THE MPT®

MULTISTATE PERFORMANCE TEST

July 2011 MPTs and Point Sheets

National Conference of Bar Examiners
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Contents

Preface

The Multistate Performance Test (MPT) is developed by the National Conference of Bar Examiners (NCBE). This publication includes the items and Point Sheets from the July 2011 MPT. Each test includes two items; user jurisdictions may select either one or both items for their examinees to complete. (The MPT is a component of the Uniform Bar Examination [UBE]. Jurisdictions administering the UBE use two MPTs as part of their bar examinations.) The instructions for the test appear on page v. For more information, see the *MPT Information Booklet,* available on the NCBE website at www.ncbex.org.

The MPT Point Sheets describe the factual and legal points encompassed within the lawyering tasks to be completed. They outline the possible issues and points that might be addressed by an examinee. They are provided to the user jurisdictions to assist graders in grading the examination by identifying the issues and suggesting the resolution of the problems contemplated by the drafters. An examinee need not present his/her response in the same way or cover all the points discussed in the grading materials to receive a good grade.

Description of the MPT

The MPT consists of two items, either or both of which a jurisdiction may select to include as part of its bar examination. (UBE jurisdictions use two MPTs as part of their bar examinations.) It is administered by participating jurisdictions on the Tuesday before the last Wednesday in February and July of each year. Examinees 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 examinee 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. Examinees 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 examinee 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 examinee's ability to use fundamental lawyering skills in a realistic situation. Each test evaluates an examinee's ability to complete a task that a beginning lawyer should be able to accomplish. The MPT requires examinees 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 examinees to perform one or more of a variety of lawyering tasks. For example, examinees 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:

> 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.
>
> 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.
>
> 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.
>
> 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.
>
> Your response must be written in the answer book provided. If you are taking the 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.
>
> 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.
>
> 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.

July 2011 MPT

▶ *FILE*

MPT-1: *In re Field Hogs, Inc.*

Delmore, DeFranco, and Whitfield, LLC
Attorneys at Law
1800 Hinman Avenue
Windsor, Franklin 33732

TO: Examinee
FROM: Carlotta DeFranco
DATE: July 26, 2011
RE: Arbitration Clause for Field Hogs, Inc.

Our firm has represented Field Hogs, Inc., for over seven years. Field Hogs manufactures heavy lawn equipment for the consumer market. We have represented Field Hogs in four lawsuits in Franklin. The last case received a lot of negative publicity, and the company is concerned about reducing the costs of litigation and avoiding negative publicity for any future claims.

Accordingly, Field Hogs has asked us to draft an arbitration clause to insert into its consumer sales contracts. I attach a copy of the firm's standard commercial arbitration clause, which has not been used in consumer transactions.

The client may be able to avoid litigation through arbitration, but also may face extra costs with arbitration. Please draft a memorandum for me in which you address the following:

(1)(a) Would the firm's clause cover arbitration of all potential claims by consumers against Field Hogs under Franklin law? Why or why not? Be sure to explain how your conclusion is supported by the applicable law.

(b) Would the firm's clause's allocation of arbitration costs be enforceable against consumers under Franklin law? Why or why not? Be sure to explain how your conclusion is supported by the applicable law.

(2) Draft an arbitration clause for Field Hogs's consumer sales contracts that will be enforceable under Franklin law, and briefly explain how your draft language addresses the client's priorities, as described in the attached client meeting summary.

Do not concern yourself with the Federal Arbitration Act; focus solely on Franklin state law issues.

Delmore, DeFranco, and Whitfield, LLC

OFFICE MEMORANDUM

TO: File
FROM: Carlotta DeFranco
DATE: July 19, 2011
RE: Client Meeting Summary: Bradley Hewlett, Field Hogs COO

Today, I met with Bradley Hewlett, chief operating officer of Field Hogs since its founding in 1998. Hewlett is well versed in Field Hogs's business and has the authority to make decisions concerning any litigation involving the company.

