knew who he was. They said no, and the man said he was Peter Horvitz and stormed out. Horvitz called me within minutes, and he was furious. He demanded return of the letter and I refused. A few days later, he filed the disqualification motion.

Buckner: I see. And precisely what is it you'd like us to do for you?

Ravel: Ann, I'd like you to evaluate the merits of Phoenix's argument that we should be disqualified. Trial is only a month away, and Biogenesis would have to incur tremendous costs if it were forced to substitute new attorneys if we were disqualified. And let's be candid, we've been charged with a violation of an ethical obligation and might face some exposure as a consequence.

Buckner: I understand, Carole. Let me do some research, and I'll get back to you.

Ravel: Thanks so much.

PHOENIX CORPORATION

1500 Rosa Road
Lakewood City, Franklin 33905

January 2, 1998

CONFIDENTIAL

Peter Horvitz, Esq.
Collins Law Firm
9700 Laurel Boulevard
Lakewood City, Franklin 33905

Dear Peter:

I am writing with some questions I'd like you to consider before our meeting next Tuesday so that I can get your legal advice on a matter I think is important. I have always understood our agreement with Biogenesis to require it to pay royalties on specified categories of pharmaceuticals. I learned recently how much money Biogenesis is making from other categories of pharmaceuticals. Why can't we get a share of that? Can't we interpret the agreement to require Biogenesis to pay royalties on other categories, not only the specified ones? Let me know your thoughts when we meet.

Very truly yours,

Gordon Schetina

President

IN THE DISTRICT COURT OF THE STATE OF FRANKLIN
FOR THE COUNTY OF LANCASTER

PHOENIX CORPORATION,	)	**No. Civ. 041033**
	)	
Plaintiff,	)	**PLAINTIFF'S BRIEF IN SUPPORT OF MOTION TO DISQUALIFY COUNSEL FOR DEFENDANT**
	)	
v.	)	
	)	
BIOGENESIS, INC.,	)	
	)	
Defendant.	)	
	)	

I. Introduction

The rule governing this motion is plain: A trial court may—and, indeed, must—disqualify an attorney who has violated an ethical obligation by his or her handling of an opposing party's attorney-client privileged material and has thereby threatened that party with incurable prejudice. Just as plain is the result that the rule compels here: Defendant's attorneys obtained one of plaintiff's attorney-client privileged documents evidently by inadvertent disclosure. In violation of their ethical obligation, they chose to examine the document, failed to notify plaintiff's attorneys, and then refused to return the document at the latter's demand. By acting as they did, they have threatened plaintiff with incurable prejudice. Since this Court cannot otherwise prevent this prejudice, it must disqualify them to guarantee plaintiff a fair trial.

II. Factual Background and Procedural History

In 1977, Phoenix Corporation, a medical research company, invented a process for genetically engineering human proteins—a process essential to the development of entirely new categories of pharmaceuticals capable of managing or curing the most serious conditions and diseases afflicting human beings, including diabetes and cancer.

In 1978, Phoenix entered into an agreement with Biogenesis, Inc., one of the pioneers in the field of biotechnology: Phoenix licensed its invention to Biogenesis, and Biogenesis obligated itself to pay Phoenix royalties on its sales of various categories of pharmaceuticals.

Between 1979 and 1997, Biogenesis produced dozens of pharmaceuticals and generated billions of dollars in revenue as a result of their sale. To be sure, Biogenesis paid Phoenix substantial royalties—but, as it turns out, far less than it was obligated to.

In 1998, Phoenix learned that Biogenesis had not been paying royalties on its sales of all the categories of pharmaceuticals in question, but only categories specified in the 1978 agreement. For the first time, Biogenesis stated its position that the agreement so limited its obligation. Phoenix rejected any such limitation.

Between 1999 and 2002, Phoenix attempted to resolve its dispute with Biogenesis. Each and every one of its efforts, however, proved unsuccessful.

In 2003, Phoenix brought this action against Biogenesis for breach of the 1978 agreement, seeking $80 million in damages for royalties Biogenesis owed but failed to pay. Between 2003 and 2009, Phoenix and Biogenesis have been engaged in extensive discovery and motion practice and in several interlocutory appeals as they have prepared for a jury trial, set to begin on March 30, 2009, and expected to last six weeks.

On February 2, 2009, Phoenix learned, fortuitously, that Biogenesis's attorneys, Amberg & Lewis LLP, had obtained a document evidently through inadvertent disclosure by Phoenix's attorneys, the Collins Law Firm, in the course of discovery. On its face, the document showed itself to be protected by the attorney-client privilege, reflecting a confidential communication from Phoenix, by its then president Gordon Schetina, to one of its attorneys, Peter Horvitz, seeking legal advice, and clearly the document was not intended for the Amberg firm. Nevertheless, the Amberg firm failed to notify Collins about its receipt of the Schetina letter. As soon as it learned what had transpired, Collins instructed the Amberg firm to return the letter, but the Amberg firm refused.

III. Argument

A. This Court Should Disqualify Amberg & Lewis from Representing Biogenesis Because It Has Violated an Ethical Obligation Threatening Phoenix with Incurable Prejudice in Its Handling of Phoenix's Attorney-Client Privileged Document.

The law applicable to Phoenix's motion to disqualify Amberg & Lewis from representing Biogenesis in this action is clear.

A trial court may, in the exercise of its inherent power, disqualify an attorney in the interests of justice. *Indigo v. Luna Motors Corp.* (Fr. Ct. App. 1998). The court may—and, indeed, must—disqualify an attorney who has violated an ethical obligation by his or her handling of an opposing party's attorney-client privileged material and has thereby threatened that party with incurable prejudice. *Id.* Although the party represented by the disqualified attorney may be said to enjoy an "important right" to representation by an attorney of its own choosing, any such "right" "must yield to ethical considerations that affect the fundamental principles of our judicial process." *Id*. As the court said, "The paramount concern, however, must be to preserve public trust in the scrupulous administration of justice and the integrity of the bar." *Id*.

As will be demonstrated, the law compels the disqualification of Amberg & Lewis.

1. Phoenix's Document Is Protected by the Attorney-Client Privilege.

To begin with, the Schetina letter is protected by the attorney-client privilege. Under Franklin Evidence Code § 954, the "client . . . has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and attorney. . . ." On its face, the Schetina letter reflects a confidential communication from Phoenix's then president, Schetina, to one of its attorneys, Horvitz, seeking legal advice.

2. **Amberg & Lewis Has Violated an Ethical Obligation.**

Next, Amberg & Lewis has violated an ethical obligation by handling the Schetina letter as it did. In the face of the inadvertent disclosure of attorney-client privileged material, such as evidently occurred in this case, the ethical obligation is plain under Franklin Rule of Professional Conduct 4.4: "An attorney who receives a document relating to the representation of the attorney's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender."

Because on its face the Schetina letter reflects a confidential communication from Phoenix's then president, Schetina, to its attorney, Horvitz, seeking legal advice, and is therefore

protected by the attorney-client privilege, Amberg & Lewis should surely have known that the letter was not intended for it. The Amberg firm was at the very least obligated to notify Collins that it had received the letter. It should also have refrained from examining the letter, and should have abided by our instructions. On each point, the Amberg firm acted to the contrary, choosing to examine the letter, failing to notify Collins, and then refusing to return it at Collins's demand.

Even if it should turn out that Amberg & Lewis obtained the Schetina letter as a result of unauthorized disclosure as opposed to inadvertent disclosure, the outcome would be the same. In *Mead v. Conley Machinery Co.* (Fr. Ct. App. 1999) the Court of Appeal imposed an ethical obligation similar to that of Rule 4.4 to govern cases of unauthorized disclosure. It follows that the misconduct of the Amberg firm, as described above, would amount to an ethical violation if the letter's disclosure were unauthorized and not inadvertent.

3. Amberg & Lewis Has Threatened Phoenix with Incurable Prejudice.

Finally, by its unethical actions, Amberg & Lewis has threatened Phoenix with incurable prejudice. The Schetina letter could well prejudice the jury in the midst of a long and complex trial, especially if it were cleverly exploited by Biogenesis. Whether or not any *direct* harm could be prevented by the exclusion of the letter from evidence—which Phoenix intends to seek in the coming days—the *indirect* harm that might arise from its use in trial preparation cannot be dealt with so simply: The bell has been rung, and can hardly be unrung, except by disqualification of Amberg & Lewis—an action that is necessary in order to guarantee Phoenix a fair trial.

Even if it should turn out that Amberg & Lewis obtained the Schetina letter by *unauthorized* disclosure as opposed to *inadvertent* disclosure, the result would not change. It is true that in *Mead v. Conley Machinery Co.*, the Court of Appeal suggested in a footnote that, in cases of unauthorized disclosure, the "threat of 'incurable prejudice'. . . is neither a necessary nor a sufficient condition for disqualification." But that suggestion is mere dictum, inasmuch as *Mead* did not involve the threat of *any* prejudice, incurable or otherwise.

IV. Conclusion

For the reasons stated above, this Court should grant Phoenix's motion and disqualify Amberg & Lewis from representing Biogenesis in this action.

Respectfully submitted,

Date: February 9, 2009

Kimberly Block
COLLINS LAW FIRM LLP
Attorneys for Plaintiff Phoenix Corporation

LIBRARY

MPT-1: *Phoenix Corporation v. Biogenesis, Inc.*

RULE 4.4 OF THE FRANKLIN RULES OF PROFESSIONAL CONDUCT

Rule 4.4. Inadvertent disclosure of attorney-client document

An attorney who receives a document relating to the representation of the attorney's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

HISTORY

Adopted by the Franklin Supreme Court, effective July 1, 2002.

COMMENT

[1] Rule 4.4, which was adopted by the Franklin Supreme Court in 2002 in response to *Indigo v. Luna Motors Corp.* (Fr. Ct. App. 1998), recognizes that attorneys sometimes receive documents that were mistakenly sent or produced by opposing parties or their attorneys. If an attorney knows or reasonably should know that such a document was sent inadvertently, then this rule requires the attorney, whether or not the document is protected by the attorney-client privilege, to promptly notify the sender in order to permit that person to take protective measures.

[2] Rule 4.4 provides that if an attorney receives a document the attorney should know was sent inadvertently, he or she must promptly notify the sender, but need do no more. *Indigo v. Luna Motors Corp.*, which predated this rule, concluded that the receiving attorney not only had to notify the sender (as this rule would later require), albeit only as to a document protected by the attorney-client privilege, but also had to resist the temptation to examine the document, and had to await the sender's instructions about what to do. In so concluding, *Indigo v. Luna Motors Corp.* conflicted with this rule and, ultimately, with the intent of the Franklin Supreme Court in adopting it.

[3] Rule 4.4 does not address an attorney's receipt of a document sent without authorization, as was the case in *Mead v. Conley Machinery Co*. (Fr. Ct. App. 1999). Neither does any other rule. *Mead v. Conley Machinery Co*., which also predated this rule, concluded that the receiving attorney should review the document—there, an attorney-client privileged document—only to the extent necessary to determine how to proceed, notify the opposing attorney, and either abide by the opposing attorney's instructions or refrain from using the document until a court disposed of the matter. The Franklin Supreme Court, however, has declined to adopt a rule imposing any ethical obligation in cases of unauthorized disclosure.

Indigo v. Luna Motors Corp.
Franklin Court of Appeal (1998)

The issue in this permissible interlocutory appeal is whether the trial court abused its discretion by disqualifying plaintiff's attorney for improper use of attorney-client privileged documents disclosed to her inadvertently. We hold that it did not. Accordingly, we affirm.

I

Plaintiff Ferdinand Indigo sued Luna Motors Corporation for damages after he sustained serious injuries when his Luna sport utility vehicle rolled over as he was driving.

In the course of routine document production, Luna's attorney's paralegal inadvertently gave Joyce Corrigan, Indigo's attorney, a document drafted by Luna's attorney and memorializing a conference between the attorney and a high-ranking Luna executive, Raymond Fogel, stamped "attorney-client privileged," in which they discussed the strengths and weaknesses of Luna's technical evidence. As soon as Corrigan received the document, which is referred to as the "technical evidence document," she examined it closely; as a result, she knew that it had been given to her inadvertently. Notwithstanding her knowledge, she failed to notify Luna's attorney. She subsequently used the document for impeachment purposes during Fogel's deposition, eliciting damaging admissions. Luna's attorney objected to Corrigan's use of the document, accused her of invading the attorney-client privilege, and demanded the document's return, but Corrigan refused.

In response, Luna filed a motion to disqualify Corrigan. After a hearing, the trial court granted the motion. The court determined that the technical evidence document was protected by the attorney-client privilege, that Corrigan violated her ethical obligation by handling it as she did, and that disqualification was the appropriate remedy. Indigo appealed.

II

It has long been settled in Franklin that a trial court may, in the exercise of its inherent power, disqualify an attorney in the interests of justice. *See*, *e.g.*, *In re Klein* (Fr. Ct. App. 1947). Ultimately, disqualification involves a conflict between a client's right to an attorney of his or her choice and the need to maintain ethical standards of professional responsibility. The paramount concern, however, must be to preserve public trust in the scrupulous administration of justice and the integrity of the bar. The important right to an attorney of one's choice must yield to ethical considerations that affect the fundamental principles of our judicial process.

Appellate courts review a trial court's ruling on disqualification for abuse of discretion. A

court abuses its discretion when it acts arbitrarily or without reason. As will appear, we discern no arbitrary or unreasonable action here.

A

Indigo's first claim is that the trial court erred in determining that Corrigan violated an ethical obligation by handling the technical evidence document as she did.

From the Franklin Rules of Professional Conduct and related case law, we derive the following, albeit implicit, standard: An attorney who receives materials that on their face appear to be subject to the attorney-client privilege, under circumstances in which it is clear they were not intended for the receiving attorney, should refrain from examining the materials, notify the sending attorney, and await the instructions of the attorney who sent them.

Under this standard, Corrigan plainly violated an ethical obligation. She received the technical evidence document; the document appeared on its face to be subject to the attorney-client privilege, as it was stamped "attorney-client privileged"; the circumstances were clear that the document was not intended for her; nevertheless, she examined the document, failed to notify Luna's attorney, and refused to return it at the latter's demand.

B

Indigo's second claim is that the trial court erred in determining that disqualification of Corrigan was the appropriate remedy in light of her violation of her ethical obligation.

The trial court predicated Corrigan's disqualification on the threat of incurable prejudice to Luna. Such a threat has long been recognized as a sufficient basis for disqualification. *See*, *e.g.*, *In re Klein.* We find it more than sufficient here. Corrigan used the technical evidence document during the deposition of Luna executive Fogel, eliciting damaging admissions. Even if Corrigan were prohibited from using the document at trial, she could not effectively be prevented from capitalizing on its contents in preparing for trial and perhaps obtaining evidence of similar force and effect.

III

The trial court concluded that disqualification was necessary to ensure a fair trial. It did not abuse its discretion in doing so.

Affirmed.

Mead v. Conley Machinery Co.
Franklin Court of Appeal (1999)

The issue in this permissible interlocutory appeal is whether the trial court abused its discretion by disqualifying plaintiff's attorney on the ground that the attorney im-properly used attorney-client privileged documents disclosed to him without authorization. *Cf. Indigo v. Luna Motors Corp.* (Fr. Ct. App. 1998) (inadvertent disclosure). We hold that it did and reverse.

I

Dolores Mead, a former financial consultant for Conley Machinery Company, sued Conley for breach of contract. Without authorization, she obtained attorney-client privileged documents belonging to Conley and gave them to her attorney, William Masterson, who used them in deposing Conley's president over Conley's objection.

Conley immediately moved to disqualify Masterson. After an evidentiary hearing, the trial court granted the motion. Mead appealed.

II

In determining whether the trial court abused its discretion by disqualifying Masterson, we ask whether it acted arbitrarily or without reason. *Indigo*.

III

At the threshold, Mead argues that the trial court had no authority to disqualify Masterson because he did not violate any specific rule among the Franklin Rules of Professional Conduct. It is true that Masterson did not violate any specific rule—but it is *not* true that the court was without authority to disqualify him. With or without a violation of a specific rule, a court may, in the exercise of its inherent power, disqualify an attorney in the interests of justice, including where necessary to guarantee a fair trial. *Indigo.*

IV

Without doubt, there are situations in which an attorney who has been privy to his or her adversary's privileged documents without authorization must be disqualified, even though the attorney was not involved in obtaining the documents. By protect-ing attorney-client communications, the attorney-client privilege encourages parties to fully develop cases for trial, increasing the chances of an informed and correct resolution.

To safeguard the attorney-client privilege and the litigation process itself, we believe that the following standard must govern: An attorney who receives, on an unauthorized basis, materials of an adverse party that he or she knows to be attorney-client privileged should, upon recognizing the privileged nature of the materials, either refrain from reviewing such materials or review them only to the extent required to determine how to proceed; he or she should notify the adversary's attorney that he or she has such materials and should either follow

instructions from the adversary's attorney with respect to the disposition of the materials or refrain from using the materials until a definitive resolution of the proper disposition of the materials is obtained from a court.

Violation of this standard, however, amounts to only one of the facts and circumstances that a trial court must consider in deciding whether to order disqualification. The court must also consider all of the other relevant facts and circumstances to determine whether the interests of justice require disqualification. Specifically, in the exercise of its discretion, a trial court should consider these factors: (1) the attorney's actual or constructive knowledge of the material's attorney-client privileged status; (2) the promptness with which the attorney notified the opposing side that he or she had received such material; (3) the extent to which the attorney reviewed the material; (4) the significance of the material, i.e., the extent to which its disclosure may prejudice the party moving for disqualification, and the extent to which its return or other measure may prevent or cure that prejudice; (5) the extent to which the party moving for disqualification may be at fault for the unauthorized disclosure; and (6) the extent to which the party opposing disqualification would suffer prejudice from the disqualification of his or her attorney.[1]

Some of these factors weigh in favor of Masterson's disqualification. For example, Masterson should have known after the most cursory review that the documents in question were protected by the attorney-client privilege. Nevertheless, he did not notify Conley upon receiving them. Also, it appears that he thoroughly reviewed them, as he directly referenced specific portions in his response to Conley's disqualification motion. Finally, Conley was not at fault, since Mead copied them covertly.

Other factors, however, weigh against Masterson's disqualification. The information in the documents in question would not significantly prejudice Conley, reflecting little more than a paraphrase of a handful of Mead's allegations. The court may exclude the documents from evidence and thereby prevent any prejudice to Conley—all without disqualifying Masterson. Exclusion would prevent ringing for the jury any bell that could not be unrung. To be sure, it would not erase the documents from Masterson's mind, but any harm arising from their presence in Masterson's memory would be minimal and, indeed, speculative. In contrast, Mead would

[1] In *Indigo v. Luna Motors Corp.*, we recently considered the issue of disqualification in the context of *inadvertent* disclosure of a document protected by the attorney-client privilege as opposed to *unauthorized* disclosure. The analysis set out in the text above renders explicit what was implicit in *Indigo*, and is generally applicable to disqualification for inadvertent disclosure as well as unauthorized disclosure. Although we found the threat of "incurable prejudice" decisive in *Indigo*, it is neither a necessary nor a sufficient condition for disqualification.

suffer serious hardship if Masterson were disqualified at this time, after he has determined trial strategy, worked extensively on trial preparation, and readied the matter for trial. In these circumstances, disqualification may confer an enormous, and unmerited, strategic advantage upon Conley.

In conclusion, because the factors against Masterson's disqualification substantially outweigh those in its favor, the trial court abused its discretion in disqualifying him.

Reversed.