Field Hogs designs and manufactures heavy lawn, garden, and field maintenance equipment, which it markets to consumers. Its product lines include heavy-duty lawn mowers (the Lawn Hog line), medium-duty walk-behind brush mowers (the Brush Hog line), and heavy- duty walk-behind field-clearing equipment (the Field Boar line). Lawn Hogs mow large acreages that require frequent mowing, Brush Hogs clear fields of tall grass and saplings one inch or less in diameter, and Field Boars take down saplings up to three inches in diameter.

Field Hogs sells only in Franklin. Its products sell best in semirural areas surrounding major metropolitan areas—the right combination of income and demand.

Hewlett explained that because Field Hogs markets to consumers, it makes product safety a centerpiece of its research and marketing. It holds patents on several devices that prevent its machines from moving or cutting when the operator does not have a grip on the machine. All of Field Hogs's equipment can do real damage if not used properly, so the company invests enormous effort in making its safety features work well and durably, and in writing clear operating instructions.

Hewlett stated that Field Hogs made some mistakes in its product manuals a few years back that cost the company a lot of money. In fact, Hewlett stated, "While we've gotten very careful about what we do, we're also realistic. We know we can't keep everybody from misusing our products. Still, if we can avoid some costs on the really frivolous tort cases, that would greatly reduce our litigation expenses."

The *James* case, and the publicity surrounding it, was a wake-up call for the company. Hewlett stated:

> That was the case where a Field Boar basically ran over the customer. It was terrible. We wanted to settle the case, even though we knew that the customer had misused the machine. But as you know, the customer wouldn't hear of it. The litigation costs and fees drew down our reserves, and until the verdict, we had trouble with potential lenders because of the bad publicity. We were very satisfied with the verdict in our favor, but as you told us, it could have gone either way, and a large judgment could have ruined us. We realized that you can't control what will happen with juries, and win or lose, the expenses of litigation can really get out of hand.

Hewlett added that the company is "very interested in arbitration, even though we know that it, too, can be very expensive." He went on to add that he hopes that arbitration will be less public, yield lower awards, and be less expensive than traditional litigation. Hewlett also anticipates that professional arbitrators will be more predictable than juries. With respect to the costs of arbitration, Hewlett stated, "We know that we'll have to pay for the arbitrator's time and that it's not cheap. But when we've arbitrated contract disputes with our suppliers, we've basically split costs down the middle, so we want to do that here, too."

Hewlett stated that Field Hogs definitely doesn't want to spend a lot of time litigating the validity of the arbitration clause. Hewlett is aware that Field Hogs's sales contracts already say that Franklin law applies, and he wants to know what Franklin law says about arbitration in such consumer transactions. Hewlett closed our meeting by saying, "It's especially important to know exactly what we can expect as our products get into the hands of more and more people, but avoiding jury trials is the most important thing to me."

I told Hewlett that we would do some research on the points raised in our meeting and get back to him.

Delmore, DeFranco, and Whitfield, LLC

OFFICE MEMORANDUM

TO: File
FROM: Carlotta DeFranco
DATE: January 20, 2011
RE: Summary of Tort Litigation Against Field Hogs, Inc.

Majeski v. Field Hogs, Inc. (Franklin Dist. Ct. 2004): Plaintiff buyer sued for foot injuries resulting from improper use of safety handle on a Brush Hog. Plaintiff claimed inadequate warnings and defects in design and manufacture under negligence, warranty, and strict liability theories. During discovery, plaintiff conceded that his use of the machine did not comply with instructions printed in manual. RESULT: summary judgment for Field Hogs.

Johan v. Field Hogs, Inc. (Franklin Dist. Ct. 2005): Plaintiff buyer sued for serious leg injuries resulting from improper use of Brush Hog on a slope. Plaintiff's claims identical to those in *Majeski*. The company's manual was ambiguous about the maximum slope for recommended use. Trial court denied Field Hogs's motion for summary judgment. RESULT: verdict for plaintiff for $1.5 million.

Saunders v. Field Hogs, Inc. (Franklin Dist. Ct. 2008): Plaintiff buyer sued for knee injuries incurred while standing in front of a Lawn Hog during operation by another. Plaintiff conceded operation of mower by her 10-year-old son; the company's manual did not clearly warn against use of mower by minor children. RESULT: verdict for plaintiff for $400,000.

James v. Field Hogs, Inc. (Franklin Dist. Ct. 2010): Plaintiff buyer sued for permanent disfigurement in an accident involving a Field Boar, relying on defective design and manufacture theories. Discovery revealed factual conflict regarding plaintiff's compliance with instructions during operation of machine. The *Franklin Journal* published a three-part article about the case, focusing on the "Costs of Justice" for plaintiffs. RESULT: verdict for Field Hogs.

Delmore, DeFranco, and Whitfield, LLC
Standard Commercial Arbitration Clause

Any claim or controversy arising out of or relating to this contract or the breach thereof shall be settled by arbitration. Arbitration shall occur in accordance with the rules and procedures for arbitration promulgated by the National Arbitration Organization.

National Arbitration Organization:
Procedures for Consumer-Related Disputes

Payment of Arbitrator's Fees

If all claims and counterclaims are less than $75,000, then the consumer is responsible for one-half of the arbitrator's fees up to a maximum of $750. The consumer must pay this amount as a deposit. It is refunded if not used.

If all claims and counterclaims equal or exceed $75,000, then the consumer is responsible for one-half of the arbitrator's fees. The consumer must deposit one-half of the arbitrator's estimated compensation in advance. It is refunded if not used.

The business must pay for all arbitrator compensation beyond the amounts that are the responsibility of the consumer. The business must deposit in advance the arbitrator's estimated compensation, less any amounts required as deposits from the consumer. These deposits are refunded if not used.

Administrative Fees

In addition to the arbitrator's fees, the consumer must pay a one-time $2,000 administrative fee.

Arbitrator's Fees

Arbitrators receive $1,000/day for each day of hearing plus an additional $200/hour for time spent on pre- and post-hearing matters.

July 2011 MPT

▶ *LIBRARY*

MPT-1: *In re Field Hogs, Inc.*

LeBlanc v. Sani-John Corporation

Franklin Court of Appeal (2003)

In 1998, Jacques LeBlanc began servicing and cleaning Sani-John's portable toilets in Franklin City under a service contract. The service contract, drafted by Sani-John, contained a provision requiring arbitration in Franklin of "any controversy or claim arising out of or relating to this agreement, or the breach thereof."

Pursuant to this contract, Sani-John supplied LeBlanc with all chemicals required to clean and service the toilets. After several months, LeBlanc allegedly suffered injury from exposure to these chemicals. LeBlanc filed a complaint against Sani-John, alleging in tort that Sani-John had failed to warn him of the dangerous and toxic nature of these chemicals and had also failed to provide him with adequate instructions for their safe use.

Sani-John sought to compel arbitration pursuant to the contract. The district court found that LeBlanc's claims "arose out of or related to . . . his contract with defendant Sani-John; they were for personal injuries LeBlanc received while performing on that contract." The court granted Sani-John's motion to compel arbitration.

LeBlanc appeals, arguing that the arbitration clause in his contract with Sani-John does not subject him to arbitration over his tort claims against Sani-John. The arbitration clause here provided:

> Any controversy or claim arising out of or relating to this agreement, or the breach thereof, shall be settled by arbitration.

Franklin courts generally favor arbitration as a mode of resolution and have adopted broad statements of public policy to that end. In *New Home Builders, Inc. v. Lake St. Clair Recreation Association* (Fr. Ct. App. 1999), we held that all disputes between contracting parties should be arbitrated according to the arbitration clause in the contract unless it can be said with positive assurance that the arbitration clause does not cover the dispute. As we said then and reaffirm here, only *the most forceful evidence* of purpose to exclude a claim from arbitration can prevail over a broad contractual arbitration clause. *Id*.