FILE

MPT-2: *Ronald v. Department of Motor Vehicles*

LAW OFFICES OF MARVIN ANDERS
1100 Larchmont Avenue
Hawkins Falls, Franklin 33311

M E M O R A N D U M

To: Applicant
From: Marvin Anders
Date: February 24, 2009
Subject: Ronald v. Department of Motor Vehicles

Our client, Barbara Ronald, was arrested and charged with driving a motor vehicle with a prohibited blood-alcohol concentration. A blood test taken after her arrest indicates that she had a blood-alcohol concentration of 0.08 percent. Pursuant to § 353 of the Franklin Vehicle Code, the "Administrative Per Se" Law, the Franklin Department of Motor Vehicles (DMV) suspended her driver's license even though she has not yet had a criminal trial for driving with a prohibited blood-alcohol concentration.

Section 353 permits a driver whose license has been suspended to request an administrative hearing to vacate the suspension. The evidentiary portion of Ms. Ronald's hearing was yesterday. We must submit written argument to the administrative law judge on the issues we raised by the close of business today. Because this is an administrative proceeding—not a criminal prosecution for driving with a prohibited blood-alcohol concentration—the rules are different, particularly the rules of evidence. For example, the DMV may introduce hearsay evidence that would be inadmissible in court. Also, under § 353, the DMV need prove that Ms. Ronald was driving with a prohibited blood-alcohol concentration only by a preponderance of the evidence.

Please draft a persuasive memorandum for the administrative law judge arguing that:

1. The police officer did not have reasonable suspicion to stop Ms. Ronald;
2. The administrative law judge cannot rely solely on the blood test report to find that Ms. Ronald was driving with a prohibited blood-alcohol concentration; and
3. In light of all the evidence, the DMV has not met its burden of proving by a preponderance of the evidence that Ms. Ronald was driving with a prohibited blood-alcohol concentration.

Do not write a separate statement of facts. However, be sure to use the law and the facts to make the strongest case possible on each issue, anticipating and addressing the arguments that the DMV may be able to make in its favor.

Transcript of February 23, 2009, Administrative Hearing

Administrative Law Judge (ALJ): We're here for the hearing on the one-year suspension of Barbara Ronald's driver's license pursuant to Franklin Vehicle Code § 353. Attorney Jennifer Newman appears on behalf of the DMV, Marvin Anders on behalf of Ms. Ronald. Ms. Newman, you've got the burden; you go first.

Newman: Thank you. The DMV requests that the clerk mark as Exhibit 1 a Hawkins Falls Police Department Incident Report, by Officer Barry Thompson, regarding the incident involving Ms. Ronald on December 19, 2008. The DMV also requests that the Hawkins Falls Police Department Crime Laboratory § 353 Blood Alcohol Test, dated December 29, which is the document that triggered Ms. Ronald's driver's license suspension on January 9, be marked and admitted as Exhibit 2.

ALJ: Any objections to the admission of the police report and crime lab test results?

Anders: We don't object to admitting the police report. However, since the officer is here, I'll call him as a hostile witness and examine him on some details. We do dispute that he had reasonable suspicion to stop Ms. Ronald. We're also challenging the sufficiency of the § 353 test results as inadmissible hearsay, and we'll argue that they are not enough to support a finding that Ms. Ronald was driving with a blood-alcohol level of at least 0.08 percent.

ALJ: Ms. Newman?

Newman: It's the DMV's position that you should, at a minimum, consider the § 353 test results as evidence and that they are, in fact, enough to meet our burden, and that Officer Thompson did have reasonable suspicion to stop Ms. Ronald.

ALJ: The police report is admitted. Since this is an administrative hearing, I'll receive the § 353 test results, and you can argue their impact in a written memorandum.

Newman: With that, the DMV rests.

Anders: Your Honor, Ms. Ronald wants to testify briefly, and I'd like to call her.

[Witness takes the stand and is sworn and identified.]

Anders: Ms. Ronald, can you tell us what happened on the night of the incident?

Ronald: Yes. I went to the Lexington Club for a late supper. I had worked 18 hours at the Palace Hotel, where I'm the manager, dealing with a host of problems that came out of nowhere. I had to go somewhere to unwind, and I was hungry. I had a salad and a piece of grilled fish and some white wine—no more than two glasses, just as I told the officer. I wasn't under the influence of anything. I was just drained. I left the Lexington Club after midnight. As I was driving down Highway 13, I saw a car following me so closely that I couldn't see it in my side mirrors. I became frightened, and I guess I must have begun to weave in my lane as I paid more attention to the car in my rearview mirror than to the road ahead. I was actually relieved when I saw the police lights. I immediately pulled over to the shoulder. I told the officer about the wine because I had nothing to hide. I was just very, very tired.

Anders: How do you think you did on the field sobriety tests that Officer Thompson had you perform—the coordination and balancing tests?

Ronald: Well, the officer told me I did not perform well. I myself think I did quite well, particularly since I'd been working for 18 hours. I was also wearing high heels, my arthritis was acting up, and traffic was whizzing by the side of the road where the officer had me perform the tests.

Anders: Thank you, Ms. Ronald. Your witness.

Newman: Ms. Ronald, how can you be sure you weren't under the influence of alcohol?

Ronald: I've worked in the hospitality business all my life. I've seen many people under the influence of alcohol. I know how they act. I simply wasn't acting that way.

* * * *

Anders: I'd like to call Officer Barry Thompson as a hostile witness. [Officer enters the room, takes the stand, and is sworn and identified.] Officer, do you remember your arrest of Ms. Ronald?

Thompson: Yes, I do.

Anders: After you first noticed her car, you followed her closely for nearly a mile. True?

Thompson: I wasn't tailgating her, but yes, I wanted to observe her carefully.

Anders: You had your high-beam headlights on?

Thompson: Yes. Again, to get a good look.

Anders: She wasn't going over the speed limit, was she?

Thompson: I don't recall.

Anders: If she had been, you would have mentioned it in your report?

Thompson: I probably would have.

Anders: You said that her vehicle was weaving back and forth in its lane, correct?

Thompson: Yes.

Anders: But not until after you started following her?

Thompson: I saw her weaving and it was 1:00 a.m., the time bars were closing.

Anders: Did Ms. Ronald's vehicle ever travel out of her traffic lane?

Thompson: I didn't see her cross into another lane, but she wasn't driving straight, either.

Anders: You stopped her car on U.S. Highway 13, a major truck route, is that right?

Thompson: Yes.

Anders: Wasn't it quite busy that night?

Thompson: I suppose so. It usually is.

Anders: After you stopped her, you had her step onto the shoulder close to Highway 13?

Thompson: Yes.

Anders: She was wearing fairly high heels, wasn't she?

Thompson: Yes.

Anders: Did you allow her to take her shoes off?

Thompson: She never asked to take her shoes off.

Anders: You asked her to stand on one foot?

Thompson: Yes.

Anders: And to walk a straight line while right next to Highway 13, the truck route?

Thompson: On the shoulder, off the highway.

Anders: Okay, Officer. Let me ask: you didn't smell alcohol on her breath, did you?

Thompson: I don't recall.

Anders: I have nothing further.

Newman: I have no questions.

Anders: We rest. [Witness steps down.]

ALJ: I've got another hearing scheduled. Written arguments are due by the close of business tomorrow.

HAWKINS FALLS POLICE DEPARTMENT INCIDENT REPORT # 48012

Incident Date: December 19, 2008 **Arrest Time:** 1:15 a.m. **Incident Type:** Driving with blood-alcohol level of 0.08 percent or more (Fr. Veh. Code § 352) **Personal Injuries:** None
Incident Location: U.S. Highway 13 at Bellaire Blvd. **Conditions:** Dark, clear, dry
Suspect: Barbara Ronald, white female, weight 145 lbs, height 5′9″, d.o.b. 9/15/1951, age 57
Suspect's Identification: Franklin driver's license, #W23152
Suspect's Address: 110 Merrill Crest Drive, Hawkins Falls, FR 33309
Motor Vehicle: License Plate: Franklin JSP-256 **Make/Model/Year:** Jaguar XJS V12 1992

Detailed Description of the Incident: This officer first observed suspect's vehicle pulling out from the Lexington Club parking lot at 1:00 a.m. at U.S. Highway 13 and Montview Way. The vehicle began to travel south on U.S. Highway 13; followed suspect in patrol car and observed her vehicle weaving back and forth in her lane. There was no debris or other material in the roadway that could explain such weaving. I activated the patrol car's overhead emergency lights, and suspect pulled over to the right shoulder near the corner of U.S. Highway 13 and Bellaire

Boulevard about 1.4 miles from the Lexington Club; approached driver's window to ask for identification; as suspect handed over her driver's license, her eyes appeared bloodshot and watery; she said that she had been weaving back and forth because she had been scared by my headlights and was trying to see who was following her; on questioning, she admitted to having consumed two glasses of white wine.

I asked suspect to exit her vehicle and observed that her gait was unsteady. Based on these observations, I asked suspect to perform a series of field sobriety tests. When asked to walk a straight line and then stand on one foot, suspect performed poorly, lost her balance, and was distracted. As a result of her poor performance on the field sobriety tests, objective symptoms of intoxication, and poor driving, I formed the opinion that she had been driving with a blood-alcohol level of at least 0.08 percent, and placed her under arrest at 1:15 a.m.

I transported her to headquarters; she consented to a blood test. I then transported her to Mercy Hospital for the blood draw. We arrived at 2:05 a.m. and waited until a blood sample could be drawn by a technician at 2:50 a.m. I booked the blood sample into the evidence locker under HFPD No. 48012.

Reporting Police Officer: Barry Thompson, Badge No. 4693

Report Date/Time: December 19, 2008, 8:29 a.m.

EXHIBIT 1

HAWKINS FALLS POLICE DEPARTMENT

CRIME LABORATORY

VEHICLE CODE § 353 BLOOD ALCOHOL TEST RESULTS

This is to certify under penalty of perjury under the law of the State of Franklin that on December 21, 2008, I tested a sample of the blood of Barbara Ronald, entered as HFPD No. 48012, on the HemoAssay-Seven Chemical Testing Instrument. I attest that my analysis of the Ronald sample reflected a blood-alcohol concentration of 0.08 percent.

Daniel Gans signed by Charlotte Swain

_____

Daniel Gans

Forensic Alcohol Analyst

(Fr. Bur. of Inv. Cert. #802)

Charlotte Swain

_____

Charlotte Swain

Senior Laboratory Technician

I certify that this is a true and accurate copy of forensic alcohol test results performed at the Crime Laboratory of the Hawkins Falls Police Department, pursuant to F.C.R. § 121.

Tony Bellagio _____

Tony Bellagio

Records Custodian

Dated: December 29, 2008

EXHIBIT 2

LIBRARY

MPT-2: *Ronald v. Department of Motor Vehicles*

FRANKLIN VEHICLE CODE

§ 352 Driving with a prohibited blood-alcohol percentage

It is unlawful for any person who has 0.08 percent or more of alcohol in his or her blood to operate a motor vehicle.

§ 353 Administrative suspension of license by Department of Motor Vehicles for prohibited blood-alcohol level on chemical testing

(a) Upon receipt by the Department of Motor Vehicles of a laboratory test report from any law enforcement agency attesting that a forensic alcohol analysis performed by chemical testing determined that a person's blood had 0.08 percent or more of alcohol while he or she was operating a motor vehicle, the Department of Motor Vehicles shall immediately suspend the license of such person to operate a motor vehicle for a period of one year.

(b) Any person may request an administrative hearing before an administrative law judge on the suspension of his or her license under this section. At the administrative hearing, the Department of Motor Vehicles shall bear the burden of proving by a preponderance of the evidence that the person operated a motor vehicle when the person had 0.08 percent or more of alcohol in his or her blood.

(c) Any party aggrieved by a decision of an administrative law judge may petition the district court in the county where the offense allegedly occurred for review of the administrative law judge's decision.

FRANKLIN CODE OF REGULATIONS

§ 121 Forensic blood-alcohol testing

Forensic blood-alcohol testing may be performed only by a forensic alcohol analyst who has been trained in accordance with the requirements of the Franklin Bureau of Investigation. A forensic blood-alcohol analysis signed by such a forensic alcohol analyst and certified as

authentic by a records custodian for the laboratory in which the analysis was performed may be admitted in any administrative suspension hearing without further foundation.

FRANKLIN ADMINISTRATIVE PROCEDURE ACT

§ 115 Hearsay evidence; admissible at administrative hearing

Hearsay evidence shall be admissible at an administrative hearing. If hearsay evidence would be admissible in a judicial proceeding under an exception to the hearsay rule under the Franklin Evidence Code, it shall be sufficient in itself to support a finding. If hearsay evidence would not be admissible in a judicial proceeding under an exception to the hearsay rule under the Franklin Evidence Code, it may nonetheless be used for the purpose of supplementing or explaining other evidence.

FRANKLIN EVIDENCE CODE

§ 1278 Hearsay definition

Hearsay is a statement, other than one made by the declarant while testifying at a judicial proceeding, offered in evidence to prove the truth of the matter asserted.

§ 1279 Hearsay rule

Hearsay is not admissible except as provided by this Code.

§ 1280 Hearsay rule: public-records exception

Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered in any judicial proceeding to prove the act, condition, or event, if (a) the writing was made by and within the scope of duty of a public employee, (b) the writing was made at or near the time of the act, condition, or event, and (c) the sources of information and method and time of preparation were such as to indicate its trustworthiness.

Pratt v. Department of Motor Vehicles
Franklin Court of Appeal (2006)

The Department of Motor Vehicles (DMV) seeks review of a district court decision vacating the suspension of Jason Pratt's driver's license for the offense of driving a motor vehicle with a prohibited blood-alcohol concentration (PBAC). The DMV asserts that the court erred in concluding that Pratt's deviations within one lane of travel, with nothing more, failed to provide the police officer with reasonable suspicion to justify an investigative stop of the vehicle.

On February 2, 2004, Plymouth police sergeant Tom Kellogg was on patrol on Mill Street. There is no line or marking delineating the traffic lane from the parking lane on this street. The parking lane is bounded by the curb. Sergeant Kellogg testified that, at approximately 9:30 p.m., he was traveling southbound on Mill Street and observed Pratt's car traveling northbound, but that the car was "canted" such that it was driving at least partially in the unmarked parking lane.

After Pratt's car passed, Sergeant Kellogg turned around and began following it. He observed the car traveling in an "S-type" pattern—a smooth motion toward the right part of the parking lane and back toward the centerline. He stated that Pratt's car moved approximately 10 feet from right to left within the northbound lane, coming within one foot of the centerline and to within six to eight feet of the curb. Pratt's car repeated the S-pattern several times over two blocks. The movement was neither erratic nor jerky, and Pratt's car did not come close to hitting any other vehicles or to hitting the curb. Sergeant Kellogg testified that the manner of Pratt's driving suggested that the driver was intoxicated, so he turned on his emergency lights and pulled Pratt's car over. As a result of the evidence obtained after the stop, Sergeant Kellogg arrested Pratt for violating § 352 of the Franklin Vehicle Code and the DMV suspended Pratt's driver's license.

At the administrative hearing, Pratt's primary defense was that Sergeant Kellogg had no reasonable basis to stop his vehicle. The administrative law judge (ALJ) held that Sergeant Kellogg's testimony of Pratt's "unusual driving" and "drifting within one's own lane" provided reasonable suspicion to justify the stop. Pratt sought review of the ALJ's decision in the district court. The district court reversed, holding that slight deviations within a single lane do not give rise to reasonable suspicion that a driver has a PBAC.

The issue is whether the traffic stop violated Pratt's constitutional rights because it was not based on reasonable suspicion. Although investigative stops are seizures within the meaning of the Fourth Amendment, in some circumstances police officers may conduct such stops even where there is no probable cause to make an arrest. *Terry v. Ohio* (U.S. 1968). Such a stop must be based on more than an officer's "inchoate and unparticularized suspicion or 'hunch.'" *Id*. Rather, the officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" the stop. *Id*. The DMV has the burden of establishing that an investigative stop is reasonable. *See Taylor v. Dept. of Motor Vehicles* (Fr. Sup. Ct. 1973).

The DMV contends that Sergeant Kellogg had reasonable suspicion to stop Pratt. It argues that, in and of itself, repeated weaving within a single lane (absent an obvious innocent explanation) provides reasonable suspicion to make an investigative stop. While we agree that the facts of the case give rise to a reasonable suspicion that Pratt was driving with a PBAC and that the investigative stop was reasonable, we reject a bright-line rule that weaving within a single lane alone gives rise to reasonable suspicion. Rather, our determination is based on the totality of the circumstances.

In *State v. Kessler* (Fr. Ct. App. 1999), a police officer observed the defendant's car traveling slowly, stopping at an intersection with no stop sign or traffic light, turning onto a cross street, and accelerating "at a high rate of speed" (but under the speed limit). The officer then saw the car pull into a parking lot where the driver opened the door and poured out a "mixture of liquid and ice" from a cup. When the officer identified himself to the driver, the driver began to walk away, at which point the officer made an investigative stop. We held that the stop was based on a reasonable suspicion, even though any of these facts alone might be insufficient to provide reasonable suspicion.

The DMV contends that repeated weaving within a single lane alone gives an experienced police officer reasonable suspicion to make an investigative stop. That view, however, conflicts with *Kessler*. Further, the DMV's proffered bright-line rule is problematic because movements that may be characterized as "repeated weaving within a single lane" may, under the totality of the circumstances, fail to give rise to reasonable suspicion. This may be the case, for example, where the "weaving" is minimal or happens very few times over a great distance. Because the DMV's proffered standard can be interpreted to cover conduct that many innocent drivers commit, it may subject a substantial portion of the public to invasions of their privacy. It is in effect no standard at all.

However, driving need not be illegal to give rise to reasonable suspicion. Thus, we adopt neither the bright-line rule proffered by the DMV that weaving within a single lane may alone give rise to reasonable suspicion, nor the bright-line rule advocated by Pratt that weaving within a single lane must be erratic, unsafe, or illegal to give rise to reasonable suspicion. Rather, we maintain the well-established principle that reviewing courts must determine whether there was reasonable suspicion for an investigative stop based on the totality of the circumstances. As the building blocks of fact accumulate, reasonable inferences about the cumulative effect can be drawn.

Sergeant Kellogg did not observe any actions that constituted traffic violations or that, considered in isolation, provided reasonable suspicion that criminal activity was afoot. However, when considered in conjunction with all of the facts and circumstances of the case, Pratt's driving provided Kellogg with reasonable suspicion to believe that Pratt was driving while intoxicated.

Moving between the roadway centerline and parking lane is not slight deviation within one's own lane. The district court also incorporated by reference Sergeant Kellogg's testimony regarding Pratt's drifting and unusual driving. Our read of Sergeant Kellogg's testimony does not support the view that Pratt's weaving constituted only slight deviation within one lane. After initially stating that he did not have an estimate of how many times Pratt's vehicle weaved, on cross-examination Sergeant Kellogg stated that Pratt's vehicle weaved "several" or "a few" times over several feet. The manner and frequency of Pratt's weaving are not the only specific, articulable facts here. When Sergeant Kellogg first observed Pratt's vehicle, it was "canted into the parking lane" and "wasn't in the designated traffic lane." Finally, we note that the incident took place at 9:30 at night. While this is not as significant as when poor driving takes place at or around "bar time," it does lend some further credence to Sergeant Kellogg's suspicion that Pratt was driving while intoxicated.

When viewed in isolation, these individual facts may not be sufficient to warrant a reasonable officer to suspect that Pratt was driving while intoxicated. However, such facts accumulate, and as they accumulate, reasonable inferences about the cumulative effect can be drawn. We determine, under the totality of the circumstances, that Sergeant Kellogg presented specific and articulable facts, which, taken together with rational inferences from those facts, gave rise to the reasonable suspicion necessary for an investigative stop. Accordingly, the stop did not violate Pratt's constitutional right to be free from unreasonable searches and seizures.

Reversed.