Arbitration promotes efficiency in time and money when a dispute between parties is

contractual in nature. However, when a dispute is not contractual but arises in tort, our courts have been reluctant to compel arbitration. Some courts have limited arbitration clauses where tort claims are concerned. In *Norway Farms v. Dairy and Drovers Union* (Fr. Ct. App. 2001), for example, the court of appeal opined that "absent a clear explicit statement in a contract directing an arbitrator to hear tort claims by one party against another, it must be assumed that the parties did not intend to withdraw such disputes from judicial authority."

This approach suggests that unless the parties have explicitly included tort actions within the scope of an arbitration clause, they must not have intended such claims to be subject to arbitration.

Cases in other jurisdictions suggest that, even where the arbitration clause explicitly covers tort claims, public policy may bar compelling arbitration of such claims. For example, in *Willis v. Redibuilt Mobile Home, Inc.* (Olympia Ct. App. 1995), the Olympia Court of Appeal reversed a trial court's order compelling arbitration of a products liability claim. The relevant arbitration clause provided:

> Any claim, dispute, or controversy (whether in contract, tort, or otherwise) arising from or related to the sale of the Mobile Home shall be subject to binding arbitration in accordance with the rules of the Olympia Arbitration Association.

The Olympia court reasoned that the plaintiffs' products liability claims "did not require an examination of the parties' respective obligations and performance under the contract." *Id*. Further, the court suggested that "[t]he tort claims are independent of the sale. Plaintiffs could maintain such claims against defendants regardless of the warranty and the sale transaction." *Id*.

In the case at hand, the arbitration clause contains no explicit reference to tort claims but requires arbitration only of those disputes "arising out of or relating to this agreement, or the breach thereof." In our view, for the dispute to "arise out of or relate to" the contract, the dispute must raise some issue the resolution of which requires construction of the contract itself. The relationship between the dispute and the contract does not exist simply because the dispute would not have arisen absent the existence of a contract between the parties.

If such a connection to the contract is not present, the parties could not have intended tort claims to be subject to arbitration under a clause covering only claims "arising out of

or relating to" the contract. If the duty allegedly breached is one that law and public policy impose, and one that the defendant owes generally to others beyond the contracting parties, then a dispute over the breach of that duty does not arise from the contract. Instead, it sounds in tort. An arbitration clause that covers only contract-related claims (like the clause at issue here) would not apply.

We do not reach the question of how to interpret an arbitration clause that explicitly includes tort claims within its scope. We are troubled by the Olympia court's view that parties may never agree to arbitrate future tort claims. We see no reason to go so far. We note only that parties should clearly and explicitly express an intent to require the arbitration of claims sounding in tort. In turn, courts should strictly construe any clause that purports to compel arbitration of tort claims.

The contract in this case does not clearly and explicitly express the requisite intent. Therefore, the judgment of the trial court is reversed, and the matter is remanded for reinstatement of LeBlanc's complaint.

Reversed and remanded.

Howard v. Omega Funding Corporation

Franklin Supreme Court (2004)

Defendant Omega Funding Corp. (Omega) extends loans to consumer borrowers. In December 1999, Omega entered into an automobile loan contract with plaintiff Angela Howard, a 72-year-old woman with only a grade-school education and little financial sophistication. The $18,700 loan was secured with a security interest in the car purchased by Howard and bore an annual interest rate of 17 percent.

The loan contract contains an arbitration agreement that allows either party to elect binding arbitration as the forum to resolve covered claims. Regarding costs, the agreement provides as follows:

> At the conclusion of the arbitration, the arbitrator will decide who will ultimately be responsible for paying the filing, administrative, and/or hearing fees in connection with the arbitration.

The agreement also contains a severability clause, which states that

> [i]f any portion of this Agreement is deemed invalid or unenforceable, it shall not invalidate the remaining portions of this Agreement, each of which shall be enforceable regardless of such invalidity.