Schwartz v. Department of Motor Vehicles
Franklin Court of Appeal (1994)

On October 21, 1992, at 2:25 a.m., Dixon City Police Officer James Pisano observed Gil Schwartz's vehicle straddling the south-bound lanes of Valley Road at 60 miles per hour. Officer Pisano stopped Schwartz's vehicle at that time and, after making contact with him, noted that Schwartz had slurred speech, bloodshot eyes, a strong odor of alcohol, and an unsteady gait. Officer Pisano then administered field sobriety tests on which Schwartz performed poorly. Officer Pisano then arrested Schwartz.

Officer Pisano had Schwartz's blood drawn at 3:45 a.m. at the Dixon City hospital. The blood-alcohol lab test disclosed a blood-alcohol concentration of 0.129 percent. The lab test results were immediately noted on the lab's internal records but, because of an error, not on the official § 353 report until November 29, 1992, over a month after Schwartz's arrest and blood draw.

Pursuant to § 353 of the Franklin Vehicle Code, the Department of Motor Vehicles (DMV) suspended Schwartz's driver's license. Schwartz challenged the suspension at an administrative hearing. At the hearing, Officer Pisano testified and the administrative law judge (ALJ) received the lab test report offered by the DMV showing Schwartz's blood-alcohol concentration. Schwartz did not offer any evidence of his own, but raised several evidentiary objections, including that the lab test report was hearsay. The ALJ overruled his objections, concluded that the lab test report came within the public-records exception to the hearsay rule, Fr. Evid. Code § 1280, found that the DMV had proved by a preponderance of the evidence that Schwartz had operated a motor vehicle with a blood-alcohol concentration of at least 0.08 percent, and upheld the suspension.

Schwartz petitioned for review in the district court, seeking to overturn the ALJ's decision. The court concluded that the lab report did not come within the public-records exception to the hearsay rule because the results of the test were not recorded close in time to the performance of the test, as required, but more than a month later. The court thus ruled that the suspension was not supported by a preponderance of the evidence. The DMV appeals.

Under § 353 of the Franklin Vehicle Code, the ALJ was bound to uphold the suspension if he found by a preponderance of the evidence—that is, if he found it more likely than not—that Schwartz was driving with a blood-alcohol concentration of 0.08 percent

or more. The DMV has now conceded that the § 353 analysis in this case does not satisfy the public-records exception to the hearsay rule because of the late recording of the results. Therefore, we must consider what weight to give it.

Pursuant to Franklin Administrative Procedure Act § 115, if the blood-alcohol analysis satisfies an exception to the hearsay rule, it may conclusively establish a violation of § 352. If not, additional evidence is needed to support such a finding.

In this case, the lab test report supplements Officer Pisano's testimony. Although a chemical blood-alcohol test report is one means of establishing that a driver's blood-alcohol concentration was 0.08 percent or more, it is not the only means. Both parties are free to introduce circumstantial evidence bearing on whether the driver's blood-alcohol concentration was at least 0.08 percent. Officer Pisano testified that he observed Schwartz driving in an erratic and dangerous manner, and that Schwartz had bloodshot eyes, gave off a strong odor of alcohol, had an unsteady gait and slurred speech, and performed poorly on field sobriety tests. This evidence that Schwartz was driving while heavily intoxicated provided sufficient support for the ALJ's finding that Schwartz was driving with a blood-alcohol concentration of at least 0.08 percent.

We emphasize that our decision does not justify license suspensions based solely on circumstantial evidence. A police officer's observations, standing alone, cannot establish that a driver's blood-alcohol concentration is at least 0.08 percent or more. Here, however, the record contains a blood test report, which (though inadmissible in court because it does not meet the public-records exception) may still be used in an administrative proceeding "for the purpose of supplementing or explaining other evidence." Franklin APA § 115.

Thus, the ALJ could properly consider whether this blood test report, together with the police officer's observations, supported a finding on the critical fact of blood-alcohol concentration. We conclude that the ALJ's decision is properly supported by the record in this case.

Reversed.

Rodriguez v. Department of Motor Vehicles
Franklin Court of Appeal (2004)

Following suspension of his driver's license by the Department of Motor Vehicles (DMV), Peter Rodriguez sought review in the district court seeking to vacate the suspension. The district court vacated the suspension, and the DMV appeals. We affirm.

Rodriguez was stopped by Town of Ada Police Officer Mac Huber on June 20, 2003, after failing to stop at a stop sign. When Officer Huber observed that Rodriguez was exhibiting symptoms of intoxication, he arrested him. Rodriguez submitted to a blood test, which purportedly showed a blood-alcohol concentration of 0.17 percent.

The DMV suspended Rodriguez's driver's license. At the hearing on the suspension held pursuant to the "Administrative Per Se" Law (Fr. Veh. Code § 353), the DMV submitted Officer Huber's written police report describing in perfunctory fashion the circumstances of the stop and the arrest. The DMV also submitted a one-page document entitled "blood-alcohol test results," which stated that Rodriguez's blood had been tested and found to contain "0.17 percent alcohol." The blood-alcohol test report was on letterhead from the "Town of Ada Police Department Crime Laboratory." The report bore the signature of "Virginia Loew, Criminalist."

Rodriguez challenged the sufficiency of the blood-alcohol test report under § 115 of the Franklin Administrative Procedure Act. He contended that the DMV had failed to show that the blood-alcohol test report satisfied the public-records exception to the hearsay rule because the DMV did not establish that the report had been prepared by a person with an official duty to perform a forensic alcohol analysis, as required by § 121 of the Franklin Code of Regulations. The administrative law judge (ALJ) rejected the challenge to the report and found that Rodriguez was driving with a blood-alcohol level of 0.08 percent or more, a finding based solely on the report.

Section 115 of the Franklin Administrative Procedure Act provides: "Hearsay evidence shall be admissible at an administrative hearing. If hearsay evidence would be admissible in a judicial proceeding under an exception to the hearsay rule under the Franklin Evidence Code, it shall be sufficient in itself to support a finding. If hearsay evidence would not be admissible in a judicial proceeding under an exception to the hearsay rule under the Franklin Evidence Code, it may nonetheless be used for the purpose of supplementing or explaining other evidence."

Rodriguez maintains that there is not sufficient evidence to support the ALJ's finding that he was driving with a blood-alcohol level of at least 0.08 percent because the report purporting to show his blood-alcohol concentration at 0.17 percent was hearsay that would not have been admissible at a judicial proceeding under the public-records exception.

As the proponent of the blood-alcohol test report, the DMV bore the burden of establishing the foundation for the public-records exception, which entailed findings that (1) the forensic alcohol analysis was performed within the scope of the public employee's duty, (2) the results were recorded close in time to the performance of the analysis, and (3) the analysis and results were generally trustworthy. *See* Fr. Evid. Code § 1280.

The DMV claims that it established the proper foundation for the public-records exception to the hearsay rule regarding the blood-alcohol test report because under § 664 of the Franklin Evidence Code, "[i]t is presumed that official duty has been regularly performed."

We generally agree with the DMV that when a blood-alcohol test is performed within the scope of a public employee's duty, under § 664 of the Franklin Evidence Code it is presumed that the results were recorded close in time to the performance of the blood test and that the test and its results were generally trustworthy, inasmuch as the public employee's duty imposes such requirements.

We disagree, however, with the DMV that Rodriguez's blood-alcohol test was performed within the scope of duty of the public employee in question. Indeed, we conclude that the public employee here was not authorized to perform the forensic alcohol analysis in the first place.

The performance of forensic alcohol analysis is subject to strict regulation by § 121 of the Franklin Code of Regulations. Section 121 authorizes *only* "forensic alcohol analysts" to perform forensic alcohol analysis—and none others, including "criminalists."

On this record, it is evident that the blood-alcohol test here was performed by a public employee who was not authorized to perform forensic alcohol analysis. Virginia Loew is identified solely as a "criminalist"—and criminalists, as is evident, are not authorized to perform such blood-alcohol analyses.

The DMV argues that *Schwartz v. Department of Motor Vehicles* (Fr. Ct. App. 1994) permits the ALJ to consider an otherwise inadmissible blood test report, together with other circumstantial evidence, including a police officer's observations of the driver. But *Schwartz* involved very different facts. The DMV in that case

conceded that the blood test report did not come within the public-records exception to the hearsay rule. Because the blood test report, by itself, was insufficient to support a finding, the DMV took great pains to establish the police officer's observations in detail. Here, by contrast, the DMV provided only cursory proof of the officer's observations. Indeed, this case illustrates a danger in the *Schwartz* ruling, especially if it permits the DMV to "rescue" testing by an unqualified person with unscientific testimony. For these reasons, we reject the DMV's reliance on *Schwartz*.

In this case, it follows that the DMV failed to meet its burden of establishing the necessary foundation for the public-records exception to the hearsay rule with respect to the blood-alcohol test report. A police report void of detail and a blood test report that lacks proper foundation, even in combination, do not add up to the necessary quantum of evidence. Consequently, the DMV failed to prove by a preponderance of the evidence that Rodriguez had an excessive blood-alcohol concentration, and the district court did not err in granting Rodriguez's petition and vacating the suspension of his driver's license.

Affirmed.

POINT SHEET

MPT-1: *Phoenix Corporation v. Biogenesis, Inc.*

Phoenix Corporation v. Biogenesis, Inc.

DRAFTERS' POINT SHEET

About six years ago, Phoenix Corporation, a medical research company represented by the Collins Law Firm, brought a breach-of-contract action in state court seeking about $80 million in damages against Biogenesis, Inc., a biotechnology company represented by Amberg & Lewis LLP. A jury trial is set to begin in a month and is expected to last six weeks. Two weeks ago, however, Phoenix filed a motion to disqualify Amberg & Lewis as Biogenesis's attorneys. Phoenix claims that Amberg & Lewis violated an ethical obligation threatening incurable prejudice through its handling of one of Phoenix's attorney-client privileged documents, which Phoenix assumes was disclosed inadvertently.

Amberg & Lewis has retained applicants' law firm to consult on the motion for disqualification. Applicants' task is to prepare an objective memorandum evaluating the merits of Phoenix's argument to disqualify.

The File contains the following materials: a memorandum from the supervising attorney describing the assignment (task memo), the transcript of the client interview, the document that is the subject of the disqualification motion, and Phoenix's brief in support of its motion for disqualification. The Library contains Rule 4.4 of the Franklin Rules of Professional Conduct and two cases bearing on the subject.

The following discussion covers all of the points the drafters intended to raise in the problem. Applicants need not cover them all to receive passing or even excellent grades. Grading is left entirely to the discretion of the user jurisdictions.

I. Overview

Applicants are given a general call: "Please prepare a memorandum evaluating the merits of Phoenix's argument for Amberg & Lewis's disqualification. . . ." To complete the assignment, applicants should identify and discuss two key issues: (1) whether Amberg & Lewis has violated the rules of professional conduct, and (2) whether disqualification is indeed the appropriate remedy on the facts as given.

There is no specific format for the assigned task. Applicants' work product should resemble a legal memorandum such as one an associate would draft for a supervising partner. Applicants may choose to follow the lead of Phoenix's motion to disqualify and organize their answer in response to each of the issues raised in Phoenix's supporting brief. However, it should be an objective memorandum; applicants who draft a memorandum that is persuasive in tone have not followed instructions (jurisdictions may want to consider whether points should be deducted from such papers). The task memorandum instructs applicants not to draft a statement of facts but to be sure to incorporate the relevant facts into their discussions.

Applicants should conclude that even if Amberg & Lewis has violated an ethical obligation (and it is not at all clear that it has), disqualification is not the appropriate remedy in this case.

II. Detailed Analysis

These are the key points that applicants should discuss, taking care to incorporate the relevant facts and explain and/or distinguish the applicable case law, in an objective memorandum evaluating the merits of Phoenix's argument to disqualify Amberg & Lewis:

As a preliminary matter, applicants should set forth the basis for why the Schetina letter may trigger disqualification under the Franklin Rules of Professional Conduct.

- Franklin Evidence Code § 954 provides that a client has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and attorney.
- It appears undisputed that the Schetina letter is protected by the attorney-client privilege under § 954.
    - It is a communication, labeled "CONFIDENTIAL," from Phoenix's then president, Schetina, to one of its attorneys, Horvitz.
    - Amberg & Lewis concedes that the letter is privileged.
    - Even if the Schetina letter were not privileged, it relates "to the representation of the attorney's client," which is the standard used in Rule 4.4. In other words, a document does not have to be attorney-client privileged for its handling by opposing counsel to constitute a violation of the Rule.
- In *Indigo v. Luna Motors Corp.* (Fr. Ct. App. 1998), the court affirmed the granting of a motion for disqualification in a case where an attorney inadvertently received privileged materials and did not return them forthwith to opposing counsel.

A. Whether Amberg & Lewis violated its ethical obligation by its handling of the Schetina letter

Applicants should incorporate into their discussion of this issue the following facts surrounding Amberg & Lewis's receipt of the Schetina letter:

- On February 2, 2009, Amberg & Lewis obtained the Schetina letter as a result of the letter's unauthorized disclosure by some unidentified person at the Collins Law Firm, which represents Phoenix. (The letter arrived in an envelope bearing Collins's return address and was accompanied by a note reading "From a 'friend' at the Collins Law Firm.") The letter is dated January 2, 1998, and is labeled "CONFIDENTIAL."[2]
- Amberg & Lewis did not notify Collins of its receipt of the letter.
- Indeed, Amberg & Lewis would like to use the letter in its case against Phoenix—Schetina's statement is essentially an admission that Biogenesis's interpretation of the royalty agreement is the correct one.

[2] The letter states in its entirety: "I am writing with some questions I'd like you to consider before our meeting next Tuesday so that I can get your legal advice on a matter I think is important. I have always understood our agreement with Biogenesis to require it to pay royalties on specified categories of pharmaceuticals. I learned recently how much money Biogenesis is making from other categories of pharmaceuticals. Why can't we get a share of that? Can't we interpret the agreement to require Biogenesis to pay royalties on other categories, not only the specified ones? Let me know your thoughts when we meet."

- Also on February 2, 2009, Phoenix learned, by chance, that Amberg & Lewis had obtained the Schetina letter, but assumed, incorrectly, that it had done so as a result of inadvertent disclosure by Collins in the course of discovery. Collins instructed Amberg & Lewis to return the letter, but Amberg & Lewis refused.
- In response, Phoenix filed the present motion to disqualify Amberg & Lewis.

Phoenix's argument regarding Amberg & Lewis's handling of the Schetina letter

- In its brief, Phoenix's first argument assumes that the Schetina letter's disclosure was inadvertent and cites Rule 4.4 in support of its position that, at a minimum, Amberg & Lewis was required to "promptly notify the sender" (i.e., the Collins Law Firm) after it received the Schetina letter.
- If the letter's disclosure was unauthorized, Phoenix contends that *Mead v. Conley Machinery Co*. (Fr. Ct. App. 1999) "imposed an ethical obligation similar to that of Rule 4.4 to govern cases of unauthorized disclosure."
    - Contrary to both Rule 4.4 and *Indigo*, Amberg & Lewis chose to examine the Schetina letter, failed to notify Collins of its receipt, and then refused to return it at Collins's demand.
    - So, either way, whether the disclosure was inadvertent or unauthorized, Phoenix argues that Amberg & Lewis has committed an ethical violation.

Application of Rule 4.4 and relevant case law

Applicants should realize that Phoenix's argument overstates its position and that it is not so clear that Amberg & Lewis has violated the Franklin Rules of Professional Conduct.

- Rule 4.4 provides in its entirety that "[a]n attorney who receives a document relating to the representation of the attorney's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender."
- Thus, under Rule 4.4, an attorney receiving a document disclosed inadvertently need do no more than notify the sender.
- On its face, the text of the rule pertains only to situations involving *inadvertent* disclosure. The comments to Rule 4.4 are very clear on this point. In short, Rule 4.4 does not address the ethical implications for cases of *unauthorized* disclosure of privileged communications.
- Accordingly, Amberg & Lewis's conduct is not forbidden by the plain language of Rule 4.4.

1. *Indigo v. Luna Motors Corp*. is not dispositive.

- In *Indigo*, the plaintiff's attorney received an attorney-client privileged document during document production as a result of inadvertent disclosure. The attorney closely examined the document, which discussed the opposing side's technical evidence, and then used the document at deposition to obtain damaging admissions from the opposing party. Plaintiff's attorney refused opposing counsel's demands to return the document. The court held that this conduct by plaintiff's attorney constituted a violation of an ethical obligation and was grounds for disqualification.
- The *Indigo* court then articulated the following standard for how attorneys should proceed in such situations:

- An attorney who receives materials that on their face appear to be subject to the attorney-client privilege, under circumstances in which it is clear they were not intended for the receiving attorney, should refrain from examining the materials, notify the sending attorney, and await the instructions of the attorney who sent them.

- The facts of the present case distinguish it from *Indigo*. Here, an unknown Collins employee intentionally sent the Schetina letter to Amberg & Lewis. (Phoenix could not know this, because it is unaware of how Amberg & Lewis came into possession of the Schetina letter.)
  - Presumably, someone at Amberg & Lewis kept the envelope and note that came with the Schetina letter ("From a 'friend' at the Collins Law Firm") and so it can easily prove that the disclosure was unauthorized, as opposed to inadvertent.
- More to the point, in adopting Rule 4.4, the Franklin Supreme Court expressly pulled back from the holding in *Indigo*. *See* Rule 4.4, Comment 2. The Comment explains that when there is an inadvertent disclosure, the attorney "must promptly notify the sender, but need do no more. . . . *Indigo v. Luna Motors Corp.* conflicted with this rule and, ultimately, with the intent of the Franklin Supreme Court in adopting it."
- Thus, to the extent that it concluded otherwise, *Indigo* conflicts with Rule 4.4 and, ultimately, with the intent of the Franklin Supreme Court in adopting it. Rule 4.4 does not apply to unauthorized disclosure. Notwithstanding *Mead* (discussed below), the Franklin Supreme Court has declined to adopt a rule imposing any ethical obligation in such cases.

2. Application of *Mead*

- In *Mead*, the Franklin Court of Appeal held that an attorney who received privileged documents belonging to an adverse party through an unauthorized disclosure should do the following: "upon recognizing the privileged nature of the materials, either refrain from reviewing such materials or review them only to the extent required to determine how to proceed; he or she should notify the adversary's attorney that he or she has such materials and should either follow instructions from the adversary's attorney with respect to the disposition of the materials, or refrain from using the materials until a definitive resolution of the proper disposition of the materials is obtained from a court."
- But the court goes on to state that violation of this standard, standing alone, does not warrant disqualification.
- So, while *Mead* appears to require Amberg & Lewis to notify the Collins firm that it received the Schetina letter, following the offended law firm's instructions on what to do with the letter is optional—instead, Amberg & Lewis can wait for the court to weigh in on the issue.
  - But, under *Mead*, Amberg & Lewis must still refrain from using the materials until such court resolution is obtained.
  - In addition, astute applicants will point out that, while Amberg & Lewis wanted to use the Schetina letter in its case against Phoenix, Phoenix found out that Amberg & Lewis had the Schetina letter the *same day* that Amberg & Lewis received it (when Peter Horvitz, Phoenix's attorney, overheard the associates talking about the letter at lunch). Arguably, Amberg & Lewis could have notified

the Collins firm that it had received the letter, if not for the fact that Horvitz found out about it before Amberg & Lewis had a chance to tell him.

- Again, applicants should note that *Mead* was decided in 1999, before the Franklin Supreme Court enacted Rule 4.4 in 2002. It could be implied that, had the court intended that there be an ethical rule regarding the use of privileged documents that were disclosed without authorization, it could have created one.
  - In fact, Comment 3 to Rule 4.4 mentions the *Mead* case and then notes that "[t]he Franklin Supreme Court . . . has declined to adopt a rule imposing any ethical obligation in cases of unauthorized disclosure."
- As a consequence, *Mead* may lack continuing vitality on the ground that it is inconsistent with the Franklin Supreme Court's presumed intent not to impose any ethical obligation.
- That being said, it is also arguable that Amberg & Lewis did indeed violate an ethical obligation. Although the Franklin Supreme Court declined to adopt a rule imposing any ethical obligation in cases of unauthorized disclosure, it may have done so because it was satisfied with *Mead*, which had already imposed such an ethical obligation.

3. Even if there was no ethical violation, a violation of a rule is not necessary for disqualification.

- Language in both *Indigo* and *Mead* suggests that a motion for disqualification may be granted by a court even if there has been no rule violation. "It has long been settled in Franklin that a trial court may, in the exercise of its inherent power, disqualify an attorney in the interests of justice." *Indigo*, citing *In re Klein* (Fr. Ct. App. 1947). *See also Mead* ("[w]ith or without a violation of a specific rule, a court may . . . disqualify an attorney . . . where necessary to guarantee a fair trial") citing *Indigo*.

4. Conclusion of Issue A

- Phoenix's argument that Amberg & Lewis violated an ethical obligation by its handling of the Schetina letter fails insofar as it incorrectly assumes that Amberg & Lewis obtained the letter as a result of inadvertent, rather than unauthorized, disclosure.
- It appears that Amberg & Lewis would *not* have violated the ethical obligation imposed by *Indigo*. *Indigo* conflicts with Rule 4.4 and, ultimately, with the intent of the Franklin Supreme Court in adopting it, and therefore lacks continuing vitality.
- By contrast, Phoenix's argument that Amberg & Lewis violated an ethical obligation may succeed insofar as it assumes in the alternative that Amberg & Lewis obtained the letter as a result of unauthorized disclosure, depending, as indicated above, on whether *Mead* is still good law in light of the comments to Rule 4.4.
- Accordingly, there is a strong argument to be made that Amberg & Lewis has not violated the letter of the Professional Rules. Nevertheless, because the import of the *Mead* decision is uncertain, that does not end the inquiry and the court will still, most likely, go on to consider whether disqualification is required in the interests of justice.

B. Whether disqualification of Amberg & Lewis is the appropriate remedy

- A trial court may, in the exercise of its inherent power, disqualify an attorney in the interests of justice. It must exercise that power, however, in light of the important right enjoyed by a party to representation by an attorney of its own choosing. Such a right must nevertheless yield to ethical considerations that affect the fundamental principles of the judicial process. *Indigo*.
- Phoenix contends that Amberg & Lewis has threatened it with incurable prejudice and therefore disqualification must follow. In Phoenix's view, whether or not any *direct* harm could be prevented by exclusion of the Schetina letter from evidence, the *indirect* harm that might arise from its use in trial preparation cannot be dealt with so simply, inasmuch as "[t]he bell has been rung, and can hardly be unrung." (Pltf's br.)
    - It is true that in *Mead* the court suggested in a footnote that, in cases of unauthorized disclosure, the "threat of 'incurable prejudice'. . . is neither a necessary nor a sufficient condition for disqualification." But that suggestion is mere dictum, inasmuch as *Mead* did not involve the threat of *any* prejudice, incurable or otherwise (in *Mead*, the court described the document at issue as "little more than a paraphrase of a handful of [the plaintiff's] allegations").
- Applicants should conclude that disqualification is not mandated in this case.
- Even if Amberg & Lewis violated an ethical obligation, it should not be disqualified.
- Under *Mead*, disqualification in all cases of disclosure, whether inadvertent or unauthorized, depends on a balancing of six factors: (1) the receiving attorney's actual or constructive knowledge of the material's attorney-client privileged status; (2) the promptness with which the receiving attorney notified the opposing side of receipt; (3) the extent to which the receiving attorney reviewed the material; (4) the material's significance, i.e., the extent to which its disclosure may prejudice the party moving for disqualification, and the extent to which its return or other measure may cure that prejudice; (5) the extent to which the party moving for disqualification may be at fault for the unauthorized disclosure; and (6) the extent to which the party opposing disqualification would suffer prejudice from disqualification.
    - Contrary to any implication in *Indigo*, the threat of incurable prejudice is neither a necessary nor a sufficient condition for disqualification.
- The balance weighs *against* disqualification here.
    - As in the *Mead* case, where the documents were covertly copied, Phoenix is not at fault (Factor 5)—the Schetina letter was passed on to Amberg & Lewis by a disgruntled Collins employee. This favors disqualification.
    - Furthermore, Amberg & Lewis knew or should have known of the letter's attorney-client privileged status (Factor 1), did not notify Collins of its receipt (Factor 2), and reviewed it thoroughly—in part because of its brevity (Factor 3). Concededly, these factors favor disqualification.
    - But that being said, the Schetina letter nonetheless proves to be of dubious significance (Factor 4). True, it amounts to an admission by Phoenix that Biogenesis was correct in its understanding of its royalty obligation under the 1978 agreement. But its exclusion from evidence would prevent any prejudice to Phoenix. (Contrary to the situations in *Indigo* and *Mead*, where the attorneys in each case made use of the disclosed materials at depositions, here Amberg &

Lewis has not yet made any use of the letter.) Moreover, any harm arising from any conceivable non-evidentiary use of the letter would be at best speculative.

- By contrast, Biogenesis would suffer substantial prejudice from Amberg & Lewis's disqualification, inasmuch as it would have to incur appreciable costs if it were forced to attempt to substitute new attorneys for a trial set to begin in a month after six years of preparation. These factors (Factors 4 and 6) disfavor disqualification—and they appear to predominate.
    - Biogenesis enjoys an "important right" to representation by Amberg & Lewis as its chosen attorneys. *Indigo*.
    - And there appear to be no "ethical considerations" so affecting the "fundamental principles of our judicial process" as to require that "right" to "yield." *Id*.
    - In sum, disqualification of Amberg & Lewis does not appear necessary to guarantee Phoenix a fair trial.
- Contrary to Phoenix's argument, which relies on language that appears in *Indigo*,[3] disqualification of Amberg & Lewis does not depend solely on the threat of incurable prejudice. Although Phoenix attempts to dismiss the court's analysis in *Mead* as mere dictum, the *Mead* court intended its analysis at least to clarify, and at most to supersede, its earlier language in *Indigo* in order to make plain that disqualification depends on a balancing of factors not reducible to the threat of incurable prejudice alone. In any event, there is no threat of incurable prejudice here. As stated, the exclusion of the Schetina

  letter from evidence would avoid any prejudice, and any harm arising from its presence in the memory of Amberg & Lewis attorneys would be at best speculative.

[3] In *Indigo*, the court relied on the opinion in *In re Klein*, which held that the threat of incurable prejudice "has long been recognized as a sufficient basis for disqualification." *Indigo*, citing *In re Klein*.

POINT SHEET

MPT-2: *Ronald v. Department of Motor Vehicles*

Ronald v. Department of Motor Vehicles

DRAFTERS' POINT SHEET

In this performance test, applicants work for a sole practitioner who represents Barbara Ronald. The Franklin Department of Motor Vehicles (DMV) suspended Ronald's driver's license for one year under § 353 of the Franklin Vehicle Code for driving with a blood-alcohol level of 0.08 percent or more in violation of § 352 of the same code. Ronald requested an administrative hearing to challenge the suspension. The evidentiary portion of the administrative hearing occurred on February 23, 2009. By the close of business on February 24, counsel must submit written arguments to the administrative law judge (ALJ). Applicants have a single task, to draft a persuasive memorandum arguing that (1) the officer did not have a reasonable suspicion warranting the stop of Ronald's vehicle; (2) the ALJ cannot rely solely on a blood test report to make a finding that Ronald was driving with a blood-alcohol concentration of at least 0.08 percent; and (3) in light of all the evidence, the DMV has not met its burden of proving that Ronald was driving with a blood-alcohol concentration of that percentage.

The File contains the memorandum from the supervising attorney, the administrative hearing transcript, the police report, and the § 353 test results. The Library contains a selection of Franklin statutes, administrative code provisions, and three cases.

The following discussion covers all of the points the drafters intended to raise in the problem. Applicants need not cover them all to receive passing or even excellent grades. Grading decisions are entirely within the discretion of the user jurisdictions.

I. Overview

Applicants' task is to prepare a persuasive memorandum setting forth three arguments for why the ALJ should vacate the suspension of Ronald's driver's license for driving with a prohibited blood-alcohol concentration. No specific format is given for the task. Applicants are instructed not to draft a statement of facts. However, applicants are told to incorporate the relevant facts into their arguments. In addition, applicants should anticipate the arguments that the DMV may make in support of the suspension.

Because this is an administrative proceeding, and not a criminal matter, applicants should recognize that the DMV has a lower burden of proof: it need prove that Ronald violated § 352 only by a preponderance of the evidence. With respect to the three issues, it is expected that applicants will make the following points:

1. The officer did not have a reasonable suspicion justifying the stop of Ronald's vehicle and the contrary case law (*Pratt v. Department of Motor Vehicles* (Fr. Ct. App. 2006)) is readily distinguishable.
2. The blood test report would not be admissible hearsay in a judicial proceeding as it does not fall within the applicable exception to the hearsay rule—the public-records exception. Therefore it cannot, by itself, support a finding that Ronald was driving with a prohibited blood-alcohol concentration.
3. The remaining evidence (the police report and testimony), coupled with the limited weight accorded to the blood test report, falls far below what is required (and thus the DMV

cannot meet its burden of proof) to show that Ronald was driving a motor vehicle with a prohibited blood-alcohol concentration.

II. Analysis

A. Officer Thompson did not have reasonable suspicion to stop Ronald.

In *Pratt v. Department of Motor Vehicles* (Fr. Ct. App. 2006), the court discussed the circumstances under which a weaving automobile presents reasonable suspicion justifying a traffic stop.

- Driving does not have to be illegal to give rise to reasonable suspicion.
- Rather, reasonable suspicion exists when an officer can "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" the stop. *Pratt*, quoting *Terry v. Ohio* (U.S. 1968). Rejecting a bright-line rule for such situations, the court held that there was reasonable suspicion for stopping the defendant in *Pratt* based on his erratic driving.
- Under the totality of the circumstances test, the court concluded that Pratt's driving created a reasonable suspicion. Pratt's driving went beyond slight deviation within one lane—his vehicle moved from the parking lane to within one foot of the center-line and then to within six to eight feet of the curb. This conduct occurred several times. In addition, when first observed, Pratt's vehicle was not in the designated driving lane but was "canted" in the parking lane. And the incident occurred at 9:30 at night. Taken together, these facts and the reasonable inferences therefrom provided the officer with a reasonable suspicion to stop Pratt.

Applying the *Pratt* standard to the *Ronald* facts

Applicants should argue that the ALJ should reject the DMV's assertion that there was reasonable suspicion for the traffic stop of Ronald's vehicle.

- First, there was no traffic violation.
    - Officer Thompson admitted that had Ronald been speeding, he would have noted so in his report.
    - Ronald's vehicle never crossed into another lane.
- Second, there is an innocent explanation for the weaving of Ronald's vehicle.
    - Ronald testified that when she noticed that a vehicle was following her closely (so closely that she could not see it in her side mirrors), she became frightened and began "to weave in my lane as I paid more attention to the car in my rearview mirror than to the road ahead."
    - And she was very tired, having just finished working an 18-hour shift.
    - By contrast, in *Pratt*, the defense did not offer any innocent explanation for Pratt's erratic driving.
    - Further, unlike the situation in *State v. Kessler* (Fr. Ct. App. 1999) (discussed in *Pratt*), there are no actions by the driver that provide additional facts supporting reasonable suspicion. In *Kessler*, the driver did not break any traffic laws, but did stop at an intersection where there was no traffic signal, accelerated at a high rate of speed, and then pulled into a parking lot where the driver then poured a "mixture of liquid and ice" from a cup onto the

ground. When the officer identified himself to the driver, the driver began to walk away and at that point the officer executed a *Terry* stop.

- Officer Thompson's account of the stop does not contradict or undercut Ronald's testimony that she began to weave in her lane because she was frightened by the car following her. In fact, his testimony corroborates her description of the stop.
    - A fair reading of both Officer Thompson's testimony and his police report supports the conclusion that Ronald did not begin to weave in her lane until Thompson began following her.
    - Unlike *Pratt*, where there was detailed testimony describing the extreme nature of how the defendant weaved in his lane, here there are no details about the weaving beyond Officer Thompson's statement that "I didn't see her cross into another lane, but she wasn't driving straight, either."
    - Also, Officer Thompson testified that he used his high-beam lights. This would distract Ronald and make it difficult for her to see who was following her so closely.
- While it is relevant that Officer Thompson saw Ronald's vehicle leave the Lexington Club at 1:00 a.m., the time that bars close in Hawkins Falls, without more, that fact is not enough to constitute reasonable suspicion for the traffic stop.
    - Granted, in *Pratt*, the court noted that it is more suggestive of intoxication when poor driving occurs "at or around 'bar time.'"
- In short, there are only three facts weighing in favor of reasonable suspicion: that Ronald had left a restaurant where alcohol was served, that she was driving around "bar time," and that she was weaving within her lane (but only after being closely followed).
- Applicants should argue that when viewed in light of the totality of circumstances—Ronald broke no traffic laws, and began weaving only after Officer Thompson began to follow her so closely that his vehicle could not be seen in her side mirrors, and he had his high-beam lights on—the facts fall far short of establishing reasonable suspicion for the traffic stop.

B. The blood test report cannot, by itself, support a finding that Ronald was driving with a prohibited blood-alcohol concentration (0.08 percent or more).

- The relevant facts regarding the test of Ronald's blood are undisputed:
    - On December 19, 2008, at 2:50 a.m., a sample of Ronald's blood was drawn at Mercy Hospital in Hawkins Falls.
    - On December 29, 2008, the Crime Laboratory of the Hawkins Falls Police Department issued a "Vehicle Code § 353 Blood Alcohol Test Results" stating that Ronald's blood sample was subjected to a chemical test on December 21 and reflected a blood-alcohol concentration of 0.08 percent. The document bears the signature of Charlotte Swain, who is identified by the title of "Senior Laboratory Technician," and the name "Daniel Gans," who is identified by the title of "Forensic Alcohol Analyst." Gans did not sign the document. Rather, his name was signed by Swain.
- The burden is on the DMV to prove by a preponderance of the evidence, that is, to prove that it is more likely than not, that Ronald was driving with a blood-alcohol

concentration of at least 0.08 percent. Fr. Veh. Code § 353(b); *Schwartz v. Dept. of Motor Vehicles* (Fr. Ct. App. 1994).

- The ALJ should give limited weight to the § 353 lab report as evidence that Ronald had a prohibited blood-alcohol concentration.
    - The § 353 lab report is hearsay: it is an out-of-court statement offered to prove the truth of the matter asserted—that Ronald was driving with a blood-alcohol concentration of 0.08 percent or more. *See* Fr. Evid. Code § 1278 (defining hearsay).
- The DMV asserts that the § 353 lab report should be considered as evidence and that, by itself, the lab report is sufficient to prove by a preponderance of the evidence that Ronald was driving with a prohibited blood-alcohol concentration.
- The § 353 lab report does not fall within an exception to the hearsay rule and therefore cannot, by itself, support a finding at an administrative proceeding.
    - Under § 115 of the Franklin Administrative Procedure Act, if hearsay evidence would be admissible in a judicial proceeding under an exception to the hearsay rule, it is sufficient to support a finding at an administrative hearing. *See Rodriguez v. Dept. of Motor Vehicles* (Fr. Ct. App. 2004).
    - Thus, the question is whether the § 353 lab report comes within the public-records exception of § 1280 of the Franklin Evidence Code. *Rodriguez*; *Schwartz*. Section 1280 provides: "Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered in any judicial proceeding to prove the act, condition, or event, if (a) the writing was made by and within the scope of duty of a public employee, (b) the writing was made at or near the time of the act, condition, or event, and (c) the sources of information and method and time of preparation were such as to indicate its trustworthiness."
        - The report of a forensic alcohol analysis, when performed by an authorized person, comes within the public-records exception of § 1280 of the Evidence Code by virtue of the presumption of § 664 as described in *Rodriguez*, that the "official duty has been regularly performed."
        - However, under § 121 of the Franklin Code of Regulations, forensic alcohol analysis "may be performed only by a forensic alcohol analyst." *See also Rodriguez*.
        - The § 353 lab report proffered by the DMV bears the signature of Charlotte Swain, who is identified by the title of "Senior Laboratory Technician," not the requisite "Forensic Alcohol Analyst." *See Rodriguez*. The "signature" of Daniel Gans, a "Forensic Alcohol Analyst," was executed by Swain.
        - As a result, the § 353 lab report does not comply with the requirements of § 121 of the Code of Regulations. As in *Rodriguez*, "the public employee here was not authorized to perform the forensic alcohol analysis in the first place."
        - Therefore, the DMV cannot establish the necessary foundation for the public-records exception to the hearsay rule with respect to the § 353 lab report.
        - In addition, there is a question as to whether the § 353 lab report was prepared "at or near the time of the . . . event." Fr. Evid. Code § 1280.

- In *Schwartz*, the lab test results were recorded over five weeks after the defendant's arrest and blood draw, and the DMV conceded that, as a result of the delay, the § 353 lab report did not satisfy the public-records excep-tion to the hearsay rule.
- Here, Ronald's blood sample was tested just two days after her arrest, and the § 353 lab report was completed and certified eight days later, on December 29, 2008, during a holiday week.
- While much shorter than the five-week delay in *Schwartz*, an applicant could argue that the delay in preparing the report places it outside of the public-records exception.
- Applicants who make this argument may receive some credit, but the delay should not be the sole focus of their public-records exception argument.
- Rather, the fact that the alcohol analysis was performed by a laboratory technician and not a forensic alcohol analyst categorically precludes the report from satisfying the public-records exception. *See Rodriguez*.

To recap, the § 353 lab report would be inadmissible to support a finding in a judicial proceeding because it does not satisfy the requirements of the public-records exception to the hearsay rule. Although hearsay is admissible in administrative proceedings such as Ronald's, it is accorded limited weight; it cannot support a finding by itself, but may be used only to supplement or explain other evidence. *See* Fr. Admin. Proc. Act § 115.

C. In light of all the evidence, the DMV has not met its burden of proving that Ronald was driving with a prohibited blood-alcohol concentration.

- Assuming, *arguendo*, that there was reasonable suspicion for the traffic stop, the DMV still cannot meet its burden to prove by a preponderance of the evidence that Ronald had a blood-alcohol concentration of 0.08 percent or more.
- The only evidence in addition to the problematic § 353 lab report of Ronald's possible intoxication is found in the police incident report and Officer Thompson's testimony.
- Officer Thompson's report notes that he observed Ronald's vehicle "weaving back and forth in her lane." When he stopped her vehicle, he noted that "her eyes appeared bloodshot and watery" and that she told him that she had had two glasses of white wine. According to Officer Thompson, her gait was unsteady, she performed poorly on field sobriety tests, and she was distracted.