Howard, whose only source of income was Social Security benefits, was eventually unable to make the loan payments. Omega repossessed the automobile and later sold it at auction, leaving a deficiency of $16,763.00. Howard then sued Omega in Franklin District Court, alleging violations of the Franklin Consumer Fraud Act. Thereafter, Omega filed a motion to compel arbitration pursuant to the contract and a motion to dismiss. Howard opposed the motions, arguing that the arbitration clause was itself unconscionable. The district court granted Omega's motion to compel arbitration and dismissed Howard's complaint. The court of appeal affirmed, and we granted review.

When a party to arbitration argues that the arbitration agreement is unconscionable and unenforceable, that claim is decided based on the same state law principles that apply to contracts generally. Franklin law expresses a liberal policy favoring arbitration agreements. Our law, however, permits courts to refuse to enforce an arbitration agreement to the extent that grounds exist at law or in equity for the revocation of any contract. Generally recognized contract defenses, such as duress, fraud, and unconscionability, can justify judicial refusal to enforce an arbitration agreement.

Unconscionability sufficient to invalidate a contractual clause under Franklin law requires both procedural unconscionability — in that the less powerful party lacked a reasonable opportunity to negotiate more favorable terms and in that the process of signing the contract failed to fairly inform the less powerful party of its terms—*and* substantive unconscionability—in that the terms of the contract were oppressive and one-sided. Here, Omega has conceded procedural unconscionability. That leaves us with Howard's contention that the provisions relating to costs are substantively unconscionable.

Our lower courts have had difficulty in reviewing arbitration clauses that allocate costs. To some extent, this difficulty arises from the variety of cost-allocation measures under review. In *Georges v. Forestdale Bank* (Fr. Ct. App. 1993), the court of appeal reviewed a provision requiring the consumer to pay a small initial fee to the arbitrator and requiring the seller to cover all remaining costs. The court confirmed that "the cost of arbitration is a matter of substantive, not procedural, unconscionability" but concluded that the relatively minimal cost of the initial fee did not render the clause substantively unenforceable.

In *Ready Cash Loan, Inc. v. Morton* (Fr. Ct. App. 1998), the court of appeal reviewed an arbitration provision in a consumer loan agreement that divided the costs of arbitration. The clause limited the borrower/consumer to paying 25 percent of the total costs of arbitration and required the lender to pay 75 percent, regardless of who initiated the arbitration. Despite the unequal division, the court of appeal invalidated the clause, reasoning that "the clause . . . does not relieve the chilling effect on the borrower, given the potential expansion of costs involved in disputing substantial claims." *Id*.

In *Athens v. Franklin Tribune* (Fr. Ct. App. 2000), the court of appeal invalidated an arbitration clause in an employment contract that permitted the arbitrator to award costs. In *Athens*, the costs of arbitration included a filing fee of $3,250, a case service fee of $1,500, and a daily rate for the arbitration panel of $1,200 per arbitrator.[1] The court of appeal noted that "the provision at issue in *Ready Cash* allocated a portion of the costs to the consumer. The provision in this case potentially allocates all the costs to the consumer, serving as a greater deterrent to potential disputants."

Finally, in *Scotburg v. A-1 Auto Sales and Service, Inc.* (Fr. Ct. App. 2003), the court of appeal reviewed an arbitration clause that

[1] In a typical arbitration clause, parties select a private arbitration service, such as the National Arbitration Organization. In so doing, parties typically adopt that service's rules and procedures.

was completely silent on the allocation of costs. The defendant argued that the court should adopt the reasoning of a line of Columbia cases which held that absent a showing by the plaintiff of prohibitive cost, such arbitration clauses were enforceable. The *Scotburg* court rejected that argument and, relying solely on Franklin law, concluded that "the potential chilling effect of unknown and potentially prohibitive costs renders this clause unenforceable as a matter of substantive unconscionability."