- Officer Thompson's incident report was undermined by the testimony of Thompson himself, who made admissions supporting Ronald's testimony.
  - At the hearing, he conceded that Ronald had not exceeded the speed limit and that he had been following her closely with his high beams on.
  - Furthermore, he agreed, upon questioning, that Highway 13 is a busy truck route, and that Ronald performed the balancing and coordination tests while wearing high heels and standing on the shoulder of a busy highway.
  - Most telling, he could not recall smelling alcohol on Ronald's breath, nor is there any mention of his smelling alcohol in his report.
- Ronald's counsel called Ronald herself, who testified as follows:
  - She had no more than two glasses of white wine at dinner.
  - She was not under the influence of alcohol, but was drained after working for 18 hours straight.
  - She weaved while she was driving because the police officer was following too closely and she became distracted and afraid.
  - She noted that when she performed the field sobriety tests she was wearing high heels, her arthritis was acting up, and "traffic was whizzing by the side of the road."
  - Finally, she averred that she was sure that she was not under the influence of alcohol because she had long worked in the hospitality business and knew how persons acted when they were under the influence.
- Without more, the circumstantial evidence proffered by the DMV (the police report and the testimony) is insufficient to show that it was more likely than not that Ronald was driving with a prohibited blood-alcohol concentration.
- In *Schwartz*, the arresting officer testified that the driver, after being stopped for driving in an erratic manner, exhibited "slurred speech, bloodshot eyes, a strong odor of alcohol, and an unsteady gait," and then performed poorly on field sobriety tests. The court of appeal held that this circumstantial evidence of intoxication, when supplemented by a blood test (which, as is the case here, did not meet the public-records hearsay exception, and therefore could not by itself prove intoxication), provided adequate support for the ALJ's finding that the driver had a blood-alcohol level of 0.08 percent or more.
- However, in *Rodriguez*, the court emphasized the danger of allowing the DMV to "'rescue' testing by an unqualified person with unscientific testimony." Thus, where the DMV proffered "only cursory proof of the officer's observations" of the driver's intoxication, a § 353 lab report that did not meet the exception to the hearsay rule could not be used to bolster the scant circumstantial evidence of intoxication even though, under APA § 115, such a blood test could be used "for the purpose of supplementing or explaining other evidence."
- Applicants should argue that the case at hand is much closer to *Rodriguez* than to *Schwartz*, and therefore the § 353 lab report cannot sufficiently buttress Officer Thompson's testimony.
  - Unlike the facts in *Schwartz*, there is no evidence that Ronald slurred her words during her interchange with Officer Thompson, or that she gave off any odor of alcohol—two clear symptoms of intoxication.

- Ronald explained that she was tired, having just finished working 18 hours straight. Under the circumstances, her alleged poor performance on the field sobriety tests is reasonably explained by the facts that she has arthritis, was wearing high heels, and was forced to perform the tests next to a busy highway.
    - Such factors militating against intoxication were not present in *Schwartz*.
- Moreover, the demeanor of the driver in *Rodriguez* was at least as suggestive of intoxication as Ronald's, but was nevertheless held insufficient.

- Even if, considered together, all of the evidence, including the flawed § 353 lab report, shows that it is *possible* that Ronald was driving with a blood-alcohol level of at least 0.08 percent, it fails to show that it is *more likely than not* that she was doing so.

Because the DMV has not carried its burden to prove by a preponderance of the evidence that Ronald was driving with a blood-alcohol level of at least 0.08 percent, the ALJ must vacate the suspension of her driver's license.

NOTES

MPT-2 Point Sheet

July 2009 MPTs and Point Sheets

July 2009 MPTs and Point Sheets

Contents

LIBRARY

MPT Point Sheets

Preface

Multistate Performance Test (MPT) is developed by the (NCBE). includes the items and point sheets from the July 2009 MPT. Each test includes two items; jurisdictions that use the MPT select either one or both items for their applicants to complete. vmore,, available on the

The MPT point sheets describe the factual and legal points encompassed within the lawyering tasks to be completed by the applicants. They outline the possible issues and points that might be addressed by an examinee. They are provided to the user jurisdictions for the sole purpose of assisting graders in grading the examination by identifying the issues and suggesting the resolution of the problems contemplated by the drafters. Point sheets are not official grading guides and are not intended to be "model answers." Examinees can receive a range of passing grades, including excellent grades, without covering all of the points discussed in the point sheets. User jurisdictions are free to modify the point sheets. Grading of the MPT is the exclusive responsibility of the jurisdiction using the MPT as part of its admissions process.

Description of the MPT

MPT consists of two items, either or both of which a jurisdiction may select to include as part of its bar examination. Applicants are expected to spend 90 minutes completing each MPT item administered.

The materials for each MPT include a File and a Library. The File consists of source documents containing all the facts of the case. The specific assignment the applicant is to complete is described in a memorandum from a supervising attorney. The File might also include transcripts of interviews, depositions, hearings or trials, pleadings, correspondence, client documents, contracts, newspaper articles, medical records, police reports, or lawyer's notes. Relevant as well as irrelevant facts are included. Facts are sometimes ambiguous, incomplete, or even conflicting. As in practice, a client's or a supervising attorney's version of events may be incomplete or unreliable. Applicants are expected to recognize when facts are inconsistent or missing and are expected to identify potential sources of additional facts.

The Library may contain cases, statutes, regulations, or rules, some of which may not be relevant to the assigned lawyering task. The applicant is expected to extract from the Library the legal principles necessary to analyze the problem and perform the task. The MPT is not a test of substantive law; the Library materials provide sufficient substantive information to complete the task.

The MPT is designed to test an applicant's ability to use fundamental lawyering skills in a realistic situation. Each test evaluates an applicant's ability to complete a task that a beginning lawyer should be able to accomplish. The MPT requires applicants to (1) sort detailed factual materials and separate relevant from irrelevant facts; (2) analyze statutory, case, and administrative materials for applicable principles of law; (3) apply the relevant law to the relevant facts in a manner likely to resolve a client's problem; (4) identify and resolve ethical dilemmas, when present; (5) communicate effectively in writing; and (6) complete a lawyering task within time constraints. These skills are tested by requiring applicants to perform one of a

variety of lawyering tasks. For example, applicants might be instructed to complete any of the following: a memorandum to a supervising attorney, a letter to a client, a persuasive memorandum or brief, a statement of facts, a contract provision, a will, a counseling plan, a proposal for settlement or agreement, a discovery plan, a witness examination plan, or a closing argument.

Instructions

The back cover of each test form contains the following instructions:

1. You will have 90 minutes 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 fictitious state of Franklin, in the fictitious Fifteenth Circuit of the United States. Columbia and Olympia are also fictitious states in the Fifteenth Circuit. In Franklin, the trial court of general jurisdiction is the District Court, the intermediate appellate court is the Court of Appeal, and the highest court is the Supreme Court.

3. You will have two kinds of materials with which to work: a File and a Library. The first document in the File is a memorandum containing the instructions for the task you are to complete. The other documents in the File contain factual information about your case and may include some facts that are not relevant.

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

5. Your response must be written in the answer book provided. If you are taking this examination on a laptop computer, your jurisdiction will provide you with specific instructions. In answering this performance test, you should concentrate on the materials in the File and Library. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.

6. Although there are no restrictions on how you apportion your time, you should be sure to allocate ample time (about 45 minutes) to reading and digesting the materials and to organizing your answer before you begin writing it. You may make notes anywhere in the test materials; blank pages are provided at the end of the booklet. You may not tear pages from the question booklet.

7. This performance test will be graded on your responsiveness to the instructions regarding the task you are to complete, which are given to you in the first memorandum in the File, and on the content, thoroughness, and organization of your response.

FILE

MPT-1: *Jackson v. Franklin Sports Gazette, Inc.*

BENSON & DEGRANDI
Attorneys at Law
120 Garfield Avenue
Franklin City, Franklin 33536

MEMORANDUM

From: Robert Benson

To: Applicant

Date: July 28, 2009

Re: *Jackson v. Franklin Sports Gazette, Inc.*

Our client, the *Franklin Sports Gazette*, has been sued by Richard "Action" Jackson, star third baseman for Franklin City's major league baseball team, the Franklin Blue Sox. The complaint alleges infringement of Jackson's right of publicity under Franklin's recently enacted right of publicity statute. I interviewed Jerry Webster, managing editor of the *Gazette*, and Sandi Allen, its vice president of marketing, and also compiled some background information on Jackson and the team. I have summarized my interview and research in the attached memorandum.

Given that the new Franklin right of publicity statute has not been tested in the courts, this will be a case of first impression. However, there has been considerable case law developed under the prior, and now preempted, common law right of publicity, which may or may not still be relevant precedent.

Please prepare a memorandum analyzing whether Jackson has a cause of action under the right of publicity statute and whether we have any legal arguments to oppose that cause of action under the statute and the relevant case law. You need not include a separate statement of facts, nor address any issue of damages. Rather, analyze Jackson's claims and our defenses, incorporating the relevant facts into your legal analysis and assessing our likelihood of success on each such basis. Draft the points of your analysis in separate sections using descriptive headings. Be sure to explain your conclusions.

BENSON & DEGRANDI
Attorneys at Law

MEMORANDUM

From: Robert Benson

To: Applicant

Date: July 28, 2009

Re: *Jackson v. Franklin Sports Gazette*—INTERVIEW AND RESEARCH SUMMARY

These notes summarize salient facts from my interview of the *Franklin Sports Gazette*'s managing editor, Jerry Webster, and its vice president of marketing, Sandi Allen, as well as background research on the Franklin Blue Sox.

The *Franklin Sports Gazette* is a weekly tabloid published in Franklin City and distributed throughout the state, dealing with Franklin's sports teams and events, including Franklin City's major league baseball team, the Franklin Blue Sox. The *Gazette* reports on Blue Sox games and team news, and is known for its incisive writing and action photography. The *Gazette* is sold by subscription and on newsstands.

Richard "Action" Jackson is the star third baseman of the Blue Sox, the only major league team for which he has played during his 12-year career. Jackson is a much-beloved fixture in the Franklin City sports scene, and is noted for his charitable endeavors and community service. It sometimes appears that the majority of fans at Blue Sox games are wearing apparel with Jackson's name, nickname, or unique double-zero number, "00," and Jackson has earned millions of dollars merchandising his name and likeness for products and services. He is reported to be among the top ten endorsement earners in baseball.

Five seasons ago, the *Gazette* published an account of a regular season Blue Sox game in which Jackson scored on a close play at home plate. The Blue Sox lost the game, which was wholly unmemorable in an unmemorable season—they finished in fifth place, last in the division. The

story was accompanied by a photograph of Jackson sliding into home plate (the "Photo"). The Photo showed the opposing team's catcher's feet, and Jackson's back as he slid with one arm thrown up in the air. A spray of dirt from the slide obscured most of Jackson's body and uniform number, allowing only the second zero to be partially visible. No part of Jackson's face could be seen. The Photo won a third place award from the Franklin City Photographers' Association "Best Sports Photo of the Year" competition. Jackson is Caucasian, and a check of the relevant Blue Sox rosters shows that, at the time, the Blue Sox had three other players (two of whom are also Caucasian) who wore uniform numbers ending in zero—today, they have five other players with such numbers (all Caucasian). The Blue Sox have not changed the design of the team uniforms in 25 years, and their uniform design is one of the few in the major leagues which does not include the player's name on the back.

One month ago, the *Gazette* ran a print advertisement in the *Franklin City Journal*, a daily newspaper, soliciting subscriptions. The ad reproduced the Photo over text and a subscription coupon. Allen chose to use the Photo in the ad, with Webster's approval, for the reasons given in the attached memorandum, which also includes her draft of the ad. The ad was published with the text unchanged from the draft.

In the week following the ad's appearance, the *Gazette*'s new subscriptions, which resulted directly from the ad (as shown by use of the coupon in the ad), increased by 18% over new subscriptions during the previous week.

Two days ago, Jackson served a complaint on the *Gazette*, alleging that it had violated Jackson's right of publicity under Franklin's statute and had damaged him by depriving him of the license fee he would have reaped from this use of his image and of his ability to license the use of his image to other sports publications.

FRANKLIN SPORTS GAZETTE

Memorandum

From: Sandi Allen

To: Jerry Webster

Date: June 15, 2009

Re: Subscription ad

We want to liven up the print ad we run every Monday in the *Franklin City Journal*; the old ads, which are text only, are too staid. We've got this award-winning photo of Action Jackson from a few years ago, which conveys excitement, action, and the kind of sports coverage we stand for. Using the photo together with new text copy will, I think, result in a significant increase in subscriptions to the *Gazette*. The draft of the ad is attached. OK?

[DRAFT ADVERTISEMENT]

OK JW 6-15-09

[ACTUAL BE REPRODUCED HERE]

GET IN WITH THE ACTION!!!!!

SUBSCRIBE NOW TO THE ***FRANKLIN SPORTS GAZETTE***!

Look at all you get:

Great stories!

Coverage of every Franklin team!!

And award-winning photos like this that put you right in the middle of the action!!!

Use this coupon for our special offer: 26 weeks of the *Gazette* for only $24.99!

[COUPON WILL BE INSERTED HERE]

LIBRARY

MPT-1: *Jackson v. Franklin Sports Gazette, Inc.*

FRANKLIN RIGHT OF PUBLICITY STATUTE

§ 62 RIGHT OF PUBLICITY—Use of Another's Persona in Advertising or Soliciting without Prior Consent

(a) Cause of Action. Any person who knowingly uses another's . . . photograph, or likeness, in any manner on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of products, merchandise, goods or services, without such person's prior consent, . . . shall be liable for any damages sustained by the person or persons injured as a result thereof.

(b) Definitions. As used in this section, "photograph" means any photograph or photographic reproduction, still or moving, or any videotape or live television transmission, of any person, such that the person is readily identifiable.

> (1) A person shall be deemed to be readily identifiable from a photograph when one who views the photograph with the naked eye can reasonably determine that the person depicted in the photograph is the same person who is complaining of its unauthorized use.

* * * *

(d) Affirmative Defense. For purposes of this section, a use of a . . . photograph, or likeness, in connection with any news, public affairs, or sports broadcast or account, or any political campaign, shall not constitute a use for which consent is required under subsection (a).

* * * *

(g) Preemption of Common Law Rights. This section preempts all common law causes of action which are the equivalent of that set forth in subsection (a).

EXCERPTS FROM LEGISLATIVE HISTORY

Franklin State Assembly, Committee on the Arts and Media, Report No. 94-176 (2008), pp. 4–5, on F.A. Bill No. 94-222 (Franklin Right of Publicity Act of 2008)

The common law of Franklin has recognized an individual's "right of publicity" for many decades. Starting in the 1950s, Franklin's courts recognized that an individual has both a property right and a personal right in the use of his or her "persona" for commercial purposes.

It is important to note that the right of publicity differs from, and protects entirely different rights than, a copyright. A copyright protects the rights of reproduction, distribution of copies to the public, the making of derivative works, public performance, and public display in an original work of authorship. Thus, for example, the copyright owner of a photograph may prevent others from reproducing the photograph without authorization. But the right of publicity protects the interests of an individual in the exploitation of his or her persona—the personal attributes of the individual that have economic value, which have nothing to do with original works of authorship. Thus, for example, even if authorization to use a copyrighted photograph is obtained from the copyright owner, commercial uses of that photograph which exploit the persona of the photograph's subject could infringe upon the subject's right of publicity. It is also important to note that the right of publicity is exclusively a matter of state law—unlike copyright, which is exclusively within federal jurisdiction. There is no federal right of publicity.

As developed by Franklin's courts, the elements of a common law cause of action for appropriation of the right of publicity are (1) the defendant's use of the plaintiff's persona, (2) appropriation of the plaintiff's persona to the defendant's commercial or other advantage, (3) lack of consent, and (4) resulting injury. Even after 50 years of development, the boundaries of Franklin's common law right of publicity are necessarily ill-defined, as the courts can deal only with the specific facts of individual cases that come before them. Given the expansion of our "celebrity culture," the opportunities for individuals to exploit this right have increased

exponentially in recent years. Accordingly, the Committee concludes that there is a need to codify this increasingly important economic right.

While the Committee agrees with, and the proposed legislation codifies, the basic elements of the cause of action as understood at common law, the Committee is of the view that some of the common law cases went too far in upholding individual claims, while others did not go far enough. The Committee therefore intends that the legislation set forth the full extent of the right, thus preempting the common law cause of action in this area. Obviously, to the degree that prior common law decisions accord with the legislation's provisions, they continue to constitute good precedent which the courts may use for guidance in applying the legislation.

The legislation would achieve several goals in clarifying the law:

* * * *

- The case law has, in a few opinions, dealt with the specificity with which an individual needs to be identifiable when his or her photographic image is used without consent. It is important that a single standard be used for such analysis. Accordingly, the legislation includes a subsection which explicitly sets forth the requirements for that identification.

- There has been some uncertainty as to whether news reporting organizations were liable for infringement of the right of publicity when they included an individual's picture or other indices of persona in ancillary uses. It is the Committee's view that the important right of freedom of the press, found in both the Franklin Constitution and the First Amendment to the United States Constitution, must supersede any individual claims based on "any news, public affairs, or sports broadcast or account, or any political campaign." Hence, the legislation includes an express exemption for such uses of an individual's persona.

* * * *

The legislation is hereby favorably reported to the Assembly.

Holt v. JuicyCo, Inc., and Janig, Inc.

Franklin Supreme Court (2001)

The right of publicity, which exists at common law in Franklin, has been defined as the protection of an individual's persona against unauthorized commercial use. Since we recognized this right some 50 years ago, there has been an increasing number of cases dealing with it, reflecting the similarly increasing economic importance of the right.

The issue in this case is whether an individual's persona, as reflected in certain aspects of his visual image, is identifiable in an audiovisual work—and thus actionable if the other elements of the common law cause of action are met—even if his face and other more common identifying features are unseen.

Ken Holt, a Franklin resident, is a noted downhill skier, participating on the World Cup Ski Tour. He has a devoted fan following, due in large part to his dashing good looks and winning personality. As is the custom in downhill skiing races, when he is competing, Holt is completely covered up: he wears a body-clinging "slick" suit, boots, gloves, and a helmet with a tinted faceplate. In competition, Holt always wears a distinctive and unique gold-colored suit with purple stripes, adorned with patches from his sponsors. His name is emblazoned in large gold letters on his purple helmet. And, as do all competitors, he wears a bib with his assigned number for that particular competition, so that he may be distinguished from other competitors.

JuicyCo manufactures a sports drink called PowerGold, which ostensibly aids in maintaining energy during athletic activity. JuicyCo markets PowerGold nationwide to consumers. Janig is its advertising agency.

In 1999, Janig produced a television commercial for PowerGold, using a video clip of a two-man race between Holt and another skier, for which it acquired the rights by license from the broadcast network that covered the race and owned the copyright in the clip (the network had obtained no rights from Holt, nor did it need to, as its coverage was newsworthy and authorized by the World Cup Ski Tour). Neither Janig nor JuicyCo sought permission from Holt or the other skier to use their images in the commercial. Janig used digital technology to modify aspects of Holt's appearance in the video clip: it deleted the patches on his suit, deleted his bib number, deleted the name "HOLT" from the helmet, and inserted the PowerGold logo on his helmet and chest. Voice-over narration was added describing the attributes of PowerGold.

Holt brought this action for violation of his common law right of publicity, claiming that his likeness was used for commercial purposes without his consent. He claimed that the use implied his endorsement of PowerGold, depriving him of endorsement fees from JuicyCo and precluding his endorsing competing sports drinks.

JuicyCo and Janig argued that there was no way to identify the skier in the commercial as Holt, given that his face, name, bib number, and sponsors' patches were not visible. JuicyCo and Janig moved to dismiss for failure to state a cause of action.

In considering a motion to dismiss for failure to state a claim, a court must accept the complaint's well-pleaded allegations as true and construe them in a light most favorable to the plaintiff. Dismissal of the complaint is proper if it appears certain that, under applicable law, the plaintiff is not entitled to relief under any facts which could be proved in support of the claim.

The district court dismissed the action on the grounds that Holt was not identifiable in the video clip, holding that he was unrecognizable as his face was not visible and his name, sponsors' patches, and bib number were deleted. The court of appeal affirmed. If the courts below were correct that, as a matter of law, the plaintiff was not identifiable, then in no sense has his right of publicity been violated.

We agree with the district court that Holt's likeness—in the sense of his facial features—is itself unrecognizable. But the question is not simply whether one can recognize an individual's features, but whether one can *identify* the specific individual from the use made of his image.

We hold that the lower courts' conclusion that the skier could not be *identifiable* as Holt is erroneous as a matter of law, in that it wholly fails to attribute proper significance to the distinctive appearance of Holt's suit and its potential, as a factual matter, to allow the public to identify Holt as the skier in the commercial. The suit's color scheme and design are unique to Holt, and their depiction could easily lead a trier of fact to conclude that it was Holt, and not another wearing that suit, appearing in the commercial and endorsing PowerGold. Whether it did or not is a factual, not a legal, question that will have to be decided at trial.

Reversed and remanded.

Brant v. Franklin Diamond Exchange, Ltd.

Franklin Court of Appeal (2003)

Barbara Brant was the star of the Franklin University intercollegiate diving team that won the national collegiate championships in 1995. She was the only diver in the championships to score a perfect "10" in a dive from the 10-meter board. She has retired from competitive diving and now lives in Franklin City, where she practices law.

The Franklin Diamond Exchange (the "Exchange") is a jewelry store in Franklin City. In 2002, it obtained the rights to reproduce a photograph of Brant's perfect dive from the copyright owner of the picture. The photograph shows Brant from the waist to the toes entering the water on the completion of her dive. Her head and torso, to her waist, have entered the water and are not visible. The picture does show her legs and the bottom of her bathing suit, which was a generic one-piece suit, of the same color, design, and cut as was required to be worn by all female divers who participated in the championships. Other than that part of Brant's body, the picture shows nothing but the surface of the swimming pool—there is no way to identify the venue, time, or event depicted. The Exchange used the photograph in an advertisement in the *Franklin City Journal* over the headline "Make a Splash! Give Her a Diamond!" with illustrations of four different diamond bracelets, their prices, and the name, address, and phone number of the Exchange.

Brant saw the advertisement and brought this action against the Exchange for violation of her common law right of publicity. The Exchange admitted that the photograph depicted Brant, but moved to dismiss for failure to state a cause of action. The Exchange argued that Brant's likeness was not identifiable from the photograph, and hence her right of publicity could not have been infringed. Brant opposed the motion, citing *Holt v. JuicyCo, Inc., and Janig, Inc.* (Fr. Sup. Ct. 2001) as authority for the proposition that one's face or similar identifying features need not be visible if the individual whose right of publicity is allegedly violated is nevertheless identifiable from the depiction used. The district court agreed and, after trial, awarded Brant $150,000 in damages. The Exchange appealed, alleging that the district court erred as a matter of law. For the reasons given below, we agree and reverse, with instructions to dismiss the complaint.

In *Holt*, the skier whose picture was used in a commercial advertisement was identifiable because of his unique uniform which,

> though somewhat altered digitally, nevertheless remained basically the same and clearly visible in the depiction. Thus, the public to whom the advertisement was aimed could easily identify the figure depicted as Holt and no other skier.

Brant argues that, following *Holt*, there are two elements that can be used to identify the individual depicted in the picture as herself—her legs and the visible portion of her bathing suit. We disagree. *Holt* is inapposite and distinguishable on the facts before us. It strains credibility here to argue that Brant's legs, which have no unique scars, marks, tattoos, or other identifying features, are identifiable by the public compared to any other diver's legs. The only other visible element in the picture is her bathing suit from the waist down. But that suit was identical in color, design, and cut to those worn by every other diver in the meet.

In sum, even though the Exchange does not contest that it is Brant who appears in the photograph, there is no way that the public could conclude that this was a picture of Brant as opposed to any other diver. Neither her likeness nor any other identifying attribute was present in the photograph. Thus, there is no possibility that Brant could prove facts which support her claim under the law. Her right of publicity was not infringed.

The judgment of the district court is reversed, and the case remanded with instructions to dismiss the complaint for failure to state a cause of action.

Miller v. FSM Enterprises, Inc.

Franklin Court of Appeal (1988)

Jan Miller, a resident of Franklin City, is a world-class figure skater, an Olympic champion now on the professional tour. FSM Enterprises, Inc., is the publisher of *Figure Skating!* Magazine ("FSM"), a national monthly which is devoted to the sport. In the course of its normal news coverage of the sport, FSM ran a story on Miller's appearance at the World Professional Figure Skating Championships in January 1987, and included a photograph of Miller seemingly frozen in midair in one of her jumps off the ice (the "Photo").

In February 1987, FSM placed an advertisement soliciting subscriptions in several national sports magazines, all of which were distributed in Franklin. The advertisement included the Photo over text extolling the quality of FSM's coverage of the sport of figure skating. There was no mention of Miller's name in the text. Miller sued, alleging that the use of her image in that advertisement violated her common law right of publicity.

The defendant moved to dismiss for failure to state a cause of action, claiming that the use was for newsworthy purposes. The district court denied the motion, holding that the advertisement soliciting subscriptions was not for such purposes, but was rather for a commercial use wholly detached from news coverage. After a bench trial, the district court found that Miller's right of publicity had been infringed, and awarded damages of $250,000. This appeal followed, and we are called upon to decide an issue of first impression: the use of an individual's image in an advertisement by and for a news medium under Franklin's common law right of publicity.

The elements of a common law cause of action for violation of the right of publicity are (1) the defendant's use of the plaintiff's persona, (2) appropriation of the plaintiff's persona to the defendant's commercial or other advantage, (3) lack of consent, and (4) resulting injury.

The right is not without limitations, however. One of the most important is an exemption for news reporting. The guarantees of freedom of the press in the Franklin and United States Constitutions are such that no individual can complain of legitimate news reporting which reproduces any aspect of his or her persona—name, image, or the like. Thus, wisely, we think, Miller makes no complaint about the use of her image in the issue of FSM that reported on her participation in the skating championships, and explicitly agrees that the use of the Photo there was for a legitimate news report. She does, however, argue that the use in the advertisement

soliciting subscriptions is a different matter, and one that is actionable.

Miller argues that this case is no different from *Jancovic v. Franklin City Journal, Inc.* (Fr. Sup. Ct. 1984). Jancovic was a star goalie for the Franklin City Foxes, a minor league hockey team. The Foxes had a rabid following in Franklin City, and had won the championship of their league. The *Journal* printed a special section devoted to the championship series, which featured many photographs of the team, including one of Jancovic making an acrobatic save of a shot by the opposition. The *Journal* then reprinted that photograph as a large poster, with no text on it whatsoever, and sold the poster to retail stores which then sold it to the public. Jancovic claimed that his common law right of publicity was violated by the *Journal*'s poster sales. The Franklin Supreme Court agreed.

The Court held that, notwithstanding that the poster was manufactured and sold by an entity which functioned as a news organization, the poster as sold to the public had no relationship whatsoever to that function. Hence, the use did not qualify for the common law exemption for news reporting.

We think that this case is distinguishable from *Jancovic*, and that the use of Miller's image in the Photo when reproduced in the advertisement did not violate her right of publicity. In *Jancovic,* there could be no relationship in the mind of the consumer between the poster and the newspaper, and more particularly the news dissemination function of the newspaper. No part of the news story about Jancovic or his team—not even a caption for the photograph—was reproduced on the poster. Indeed, the purchasers would not have known that the newspaper had anything to do with the sale of the poster. The poster could just as easily have been manufactured and sold by a business selling sports memorabilia, and if it had been, there would have been no doubt that Jancovic's right of publicity had been violated.

But here, the use of Miller's image was incidental to the advertising of FSM in relationship to its news reporting function. The use illustrated the way in which Miller had earlier been properly and fairly depicted by the magazine in a legitimate news account. It informed the public as to the nature and quality of FSM's news reporting. Certainly, FSM's republication of Miller's picture was, in motivation, sheer advertising and solicitation. But that alone is not determinative of whether her right of publicity was violated. We think that the common law must accord exempt

status to incidental advertising of the news medium itself. Certainly, that aspect of the exemption is limited—it can apply only when there can be no inference of endorsement by the individual depicted. So long as the Photo was used only to illustrate the quality and content of the periodical in which it originally appeared, and nothing more, Miller's rights were not violated. We might have concluded otherwise if the advertisement had somehow tied her explicitly to the solicitation for subscriptions (as, for example, by featuring her name in its headline or text) and thus implied an endorsement, for that implied endorsement would have met the requirement that the use of the persona be for the defendant's commercial advantage, beyond a reference to its newsworthy value. But such is not the case here.

Reversed and remanded with instructions to dismiss the complaint.

WEISS, J., dissenting:

I dissent. Miller is in part in the business of endorsing products, and this use implies her endorsement of the defendant's magazine. As the majority notes, if her name had been used in connection with the solicitation, there would have been no question that an endorsement was implied and her right of publicity violated. That her name was not used does not to my mind mean, as the majority would have it, that no endorsement was implied—a picture is, as we all know, worth a thousand words. The question of the use is one of degree, and here the use of her image seems to me to be trading on her persona for a purely commercial use as opposed to one that is intended to inform. I would affirm.

FILE

MPT-2: *In re City of Bluewater*

OFFICE OF THE CITY ATTORNEY
CITY OF BLUEWATER
1900 Phoenix Place
Bluewater, Franklin 33070

MEMORANDUM

To: Applicant
From: Amy Gonzalez, City Attorney
Date: July 28, 2009
Re: Water Dispute

The City of Bluewater is in the process of annexing a 500-acre tract of land located here in Bluewater County adjacent to the existing city limits. Annexation is the process by which land is brought into the City and made subject to its taxing and service authority. The tract is the site for the future Acadia Estates subdivision. Once the tract is annexed into the City and the subdivision is built, the City intends to provide water, sewer, fire, and other municipal services to the subdivision pursuant to the City's standard Service Plan and collect revenue for those services. The revenue will be important to our city finances.

However, we have just received a demand letter from the attorneys for Turquoise Water Supply Corporation (TWS) threatening to sue the City if the City proceeds with its plan to provide water and sewer services to the subdivision. TWS is a retail provider of water and sewer services in neighboring El Dorado County pursuant to a Certificate of Convenience and Necessity (CCN) issued by the Franklin Public Service Commission. It, too, wants to expand its revenue base.

TWS asserts that it has the exclusive right to provide water and sewer services to the subdivision under 7 U.S.C. § 1926(b), a federal statute that protects rural water and sewer suppliers that borrow money from the federal government to finance the costs of constructing their water and sewer facilities. TWS further asserts that the City is barred by state law from providing water and sewer services to the subdivision. If TWS were to litigate these issues and prevail, the City would still be able to annex Acadia Estates, but it would be prohibited from providing water and sewer services to the subdivision.

This issue has not been litigated in Franklin federal district court, but I have attached two cases—one from a federal district court in Columbia and one from the Fifteenth Circuit Court of Appeals—which may be helpful in evaluating and responding to TWS's contentions. Our legal assistant has assembled some background information, also attached.

Please draft a letter responding to TWS's attorneys' demand letter. We need to

- address each of TWS's contentions, and
- persuasively set forth our position that the City has the exclusive right to provide water and sewer services to the Acadia Estates subdivision.

Do not prepare a separate statement of facts. You should thoroughly analyze and integrate both the facts and the applicable legal principles in making your arguments.

OFFICE OF THE CITY ATTORNEY
CITY OF BLUEWATER
1900 Phoenix Place
Bluewater, Franklin 33070

MEMORANDUM

To: Amy Gonzalez
From: Rhonda Hostetler, Legal Assistant
Date: July 27, 2009
Re: Preliminary Research—Dispute with Turquoise Water Supply Corporation

The following is a summary of my preliminary research findings regarding Turquoise Water Supply Corporation (TWS):

- TWS is a private, nonprofit water supply corporation formed in 1985 to "develop and provide an adequate rural water supply to serve and meet the needs of rural residents," pursuant to Franklin Code § 1324.

- Since its inception, TWS has provided water and sewer services to certain rural areas of neighboring El Dorado County pursuant to a Certificate of Convenience and Necessity obtained in 1987 from the Franklin Public Service Commission.

- In 1990, TWS obtained federal loans and grants under 7 U.S.C. § 1926(a) to finance improvements of its water system. Using part of those federal loans, TWS constructed a water plant, a sewage treatment plant, and related facilities capable of providing water and sewer services to approximately 150 homes in a rural pocket of El Dorado County called Ironwood (located five miles away from the site of Acadia Estates).

- In 1996, TWS installed a six-inch-diameter water line along Franklin Highway 45, about three miles from the Acadia Estates tract, and began serving an additional 100 homes along that corridor.

- As a result of these expansions over time, TWS currently provides water and sewer services to approximately 250 rural residents and a handful of small commercial enterprises.

- The current outstanding balance on TWS's 40-year federal loans is approximately $1.4 million.

I've also spoken with engineer Angie Halloway in the City's Public Works Division and Greg Carrigan in the City's Planning Division and confirmed the following:

- When completed, the Acadia Estates subdivision will require water and sewer capacity sufficient to serve the planned development, including water lines that are at least 12 inches in diameter.

- The City has existing water lines and a sewage treatment plant less than a quarter mile from the proposed site of the subdivision. Within a few months of annexation, the City will be able to construct a 12-inch-diameter water line from its existing water facilities as well as the necessary sewer lines to serve the Acadia Estates tract using funds borrowed from the federal government for water and sewer improvements, pursuant to 7 U.S.C. § 1926(a).

- The City's federal loans were taken out in 1997 and 2003 and are for the standard 40-year term. The estimated outstanding balance is at least $4 million.

- TWS's nearest water and sewer facilities are located approximately three miles from the proposed Acadia Estates subdivision. To serve the subdivision, TWS would have to construct significant additional infrastructure, including a water well, one or more water storage tanks, and related water distribution facilities, as well as a sewage treatment plant to handle the residential wastewater generated by the subdivision. The design and construction of such facilities would likely take a minimum of two years to complete.

Bowman & Bowman
Attorneys at Law
3200 Allen Parkway
Cypress, Franklin 33027

July 24, 2009

Amy Gonzalez, City Attorney's Office
1900 Phoenix Place
Bluewater, Franklin 33070

Re: Turquoise Water Supply—Acadia Estates

Dear Ms. Gonzalez:

We are writing on behalf of our client, Turquoise Water Supply Corporation, to inform you of TWS's exclusive right to provide water and sewer services to the proposed Acadia Estates subdivision. We have learned that the City intends to provide water and sewer services to the subdivision. The City has no right under state or federal law to serve the subdivision. TWS holds a Certificate of Convenience and Necessity ("CCN") and thus has the exclusive right to serve the quadrant of El Dorado County near the proposed Acadia Estates subdivision. On July 20, 2009, TWS filed an application with the Franklin Public Service Commission to expand its service area to include Acadia Estates, pursuant to Franklin Code § 457. Once the application is granted, TWS's service area will include Acadia Estates. We understand that the City intends to annex the Acadia Estates tract. Please be advised that even if the City proceeds with the proposed annexation, TWS will nonetheless have the federally protected right, pursuant to 7 U.S.C. § 1926(b), to provide water and sewer services to the Acadia Estates subdivision through its existing water line along Highway 45 and through an expansion of its sewage treatment facilities, which is already under way and scheduled to be completed by January 2011. *See Glenpool Utility Auth. v. Creek County Rural Water Dist.* (10th Cir. 1988).

In addition, the City is precluded under state law from serving the tract. *See* Franklin Code §§ 450(b) & 675. TWS demands that the City modify its proposed Service Plan for the Acadia Estates tract to exclude water and sewer services, as such services will be provided by TWS. If the City refuses to comply, TWS will pursue all available legal remedies, including the filing of a federal lawsuit.

Sincerely,

Henry Bowman, Esq.

BLUEWATER TRIBUNE

The voice of rural Franklin

July 14, 2009

500-Home Planned Community to Become Newest Addition to City of Bluewater

A.C. Homes, a well-established real estate developer in Franklin, is asking the City of Bluewater to annex a 500-acre tract of land just outside the city limits. The requested annexation will encompass a large planned residential development called Acadia Estates.

When completed, the Acadia Estates subdivision could offer as many as 500 single-family homes, two or more condominium and/or apartment complexes, and related commercial development. Acadia Estates will include a traditional grocery-store-anchored retail center, as well as a "town square" comprising small specialty stores. The planned community will include strategically located space for recreational activities and amenities, connecting bike and walking paths, and office space for residents who work at home.

"This planned development will create a fully integrated community where people can live, work, and play," said Andrew Christianson, founder and president of A.C. Homes.

Christianson declined to comment on the development's projected costs, but said homes would range in price from $200,000 to $500,000.

If approved, Acadia Estates would be A.C. Homes's first development in Bluewater County. Christianson said that he is still working with city officials to hammer out the details of the various phases of development entailed in constructing a planned community of this size. The city council will consider granting consent to the annexation of the 500 acres of land comprising Acadia Estates in early October. A.C. Homes is also in discussions with the Bluewater Independent School District about the possibility of building a school within the development.

Christianson said construction of the necessary water and sewer infrastructure could begin as early as January 2010 and be completed by April 2010, with home construction anticipated to commence shortly thereafter and be completed by December of that year, although the precise timing will depend on how quickly the necessary development agreements and construction-drawing approvals can be obtained.

DRAFT SERVICE PLAN FOR ANNEXED AREA

Annexation Case No. A2009, City of Bluewater, Franklin

ACREAGE TO BE ANNEXED:
500 acres [legal description omitted]

DATE OF ADOPTION OF ANNEX

SERVICES TO BE PROVIDED UPON ANNEXATION:

Municipal services to the acreage described above shall be furnished by or on behalf of the City of Bluewater, Franklin (the City), at the following levels and in accordance with the following schedule:

A. Police & Fire Services

The City will provide police and fire protection, as well as ambulance service, to the newly annexed tract at the same or a similar level of service now being provided to other areas of the City with similar topography, land use, and population.

B. Water Service

The proposed area of annexation does not have a certificate of convenience and necessity (CCN), and once the area is annexed, the City can serve it in the future. The area will be provided with water service within three months of the effective date of annexation.

C. Sewer Service

Once the area is annexed, the City will have the right to provide sewer service to the proposed area of annexation. Sewer service will be provided to the area within three months of the effective date of annexation.

D. Maintenance of Water and Sewer Facilities

Any and all water or sewer facilities owned or maintained by the City at the time of the proposed annexation shall continue to be

maintained by the City. Any and all water or wastewater facilities which may be acquired subsequent to the annexation of the proposed area shall be maintained by the City to the extent of its ownership. The City Council believes that, with minor extensions to its existing water and sewer systems, the City can adequately accommodate the projected water and sewer needs in the area proposed to be annexed.

* * *

LIBRARY

MPT-2: *In re City of Bluewater*

UNITED STATES CODE

CONSOLIDATED FARM AND RURAL DEVELOPMENT ACT

7 United States Code § 1921 *et seq.*

* * * *

7 U.S.C. § 1926 Water and Waste Facility Loans and Grants

(a) The Secretary [of Agriculture] is authorized to make or insure loans to associations, including corporations not operated for profit . . . and public and quasi-public agencies, to provide for the . . . development, use, and control of water and the installation or improvement of drainage or waste disposal facilities . . . for serving farmers, ranchers, farm tenants, farm laborers, and rural businesses, and other rural residents, and to furnish financial assistance or other aid in planning projects for such purposes.

(b) The service provided or made available through any association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body . . . during the term of such loan . . . .

FRANKLIN CODE

Chapter 19. Water Utilities

§ 450. Certificate of Convenience and Necessity Required

(a) A water supply corporation may not render retail water or sewer service directly or indirectly to the public without first having obtained from the Franklin Public Service Commission a Certificate of Convenience and Necessity demonstrating that present or future public convenience and necessity require or will require such service.

(b) A person or entity may not construct facilities to provide water or sewer service or otherwise provide such service to an area for which a water supply corporation already holds a Certificate of Convenience and Necessity absent the certificate holder's written consent.

* * * *

§ 453. Requirement to Provide Continuous and Adequate Service

Any water supply corporation that possesses a Certificate of Convenience and Necessity must provide continuous and adequate service to every customer whose use is within the certificated area.