These cases provide no clear framework within which to analyze the arbitration clause in the present case. The clause here leaves the allocation of costs to the discretion of the arbitrator. If Howard did not prevail in arbitration, then she could be forced to bear the entire cost of the arbitration. This prospect could discourage Howard and similarly situated consumers from pursuing their claims through arbitration.

We remand for a factual determination of the costs that the plaintiff might bear in the absence of the original cost and fee clause. If those costs exceed those that a litigant would bear in pursuing identical claims through litigation, we direct the trial court to reinstate Howard's claim and to deny Omega's motion to compel arbitration.

Vacated and remanded.

July 2011 MPT

▶ *FILE*

MPT-2: *In re Social Networking Inquiry*

THE BALLENTINE LAW FIRM
1 St. Germain Place
Franklin City, Franklin 33033

M E M O R A N D U M

TO: Examinee
FROM: Bert H. Ballentine
DATE: July 26, 2011
RE: Social Networking Inquiry

I serve as chairman of the five-member Franklin State Bar Association Professional Guidance Committee. The committee issues advisory opinions in response to inquiries from Franklin attorneys concerning the ethical propriety of contemplated actions under the Franklin Rules of Professional Conduct. (These opinions are advisory only and are not binding upon the Attorney Disciplinary Board of the Franklin Supreme Court.)

We have received the attached inquiry, and we briefly discussed it at yesterday's meeting of the committee. Three of my colleagues on the committee thought that the course of conduct proposed by the inquiry would pose no problem, one was undecided, and my view was that the proposed conduct would violate the Rules. We agreed to look into the applicable law and then consider the matter in greater detail and come to a resolution at our meeting next week.

Those committee members who think the proposed conduct does not run afoul of the Rules will draft and circulate a memorandum setting forth their position. I, too, will circulate a memorandum setting forth my position that the proposed conduct would violate the Rules.

Please prepare a memorandum that I can circulate to the other committee members to persuade them that the proposed conduct would indeed violate the Rules. Your draft should also respond to any arguments you anticipate will be made to the contrary. Do not draft a separate statement of facts, but be sure to incorporate the relevant facts into your analysis. Also, do not concern yourself with any Rules other than those referred to in the attached materials.

In addition to the inquiry, I am attaching my notes of yesterday's brief discussion by the committee and the applicable Rules of Professional Conduct. As this is a case of first impression under Franklin's Rules, I am attaching case law from neighboring jurisdictions, which might be

relevant. (These Rules are identical for the states of Franklin, Columbia, and Olympia.) From reading these materials, I have learned that there are three approaches to resolving this issue. I believe that the proposed course of conduct would violate the Rules under all three of the approaches.

Allen, Coleman & Nelson, Attorneys-at-Law
3 Adams Plaza
Youcee, Franklin 33098

July 1, 2011

Franklin State Bar Association – Professional Guidance Committee
2 Emerald Square
Franklin City, Franklin 33033

Dear Committee Members:

I write to inquire as to the ethical propriety of a proposed course of action in a negligence lawsuit involving a trip-and-fall injury in a restaurant in which I am involved as counsel of record for the restaurant.

I deposed a nonparty witness who is not represented by counsel. Her testimony is helpful to the party adverse to my client and may be crucial to the other side's case—she testified that neither she nor the plaintiff had been drinking alcohol that evening. During the course of the deposition, the witness revealed that she has accounts on several social networking Internet sites (such as Facebook and MySpace), which allow users to create personal "pages" on which the user may post information on any topic, sometimes including highly personal information. Access to these pages is limited to individuals who obtain the user's permission by asking for it online (those granted permission are referred to as the user's "friends"). The user may grant such access while having almost no information about the person making the request, or may ask for detailed information about that person before making the decision to grant access.