* * * *

§ 457. Amendments to Certificate of Convenience and Necessity

The holder of a Certificate of Convenience and Necessity may, by written application, seek authorization from the Franklin Public Service Commission to expand or modify the service area covered by the existing Certificate of Convenience and Necessity. In determining whether to amend a Certificate of Convenience and Necessity, the Commission shall ensure that the applicant possesses the capability to provide continuous and adequate service.

* * * *

§ 675. Provision of Water and Sewer Services Outside of City Limits

Any city that owns or operates a water supply or sewer system may extend the system into, and furnish water and sewer services to any person within, any territory adjacent to the city, and may install within that territory necessary equipment, provided, however, that the extension of a water supply or sewer system shall not enter into any territory served by the holder of a Certificate of Convenience and Necessity unless such certificate holder requests the extension of water or sewer services from the city.

Fountain Water Supply, Inc. v. City of Orangevale

United States District Court, Northern District of Columbia (2003)

Fountain Water Supply, Inc. (Fountain), is a nonprofit rural water association that provides retail water service to rural customers. It furnishes service in an area that is 18 miles by 36 miles surrounding the City of Orangevale (City). The City is a municipality that also operates a water supply system and supplies water to customers inside its city limits.

Fountain sued the City alleging violation of 7 U.S.C. § 1926(b). Section 1926(b) prevents municipalities from curtailing the service area of rural water service providers who are indebted to the United States. Fountain claims that the City has encroached on its service area by providing water to customers located approximately 1.5 miles outside of the City's limits.

The City has filed a motion for summary judgment, contending that under Columbia law, Fountain does not have the legal right to serve the four customers in the disputed area because it never secured an exclusive "service area" pursuant to Columbia law. The City further disputes the extent to which Fountain was providing or making available water services in the disputed area.

The questions before the court are (1) whether Fountain is entitled to the protections of § 1926(b), and (2) whether the City's conduct in providing water and sewer services to four customers within Fountain's service area violates or potentially violates the protections afforded to Fountain by the statute.

Although the answer to the first question involves primarily interpretation of federal statutes, the answer to the second question involves an interplay between federal law and state law. The court addresses first the question of whether Fountain is entitled to whatever protections § 1926(b) affords under the circumstances.

One portion of the Consolidated Farm and Rural Development Act (the "Act") authorizes the United States Secretary of Agriculture to make or insure loans to rural water associations to provide water service and other essential community facilities to farmers and other rural residents. 7 U.S.C. § 1926(a). The specific provision of § 1926 in question here is subsection (b), which protects a borrowing association, and consequently the federal government as a secured party on loans to the association, from municipal curtailment of the association's

service area, which is the association's financial base. This provision not only encourages rural water development, but also provides the federal government greater security for its loans by ensuring that the borrower's financial base will not be lost to another provider.

To prevail on a claim that a municipality or other entity has violated § 1926(b), a rural water association must establish that (1) it is an "association" within the meaning of the Act, (2) it has a qualifying outstanding federal loan obligation, and (3) it has provided service or made service available in the disputed area. The parties do not dispute that Fountain is an "association" within the meaning of the Act. As of July 1, 1992, it had a qualifying outstanding federal loan in the amount of $2,030,000. Thus, the issue on appeal is whether Fountain has provided service or made service available in the disputed area.

The statute does not specifically define the terms "provided" and "made available." Therefore, the Court must look to state law governing the way in which a water association provides service to potential customers to determine whether a qualifying association has provided service or made service available to the disputed area. Making service available has two components: (1) the legal right under state law to serve an area; and (2) the physical ability to serve an area, which is also known as the "pipes-in-the-ground" test. The state-law and pipes-in-the-ground tests are not independent tests, but prongs of a single test for "made service available."

a. Legal authority to serve

Columbia law requires a water service provider to obtain written authorization from the Columbia Public Service Commission prior to constructing or operating a water distribution system in a particular area. Columbia Water Code § 287.02.

The City concedes that Fountain sought and obtained the necessary approvals from the Columbia Public Service Commission to serve the area in dispute. However, the City asserts that it nonetheless has the exclusive right to serve customers within two miles of its city limits pursuant to Columbia Government Code § 357A, which provides that "water services shall not be provided within two miles of a city by a rural water district." That may well be. However,

Fountain is not a rural water district but rather a rural water association. For public policy reasons, the Columbia legislature deemed that this rule should not apply to rural water associations. Thus § 357A is inapplicable to the case at hand.

b. Physical ability to serve

Turning to the "pipes-in-the-ground" test, the court finds that genuine issues of material fact preclude summary judgment on the question of encroachment upon Fountain's protected service area. Although the record includes maps of where Fountain's and the City's respective water lines run, the court finds the information provided by the maps and other exhibits does not remove all doubts about whether Fountain was physically able to provide service when the City began serving the four customers in the disputed area.

Accordingly, the City's motion for summary judgment is denied, and this matter will proceed to trial on the issues stated above.

Klein Water Company v. City of Stewart

United States Court of Appeals for the Fifteenth Circuit (2005)

Klein Water Company is a Columbia nonprofit water supply corporation. Klein provides rural water service to a portion of Dodge County, Columbia, and is regulated by the Columbia Public Service Commission. Klein is financed, in part, by federal loans made pursuant to the Consolidated Farm and Rural Development Act, 7 U.S.C. § 1921 *et seq.* The City of Stewart (City) is a municipality that owns and operates its own water distribution system and sewage treatment plant. The City provides water to businesses and residences in and around its incorporated and annexed boundaries and also has a series of federal loans under 7 U.S.C. § 1926(a).

Klein unsuccessfully sought declaratory and injunctive relief against the City, alleging that the City had extended water distribution facilities over a portion of Klein's territory in violation of 7 U.S.C. § 1926(b). In some instances, Klein alleged, the City had annexed the areas in which it had begun providing water service into its City limits, and in other instances, it had simply begun providing water service to customers outside of the City limits and within Klein's service area.

On appeal, Klein contends that (1) § 1926(b) provides no statutory protection to municipalities and protects only rural water associations against encroachment by municipalities, and (2) application of a "pipes-in-the-ground" test is contrary to law and to the purpose of § 1926(b) where a rural water association has a defined territorial boundary.

We first review the district court's holding that Klein does not qualify for § 1926(b) protection. Section 1926(b) was enacted to encourage rural water development by protecting associations' customer bases and thereby safeguarding the financial viability of rural associations and the repayment of federal loans.

To prevail, Klein must show that it is entitled to § 1926(b) protection by establishing that (1) it is an "association" within the meaning of the Act, (2) it has a qualifying outstanding federal loan obligation, and (3) it has provided service or made service available in the disputed area. The

district court held that both Klein and the City were "associations" for purposes of the Act, and that both parties had qualifying loans. The court held, however, that, unlike the City, Klein had not provided service or made service available in the disputed areas, and thus was not entitled to § 1926(b) protection.

Section 1926(a) indicates that the term "associations" includes "corporations not operated for profit . . . and public and quasi-public agencies . . . ." Congress intended that municipalities be viewed as "associations" for purposes of the Consolidated Farm and Rural Development Act. A city is a public agency. Further, as an entity created for the purpose of providing a public water supply to a designated geographic area, Klein is an "association" under the Act.

Neither party challenges the district court's finding that both parties have qualifying federal loans. Therefore, the central issue in determining whether Klein is entitled to § 1926(b) protection is whether it has provided service or has made service available within the disputed territories. The district court, in construing the term "made available," rejected Klein's argument that having a precisely drawn service area suffices to fulfill the third requirement for statutory protection. Rather, the court concluded that an association makes service available prior to the time a municipality begins providing service to a disputed area when it actually has water lines adjacent to or within the area at issue before municipal service begins. The court found that Klein had not provided service or made service available under this test and therefore did not satisfy the third prerequisite for § 1926(b) protection, whereas the evidence established that the City had satisfied this test. On appeal, the parties agree that Klein has not actually provided water service in the disputed areas.

We look to the state law governing the way in which a water district must provide service to potential customers to determine whether Klein has provided service or made service available in the disputed areas. Under Columbia law, a water supply corporation must obtain written authorization from the Columbia Public Service Commission prior to constructing or operating a water distribution system in a particular area. Columbia Water Code § 287.02. Klein admits that it has not obtained written authorization from the Columbia Public Service Commission to construct facilities or to serve customers within portions of the disputed areas, and has had no

requests for service from potential customers in the areas at issue. In our view, these concessions distinguish this case from other cases in which courts have upheld water districts' rights to § 1926(b) protection from municipal encroachment based on the fact that the water districts were actually and actively providing service, or clearly had made service available.

In *Glenpool Utility Authority v. Creek County Rural Water District* (10th Cir. 1988), the Tenth Circuit addressed the issue of whether a municipality had the exclusive right to provide water service to a newly annexed territory. There, the rural water association had been incorporated to provide water service within specific territorial limits, including an area known as Eden South, and had obtained a federal loan to construct its rural water system. The City subsequently annexed new territory into its city limits, including the area of Eden South. The City was aware at the time of annexation that the rural water district claimed the exclusive right to serve Eden South and that it was, in fact, providing water service there.

In *Glenpool*, the district court found that the rural water association had a water line that ran within 50 feet of the Eden South property and that any prospective user within the rural water association's territory could receive water service from the association simply by applying for service. Because the association would then be obligated to provide the service, the district court found that it could and would provide water service to Eden South within a reasonable time of an application for such service.

On appeal, the Tenth Circuit concluded that the association had "made service available" to the disputed area by virtue of its lines adjacent to the property and its responsibilities to applicants within its territory. The court further held that § 1926(b) prohibited the City from using annexation of Eden South as a "springboard" for providing water service to the area and thereby curtailing or limiting the service made available by the association.

Glenpool teaches that the question of whether an association has made service available is resolved by answering whether the facilities exist on, or in proximity to, the location to be served. If an association does not already provide service, to be eligible for § 1926(b) protection the association must either (1) have existing water lines within or adjacent to the property claimed to be protected by § 1926(b) prior to the time an allegedly encroaching competitor begins providing service, or (2) be able to provide such service within a reasonable period of

time.

Based on the location of Klein's distribution lines, which are located more than a mile from the disputed areas, there is no question that it had not made service available prior to the time that the City began providing service to the disputed properties. Nor has Klein demonstrated that it could make service available within a reasonable amount of time. Further, uncontroverted evidence demonstrates that (1) Klein had no facilities in the disputed areas or adjacent to the disputed areas (the nearest Klein facilities range from 1.2 to 1.4 miles away), (2) Klein did not have the financial wherewithal to extend its existing facilities to the disputed areas, and (3) even with sufficient funding it would take at least 12 months for Klein to construct the water lines necessary to serve residents in the disputed areas who were in need of water service at the time that the City began providing such service. The City, on the other hand, could meet residents' needs immediately.

Klein is unable to show that it has provided service or made service available in the disputed areas, and is therefore not entitled to the § 1926(b) protection which might otherwise have been available. The City was entitled to provide service to residents in the disputed areas.

In sum, an association's ability to serve is predicated on the existence of facilities within or adjacent to a disputed property. By its clear terms, § 1926(b) does not provide an automatic, exclusive right to serve, but rather provides protection only if certain conditions are met. Among those conditions is that an association has at least made service available or is capable of making service available within a reasonable period of time. In this case, Klein has not established its authorization to serve the disputed properties or its ability to provide the service. Not having facilities available, and not having requested authority from the Columbia Public Service Commission to construct such facilities, Klein has shown that its availability of service is merely speculative.

Affirmed.

POINT SHEET

MPT-1: *Jackson v. Franklin Sports Gazette, Inc.*

Jackson v. Franklin Sports Gazette, Inc.

DRAFTERS' POINT SHEET

In this performance test item, applicants' law firm represents the *Franklin Sports Gazette*, a weekly tabloid sports newspaper. The *Gazette* has been sued by Richard "Action" Jackson, star third baseman of the Franklin Blue Sox, Franklin City's major league baseball team, for violation of his right of publicity under the recently enacted Franklin right of publicity statute.

The *Gazette* had, five years earlier, run a photograph of Jackson sliding into home plate ("the Photo") as part of its coverage of a Blue Sox game. In the Photo, Jackson's back was to the camera, his face and most of his body were obscured, and only the last digit of his uniform number was visible.

On June 15, 2009, the *Gazette*'s vice president of marketing sent a memo to its managing editor suggesting that the *Gazette* run a new advertisement in the *Franklin City Journal*, a daily newspaper, soliciting subscriptions. The advertisement showed the Photo over the headline "GET IN WITH THE ACTION!" and text that referred to the *Gazette*'s coverage as including "award-winning photos like this that put you right in the middle of the action!!!" After the advertisement ran in the paper as drafted, Jackson sued the *Gazette*.

The *Gazette* seeks the law firm's assistance in defending against the suit. Applicants' task is to draft an objective memorandum analyzing whether there is a cause of action under Franklin's right of publicity statute, identifying the *Gazette*'s possible legal arguments to oppose such a cause of action, and assessing the likelihood of success.

The File contains 1) the instructional memorandum, 2) a memorandum from the partner summarizing background research and interviews with the *Gazette*'s managing editor and vice president of marketing, 3) the memorandum from the vice president of marketing to the managing editor suggesting the advertisement, and 4) the advertisement itself. The Library contains 1) the Franklin right of publicity statute, 2) excerpts from its legislative history, and 3) three cases bearing on the subject.

The following discussion covers all the points the drafters intended to raise in the problem. Applicants need not cover them all to receive passing or even excellent grades. Grading is entirely within the discretion of the user jurisdictions.

I. FORMAT AND OVERVIEW

The assignment is to prepare a memorandum analyzing whether there is a cause of action under the recently enacted Franklin right of publicity statute. The analysis should be objective, noting the arguments on both sides of the issues presented and assessing the likelihood of success on each issue.

Jackson v. Franklin Sports Gazette, Inc., then poses two specific questions and one overarching legal issue for applicants:

1) Was Jackson identifiable in the Photo? If not, there is no possibility he could prove facts supporting one of the necessary conditions for a cause of action for violation of his right of publicity—the requirement that the individual's *persona* be used.
2) Even if he was identifiable in the Photo, is the use of the Photo by the *Gazette* excused under the statute's exemption for news reporting?
3) The answers to these questions must be informed by the degree to which the prior common law decisions are relevant and precedential under Franklin's new right of publicity statute.

No introduction or formal statement of facts is necessary, but applicants should incorporate the relevant facts into their analyses, using descriptive headings to separate the issues; those headings presented below are illustrative examples only, and not prescribed headings that applicants must use.

Applicants would likely review the elements of a cause of action under the right of publicity statute: 1) use of the plaintiff's persona, 2) appropriation of the persona for commercial or other advantage, 3) lack of consent, and 4) resulting injury. With respect to the second element, there is no doubt that the *Gazette* used the Photo for its commercial advantage. Likewise, elements 3 and 4 are not in dispute. The key issue is whether the first element has

been met.

It is expected that applicants will conclude that there is a good, although not absolutely certain, argument that Jackson is not identifiable in the Photo. Thus, it is not possible to prove facts which meet the statutory requirement of identifiability necessary for a cause of action. On this issue, there is a strong argument that the existing common law precedents supporting the *Gazette*'s position remain good law, notwithstanding the preemption provision of the statute, as the decisions comport with the statute and its legislative history. In addition, there is a weaker, but plausible, argument that the use of the Photo comes within the news reporting exception of the statute. On this issue, the argument that the common law precedents remain good law, while plausible, is weak, given the language of the statute and legislative history.

II. DISCUSSION

A. Was Jackson identifiable?

The statute requires that the individual depicted in a photograph be "readily identifiable." § 62(b). It defines that term as meaning that a viewer can "reasonably determine that the person depicted in the photograph is the same person who is complaining of its unauthorized use." § 62(b)(1). Applicants should note that the common law right of publicity required that the plaintiff's persona be appropriated and argue that this is a standard similar to the standard in the statute. The legislative history of the statute indicates that prior common law decisions that accord with the new statutory provisions remain good precedent. This would indicate that the prior common law decisions on identifiability—*Holt v. JuicyCo, Inc., and Janig, Inc.,* and *Brant v. Franklin Diamond Exchange*—are still good law, as each appears to apply the equivalent of the new statutory standard, albeit not in so many words.

What features or attributes make an individual "identifiable"?

Jackson's face and most of his body are not visible in the Photo. Applicants should note that *Holt* teaches that facial representation is not necessary—there, the distinctive and unique garb of the athlete was sufficient to identify him in the minds of the public. On the other hand, *Brant* teaches that such "secondary" identification can only go so far—when an individual is depicted without any distinctive identifying features whatsoever, the right of publicity is not

violated, for the public cannot identify the individual depicted as the individual making the claim. Accordingly, applicants must analyze whether Jackson is "identifiable" from any non-facial features in the Photo, such that a viewer could, in the words of the statute, "reasonably determine" that it is Jackson being depicted in the Photo.

Is Jackson "identifiable" from any non-facial features in the Photo?

Applicants should address the question whether there is any aspect of Jackson's depiction in the Photo that would allow the public to know that it is he, and not another player, being depicted. Applicants should state that a successful motion to dismiss requires that Jackson is *not* identifiable from the Photo. Applicants should apply the following analysis in concluding that Jackson's claim is unlikely to succeed:

- No part of Jackson's face or body can be identified.
- One possible identification that could be made is based on Jackson's uniform. But the uniform design has not changed in 25 years, and, by definition, a "uniform" is uniform—it is the same for all players on the team. Thus, the Photo could depict any player on the team. Applicants should support this analysis by referring to and analogizing with the use of a common swimsuit design by all competitors in *Brant*.
- Applicants should distinguish *Holt* by noting that the plaintiff there was "identifiable" by the *unique* aspects of his clothing (his gold racing suit), and argue that no similarly unique attributes are present here.
- Another possible identification that could be made is based on the partial visibility of Jackson's uniform number—the last zero in his double-zero number. But, at the time the Photo was taken, three other Blue Sox players had numbers ending in zero, and, at the time of the lawsuit, five other players did. Hence, the picture could have been of any one of four to six different individuals.
- The uniform number analysis requires further refinement—as parts of Jackson's unclothed body (one arm, his neck) are visible in the Photo, were those teammates whose numbers ended in zero of the same ethnic background as Jackson? As Jackson is Caucasian, if all the other teammates whose numbers ended in zero were non-Caucasian, that might be enough to find Jackson identifiable in the Photo. But the facts tell us that a

sufficient number were also Caucasian (two of the three when the Photo was taken, and all five at the time of the lawsuit) as to preclude the possibility that Jackson could be reasonably identifiable in the Photo.

Is Jackson "identifiable" from the text of the advertisement?

- Applicants may note that Jackson may argue that the text of the advertisement, by its repeated use of the word "action," identifies the individual in the Photo as Jackson by using his nickname. This, it could be argued, is a secondary identifying feature like the distinctive outfit worn by the plaintiff in *Holt*. In response, applicants might observe that the statute's definition of what makes a person identifiable in a photograph is based solely on visual elements in the photograph itself. Hence, the use of "action" in the text does not affect the identifiability of the individual depicted in the Photo.
- Applicants might also note that Jackson could argue that the repeated use of the word "action" in the text of the advertisement and the reference to him in the memorandum from Sandi Allen to Jerry Webster show an intent to identify Jackson as the individual in the photograph, and therefore violate his right of publicity. The counterargument would be that use of "action" in the ad and the memo (with one exception, discussed below) was as a common noun, not the proper noun of Jackson's nickname: 1) if the headline in the ad had referred to Jackson, it would have said, "GET IN WITH ACTION," not "GET IN WITH *THE* ACTION" (emphasis added); 2) the memo referred to the Photo conveying "excitement, *action*, and the kind of sports coverage we stand for" (emphasis added), using the common noun "action" (with no initial capital letter) rather than the proper noun (with an initial capital letter); and 3) the text of the ad, referring to "put[ting] you right in the middle of the *action*" (emphasis added), also used the common noun, not Jackson's nickname. Hence, applicants could conclude that the public would understand the use in the ad in the sense of the common noun "action," and not as identifying Jackson himself.
- Finally, perceptive applicants will note that the memo's identification of the individual in the Photo as Action Jackson simply indicates the *Gazette*'s knowledge that the Photo depicts Jackson and not another player, and does not go to the question of the

identifiability by the public of Jackson in the ad. Although the statute imposes liability on one who "knowingly uses" an individual's persona, a second requirement is that the individual be identifiable. As the court stated in *Brant*, that knowledge, and even its admission, does not make the individual "identifiable" by the public in the use itself.

In sum, applicants should conclude that there is a good argument, albeit not a certainty, that, under the statute and relevant and still-valid precedent, Jackson is not identifiable in the Photo and, as a result, he does not have a cause of action for violation of his right of publicity.

B. Was the use for news reporting?

Applicants should proceed in their analysis to note that, even if Jackson were "identifiable" in the Photo, the use could still be exempt because of the affirmative defense for "news
reporting" in the statute, § 62(d). As there seems to be prior common law precedent which would exempt the *Gazette*'s use in the subscription solicitation, applicants should first address whether the statute has changed the common law standard; if it has, the prior supporting case law no longer serves as precedent.

Did the statute change the common law standard of what constitutes news reporting?

Both the common law right and the new statutory right contain an exception for news reporting. *See* § 62(d); *Miller v. FSM Enterprises, Inc.* (Fr. Ct. App. 1988). As the common law developed, to be exempt the use had to be somehow related to news dissemination:

- In *Jancovic v. Franklin City Journal, Inc.* (discussed in *Miller*), a news photograph that was reproduced as a poster and sold as such by the newspaper, but without any reference to its news function, was held to violate the individual's common law right of publicity. The court held that it made no difference that the poster came from a news organization, as the lack of reference to the organization or its news activities removed the use from the exemption.

- Applicants should distinguish *Jancovic* on the grounds that the *Gazette*'s use did indeed refer to its news reporting activities. The text of the advertisement made direct reference to the activities and type of news coverage the *Gazette* provides ("great stories," "coverage of every Franklin team," "award-winning photos").
- Applicants will also note that a common law precedent, *Miller*, supports exemption for exactly the sort of use made here by the *Gazette*. In *Miller*, a magazine used a news photograph for a subscription solicitation, much like the use here. The court held (over dissent) that the relation of the photograph to the news function of the magazine was sufficient to qualify for the exemption, as the use was an example of the magazine's news coverage.
- Is *Miller* still good law under the statute? The statute grants an affirmative defense for use "in connection with any news, public affairs, or sports *broadcast or account*" (emphasis added). While this obviously applies to stories and news accounts, it is unclear as to whether it would extend to solicitations for subscriptions as was the case in *Miller*—could the solicitation, which illustrates the type of "news or sports accounts" the publication covers, itself be described as a "news . . . or sports . . . account"? Arguing against applying the *Miller* common law precedent is the plain language of the statute, which refers only to "account[s]" (in contrast, in *Miller*, the court was not construing statutory language but analyzing the issue in the context of whether the use of the plaintiff's image fell within the term "news reporting" under the common law). The legislative history could also be seen as, at best, ambiguous: 1) it notes that there was "uncertainty" as to whether uses "ancillary" to news reporting incurred liability, and 2) it emphasizes the "broadcast or account" language of the new statute. Hence, applicants should note the potential argument that the subscription solicitation furthers the goal of supporting news reporting by making the public aware of the *Gazette*'s coverage of issues of public interest, and thus the *Miller* rationale should be followed as good precedent, while also noting the weakness of the argument.
- The case for a valid affirmative defense could be seen as a toss-up at best. The statute speaks of the use of a photograph "in connection with any . . . sports broadcast or

account." Is this language sufficiently broad to cover the advertisement? Is the term so ambiguous as to make resort to the legislative history necessary? Perceptive applicants will state that, while one could argue that the use of the Photo in the solicitation as an example of the *Gazette*'s content was intended to make the public aware of the *Gazette*'s coverage, one might just as easily argue that the statutory language is clear and includes only "account[s]" and not advertisements for the news medium itself.

If the statute adopted the common law standard for affirmative defense as set forth in *Miller*, did the *Gazette*'s specific use of the Photo meet that standard?

- Applicants should also note that the *Miller* precedent itself is not clear-cut and does not necessarily favor the *Gazette*. The *Miller* court opined that, if the use could be seen as an implied endorsement of the commercial purpose of the magazine, then the relation of the subscription solicitation to the news aspects would disappear and the use would violate the individual's right of publicity. The court gave as an example of such an impermissible implied endorsement the use of the individual's name in the text of the solicitation.

- The Gazette's advertisement did use Jackson's nickname ("Action") in both its headline and text, but, it could be argued, not as referring to the individual but rather to the common usage of the word "action," as previously noted. Hence, it could be argued, the use of the word would not be seen as an endorsement by Jackson. Again, applicants should note that the facts are ambiguous and this point could go against the *Gazette*.
- Perceptive applicants might conclude that the question could ultimately be whether it is the *Gazette*'s intent or the public's perception that determines the answer to whether an endorsement was implied.

Applicants should conclude that, while there is an argument to be made that Jackson's claim is not viable because the subscription solicitation falls within the statute's affirmative defense for "news reporting," that result is not certain, and good arguments could be made the other way that could defeat reliance on the "news reporting" affirmative defense.

POINT SHEET

MPT-2: *In re City of Bluewater*

In re City of Bluewater

DRAFTERS' POINT SHEET

In this performance test item, applicants are employed by the City Attorney's Office for the City of Bluewater, Franklin. The City has received a demand letter from the attorneys for Turquoise Water Supply Corporation (TWS), the provider of water and sewer services to rural residents in a neighboring county, asserting that TWS is entitled to provide water and sewer services to a 500-acre tract of land adjacent to Bluewater's existing city limits, which the City is in the process of annexing. Annexation is the process by which land is brought into the City and made subject to its taxing and service authority, thereby providing additional tax revenue for the City. The tract of land in dispute is the future site of the 500-home Acadia Estates subdivision, which is slated to be constructed over the next 18 months. Applicants' task is to prepare a persuasive letter responding to TWS's attorneys' contentions that TWS qualifies as a federally indebted "association" whose water and sewer service area is entitled to protection against municipal curtailment, pursuant to 7 U.S.C. § 1926(b) of the Consolidated Farm and Rural Development Act.

The File consists of the instructional memo from the supervising attorney, a memorandum of preliminary research findings, TWS's demand letter, a newspaper article, and the City's proposed Service Plan for the Acadia Estates subdivision. The Library contains excerpts from the Consolidated Farm and Rural Development Act (the Act), excerpts from the Franklin Code, and two cases bearing on the subject.

The following discussion covers all the points the drafters intended to raise in the problem. Applicants need not cover all of them to receive passing or even excellent grades. Grading is entirely within the discretion of the user jurisdictions.

I. Overview

The task is to write a persuasive letter to TWS's attorneys responding to the assertions made in TWS's demand letter, specifically the claim that TWS has the exclusive right to provide water and sewer services to the proposed Acadia Estates subdivision. Applicants should base their arguments on the Consolidated Farm and Rural Development Act, 7 U.S.C. § 1921 *et seq.*,

and the state statutes that govern a water supplier's right to serve a particular geographic area (Franklin Code Ch. 19 §§ 450(b) and 675).

Applicants are expected to exhibit a good deal of judgment in what the response letter says and how it says it, as there are no formatting instructions provided except that they are to respond to TWS's attorneys' arguments and argue that the City has the exclusive right to provide service to Acadia Estates. Applicants are instructed not to prepare a separate statement of facts. Their answers should be in the form of a letter to opposing counsel, using fairly formal language but not relying on legal jargon. They must "analyze and integrate" the facts and legal principles in formulating their arguments. This instruction from the supervising attorney is intended to require applicants to integrate the facts and the law, not merely recite them.

II. The Statutes and Cases

The following points, which applicants should extract and use in formulating their arguments, emerge from the federal and state statutory provisions and the cases in the Library:

- The Consolidated Farm and Rural Development Act (the Act), 7 U.S.C. § 1921 *et seq.*, authorizes the Secretary of Agriculture to make or insure loans to nonprofit associations to provide water service and other related essential community facilities to farmers and other rural residents. 7 U.S.C. § 1926(a).
- The Act further protects a borrowing association, and consequently the United States government as a secured party on loans to the association, from municipal curtailment of the association's service area, which is the association's financial base.
    - Specifically, 7 U.S.C. § 1926(b) provides in relevant part:

> The service provided or made available through any association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body . . . during the term of such loan.

- Because the Act does not specifically define the terms "provided" and "made available," courts must look to the state law governing the way in which a qualifying association provides water service to potential customers to determine whether that entity has provided service or made service available to the disputed area.

- Making service available has two components: (1) the legal right under state law to serve an area; and (2) the physical ability to serve an area, which is also known as the "pipes-in-the-ground" test. The state-law and pipes-in-the-ground tests are not independent tests, but prongs of a single test for "made service available." *Fountain Water Supply, Inc. v. City of Orangevale* (N. Dist. of Columbia 2003).

- **Legal Right:** In Franklin, a water supply corporation must hold a Certificate of Convenience and Necessity (CCN) issued by the Franklin Public Service Commission in order to have the legal right to provide water and sewer services to a particular geographic area. Franklin Code Ch. 19 § 450. Once granted, the CCN imposes an obligation upon the holder to provide "continuous and adequate service to every customer" within the certificated area. *Id*. § 453.
    - A CCN may be amended by written application approved by the Commission, upon a finding by the Commission that the applicant "possesses the capability to provide continuous and adequate service." *Id.* § 457.
    - While a city need not obtain a CCN to provide service outside its boundaries, it is prohibited from providing service to an area for which a water supply corporation already holds a CCN, absent the certificate holder's written consent. *Id.* § 675.
- **Physical Ability to Serve ("pipes in the ground"):** Whether an association has made service available is also contingent on the existence of facilities in, or in proximity to, the location to be served. *Klein Water Co. v. City of Stewart* (15th Cir. 2005). If an association does not already have service in existence, the association must either have existing water lines within or adjacent to the property claimed to be protected by § 1926(b) prior to the time an allegedly encroaching association begins providing service, or be able to provide such service within a reasonable period of time, in order to be eligible for protection. *Id.*

III. Arguments to Be Addressed in Response Letter

In its demand letter, TWS contends that it is entitled to protection under 7 U.S.C. § 1926(b) and that, in any event, under state law (specifically, Franklin Code Ch. 19 §§ 450(b) &

675) the City is prohibited from providing water and sewer services to the subdivision. Each contention will be addressed in turn.

A. TWS's Federal Argument under 7 U.S.C. § 1926(b)

- In order to prevail on its claim that the City's plan to provide water and sewer services to Acadia Estates violates § 1926(b), TWS must establish the following: (1) it is an "association" within the meaning of the Act, (2) it has a qualifying outstanding federal loan

  obligation, and (3) it has provided service or made service available in the disputed area. *Fountain; Klein*.

(1) "Association" Requirement

- Here, as in *Fountain Water Supply*, it appears that TWS is an "association" within the meaning of the Act because it is a nonprofit water supply corporation organized to provide rural water and sewer services pursuant to Franklin Code § 1324 (cited in Preliminary Research Memorandum).

- However, the City also qualifies as an "association" under § 1926(b) because § 1926(b), by its terms, applies not only to private nonprofit corporations such as TWS but also to "public and quasi-public agencies" such as the City. *See Klein.*

- Moreover, the "association" requirement is just the first of three prerequisites for entitlement to § 1926(b) protection.

(2) Federal Indebtedness Requirement

- TWS is currently indebted to the federal government for loans taken out in 1990, to the tune of $1.4 million. (Preliminary Research Memorandum.)

- However, the City is also federally indebted by virtue of having obtained federal loans in 1997 and 2003 to finance water and sewer improvements. The amount of the City's present indebtedness is estimated to be at least $4 million and thus, under *Klein,* the City qualifies for § 1926(b) protection as well. (Preliminary Research

Memorandum.)

(3) "Made Service Available" Requirement

- The core issue is whether TWS and/or the City have provided service or made service available in the disputed area.
- As set forth above, the Act does not define the terms "provided" and "made available." However, the cases provide considerable guidance on this issue and identify a two-prong test for determining whether service has been "provided" or "made available": (1) the legal right under state law to serve an area, and (2) the physical ability to serve an area ("pipes in the ground"). *Fountain*; *Klein*.

(a) State-Law Prong

- Although TWS contends that it has the right under Franklin law to provide service to the Acadia Estates subdivision, in fact it does not have that right at this time. Its application under Franklin Code Ch. 19 § 457 to expand the territory covered by its CCN to include Acadia Estates is pending before the Franklin Public Service Commission. (Demand letter.) Thus, TWS's present legal right to provide water and sewer services is limited to those portions of El Dorado County covered by its existing CCN. No portion of its existing CCN extends into Bluewater County.

    - Moreover, it is questionable whether TWS will even be able to secure the requested CCN amendment, notwithstanding its attorneys' posturing to the contrary in the demand letter, because amendment of a CCN is contingent upon being able to provide "continuous and adequate service." Franklin Code Ch. 19 § 457. As discussed below, it appears that TWS is not able to provide such service to Acadia Estates, nor will it be able to do so within a reasonable amount of time.

    - Thus, like the water association in *Klein*, TWS has not obtained the

necessary state agency authorization to provide service to the disputed area.

- The City, in contrast, has the present legal right to provide service to the tract pursuant to Franklin Code Ch. 19 § 675, which authorizes a city that owns or operates a water supply or sewer system to "extend the system into, and furnish water and sewer services to any person within, any territory adjacent to the city," provided that the territory is not already served by the holder of a CCN.
    - The Acadia Estates tract is located "adjacent to" Bluewater's existing city limits and the tract is not being served by any CCN holder.
    - Note, however, that there is no Franklin equivalent of the Columbia statute that precludes rural water districts from providing water service within a two-mile zone of a city. *Cf. Fountain* (discussing Columbia Government Code § 357A).
    - Any attempt by an applicant to apply the Columbia two-mile-zone statute to the Acadia Estates dispute, or to assert the existence of an analogous Franklin statute, would be misguided.
    - Thus, applying the state-law component of the "made service available" requirement to the facts presented in this item, the City is the only party that actually has a present right to serve the tract.
    - Furthermore, even if TWS were to secure an amendment to its CCN before the City completes its annexation of the Acadia Estates tract, this alone would not be dispositive because whether an association has "made service available" involves *both* whether an association has the legal right to provide such service, as determined by applicable state law, *and* whether service is physically available by virtue of the association having water lines ("pipes in the ground") adjacent to the disputed property.

Fountain.

(b) "Pipes-in-the-Ground" Prong

- The "pipes-in-the-ground" requirement involves an assessment of whether an association has the *physical* ability to actually supply water to a disputed area. *Fountain.*
- Whether an association has made service available depends on the existence of facilities in, or in proximity to, the location to be served. "If an association does not already provide service, to be eligible for § 1926(b) protection the association must either (1) have existing water lines within or adjacent to the property claimed to be protected by § 1926(b) prior to the time an allegedly encroaching competitor begins providing service, or (2) be able to provide such service within a reasonable period of time." *Klein* (citing *Glenpool Utility Auth. v. Creek County Rural Water Dist.* (10th Cir. 1988)).
- Important considerations are whether the federally indebted association is already providing water service to the disputed tract and whether the association has had any requests for service from potential customers in the area at issue. *Klein.*
- Here, as in *Klein*, TWS cannot overcome any of these hurdles. Its nearest existing facilities are located three miles from the proposed Acadia Estates subdivision and are inadequate to meet the needs of the subdivision.
    - TWS currently provides water and sewer services to only 250 residential customers in rural El Dorado County and a handful of commercial enterprises. Thus, its existing service area is only one-half the size of the future 500-home Acadia Estates subdivision.
        - Furthermore, TWS's existing six-inch-diameter water line along Highway 45 is inadequate to meet the needs of the

subdivision, which requires water lines that are at least 12 inches in diameter. (Preliminary Research Memorandum.)

- Thus, unlike the association in the *Glenpool* case cited in the TWS demand letter (and distinguished by the court in *Klein*), TWS cannot argue that it has adequate water lines adjacent to the disputed area or that it is currently providing service to customers in the disputed area.
- Further, similar to the association in *Klein*, TWS has not received any requests for service from any potential customers in the disputed area.
- Finally, TWS cannot provide service within a reasonable amount of time.
    - According to the *Bluewater Tribune* article, construction of the necessary water and sewer infrastructure for Acadia Estates is slated to begin as early as January 2010 and to be completed by April 2010, with home construction to commence shortly thereafter and be completed by December of that year.
    - The City's technical personnel estimate that it would take a minimum of two years for TWS to design and construct the improvements and expansions needed to serve Acadia Estates, assuming TWS has sufficient funds to do so (which is questionable, since TWS has had to borrow money from the federal government to finance prior expansions). (Preliminary Research Memorandum.)
    - TWS's own attorneys concede that it would take 18 months (until January 2011) for TWS to construct the new sewage treatment plant needed to serve the subdivision. (Demand letter.)
    - Even giving TWS the benefit of the doubt and assuming the accuracy of its own 18-month time frame, this would mean that TWS would not be capable of providing the necessary water and sewer infrastructure to Acadia Estates until a month after the subdivision is anticipated to be fully constructed.

        - Thus, it is clear that TWS would not be able to provide service within the proposed development schedule, which contemplates completion of water and sewer lines by April 2010.
    - Thus, like the association in *Klein*, TWS is unable to show that it has provided service or made service available in the disputed area, and it is therefore not entitled to the § 1926(b) protection that might otherwise have been available.
    - In contrast, the City can provide service within a reasonable period of time and thus satisfy the "pipes-in-the-ground" test.
        - According to the information provided by the City's Planning and Public Works Divisions, the City has existing water and sewer facilities less than a quarter mile from the proposed site of the subdivision. (Preliminary Research Memorandum.)
        - The City's Service Plan further indicates that with "minor extensions to its existing water and sewer system," the City can accommodate the projected needs of the subdivision and make services available within three months after annexing the tract. This would allow development of the subdivision to proceed on schedule, with home construction being completed by approximately December 2010. (Draft Service Plan; *see also Bluewater Tribune* article.)

B. **TWS's State-Law Arguments under Franklin Code Ch. 19 §§ 450(b) and 675**

- TWS's demand letter cites Ch. 19 §§ 450(b) and 675 of the Franklin Code for the proposition that the City is prohibited under state law from providing water and sewer services to the Acadia Estates subdivision.

- Section § 450(b) prohibits the provision of water and sewer services as well as the construction of facilities for such services to areas already covered by another entity's existing CCN, absent the certificate holder's written consent.
- Similarly, § 675 prevents a city from serving adjacent areas outside of city limits that are serviced by a CCN holder unless the CCN holder requests the extension of water or sewer services from the city.
- TWS's state-law arguments rest on the presumption that TWS will, in fact, be granted an amendment to its CCN.
- For the reasons set forth above, namely TWS's inability to provide continuous and adequate service to the Acadia Estates subdivision as required by § 457, these arguments must fail.

IV. Conclusion

By its clear terms, § 1926(b) does not provide an automatic, exclusive right to serve, but rather provides protection only if certain conditions are met. *Klein.* Among those conditions is that an association has made service available or is capable of making service available within a reasonable period of time. *Id.* In this case, as in *Klein,* TWS has not established a legal right under state law to serve Acadia Estates or the ability to actually provide service now or within a reasonable amount of time. Not having facilities available, and not having obtained the necessary CCN amendment to serve the Acadia Estates subdivision, TWS is not entitled to protection under federal or state law. Indeed, TWS may well be precluded by those very same statutes from attempting to interfere with the City's plans to serve the subdivision.

NOTES