I believe that the witness's pages may contain information which is relevant to the subject of her deposition and which could impeach her at trial—specifically, that she and the plaintiff had been drinking on the evening in question. I did not ask her to reveal the contents of the pages or to allow me access to them in the deposition. I did visit the witness's various social networking accounts after deposing her, and I found that access to them requires her permission. The witness disclosed during the deposition that she grants access to just about anyone who asks for it. However, given the hostility that the witness displayed toward me when I questioned her credibility, I doubt that she would allow me access if I asked her directly.

I propose to ask one of my assistants (not an attorney), whose name the witness will not recognize, to go to these social networking sites and seek to "friend" the witness and thereby gain access to the information on her pages. My assistant would state only truthful information (including his or her name) but would not reveal any affiliation with me or the purpose for which he or she is seeking access (i.e., to provide information for my evaluation and possible use to impeach the witness).

I ask for the Committee's view as to whether this proposed course of conduct is permissible under the Franklin Rules of Professional Conduct.

Very truly yours,

Melinda Nelson

Melinda Nelson

July 25, 2011

NOTES OF MEETING OF FRANKLIN STATE BAR ASSOCIATION PROFESSIONAL GUIDANCE COMMITTEE

RE: MELINDA NELSON'S INQUIRY

Chairman Ballentine asks committee members for initial reactions to Ms. Nelson's inquiry, noting that this appears to be an open question under Franklin law, although different approaches have been followed in Olympia, Columbia, and elsewhere.

Ms. Piel comments that Ms. Nelson's proposed course of action seems harmless enough because social networking pages are open to the public.

Mr. Hamm agrees and states that it is worthwhile to expose a lying witness.

Chairman Ballentine asks if this matter involves a crucial misrepresentation.

Ms. Piel thinks the committee should allow harmless misrepresentations in the pursuit of justice.

Chairman Ballentine questions the impact on the integrity of the legal profession and asks for further discussion.

Mr. Haig favors the "no harm, no foul" approach and is not sure that there is any harm in the instant case.

Chairman Ballentine notes that the witness's testimony may be critical to the case.

Ms. Rossi is undecided and concerned that the committee has not yet referred to the specific Rules that would be involved, let alone any court's interpretation of them. Needs more information on the law.

Chairman Ballentine concludes that the matter should be reopened at the next meeting, with each committee member to look into the question and the law in the meantime.

All agree.

July 2011 MPT

▶ *LIBRARY*

MPT-2: *In re Social Networking Inquiry*

EXCERPTS FROM FRANKLIN RULES OF PROFESSIONAL CONDUCT†

Rule 4.1 Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person;

. . .

Comment:

Misrepresentation

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

* * *

Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

…

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

…

† These rules are identical to the American Bar Association Model Rules of Professional Conduct and have been adopted by the states of Franklin, Columbia, and Olympia.

Comment:

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, or when they knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client of action the client is lawfully entitled to take.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. . . . [A] lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category.

In the Matter of Devonia Rose, Attorney-Respondent

Olympia Supreme Court (2004)

In this proceeding, we affirm that members of our profession must adhere to the highest moral and ethical standards, which apply regardless of motive. We therefore affirm the hearing board's finding that the district attorney in this case violated the Olympia Rules of Professional Conduct.

On March 15, 2002, Chief Deputy District Attorney Devonia Rose arrived at a crime scene where three persons lay murdered. She learned that the killer was Neal Patrick, who had apparently abducted and brutally murdered the three victims. She also learned that Patrick was holding two hostages in an apartment at the scene, and that he was in touch by telephone with the police who surrounded the apartment (the conversations were taped). Rose heard Patrick describe his crimes in explicit detail to the police lieutenant in charge, who urged him to surrender peacefully. At one point, Patrick said that he would not surrender without legal representation and asked that a lawyer he knew be contacted. Attempts to reach the lawyer were unsuccessful (it later was learned that the lawyer had retired and was no longer in practice). Patrick then asked for a public defender, but no attempt to contact the public defender's office was made. Law enforcement officials later testified that, notwithstanding their efforts to contact the lawyer Patrick had named, they would not have allowed any defense attorney to speak with Patrick, because they believed that no defense attorney would have allowed Patrick to continue to speak with law enforcement, and they needed their conversation with Patrick to continue until they could capture him.

Instead, Rose offered to impersonate a public defender, and the police lieutenant on the scene agreed. The lieutenant introduced Rose to Patrick on the telephone under an assumed name. Patrick told Rose that he would surrender if given three guarantees: 1) that he be isolated from other detainees; 2) that he be given cigarettes; and 3) that "his lawyer" be present, to which Rose responded, "Right, I'll be there." In later conversations, it was clear that Patrick believed that Rose (under her pseudonym) represented him. Patrick then surrendered to law enforcement without incident and without harm to his two hostages. He asked if his

attorney was present, and although Rose did not speak with him, she had the police lieutenant say that she was. Rose made no subsequent effort to correct the misrepresentations. The public defender who was subsequently assigned to the case found out about the misrepresentations two weeks later, upon listening to the taped conversations and speaking with her client. Shortly thereafter, Patrick dismissed the public defender, represented himself pro se (with advisory counsel appointed by the court), was tried, was convicted, and received the death penalty. The parties dispute whether he dismissed the public defender out of the mistrust precipitated by Rose's earlier deception.

The State's Attorney Regulation Counsel charged Rose with violating Olympia Rule of Professional Conduct 8.4(c), which provides, "It is professional misconduct for a lawyer to . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation." The Rule and its commentary are devoid of any exceptions.

Rose asserts that her deception was "justified" under the circumstances. But, we believe, even a noble motive does not warrant departure from the Rules. District attorneys in Olympia owe a very high duty to the public because they are governmental officials. Their responsibility to enforce the laws does not grant them license to ignore those laws or the Rules of Professional Conduct.

Rose asks that an exception to the Rules be crafted for cases involving the possibility of "imminent public harm." But we are not convinced that such was the case here. Although law enforcement officials testified that they were certain that Patrick would have harmed the two hostages had he not been convinced to surrender, Rose had options other than acting deceptively. For example, Patrick could have been told that a public defender would be provided as soon as he surrendered, but no attempt to pursue such an option was made.

The level of ethical standards to which our profession holds all attorneys, especially prosecutors, leaves no room for deception. Rose cannot compromise her integrity, and that of our profession, regardless of the cause.

In mitigation, we credit Rose's commendable reputation in the legal community, her lack of prior misconduct, and her full cooperation in these proceedings. In addition, we believe Rose's motivation to deceive Patrick

was in no way selfish or self-serving—she sincerely believed she was protecting the public. Hence, we affirm the hearing board's sanction of one month's suspension of license.

In re Hartson Brant, Attorney

Columbia Supreme Court (2007)

This is an appeal from the decision of the Columbia State Bar Disciplinary Committee, holding that Attorney Hartson Brant violated Columbia's Rules of Professional Conduct. For the reasons stated below, we reverse.

BACKGROUND

Brant is General Counsel of the Columbia Fair Housing Association, a private-sector not-for-profit association dedicated to eliminating unlawful housing discrimination in our state. The association received numerous complaints that the owner of the Taft Houses, a luxury condominium development on Columbia's seacoast, was discriminating against members of minority groups in the sale of its condominiums.

To determine whether the allegations were correct, and, if so, to collect evidence which would support the State Housing Commission in a lawsuit for violation of Columbia's fair housing statutes, the association, through Brant, undertook a "sting" operation: He instructed two legal assistants working for the association, neither of whom was an attorney and both of whom came from minority groups, to pose as a married couple. They were to seek information about purchasing a condominium in the development. Brant created false background stories concerning their supposed employment, finances, and references, all of which would depict them as qualified and highly desirable buyers.

At Brant's direction, the legal assistants first telephoned the development's sales office, explained their interest in purchasing a condominium, and discussed their "credentials" with the sales agent, who explicitly offered to sell them one of the 13 units still available. But when they visited the sales office and the same sales agent met them in person—and so became aware of their minority status—he told them that no units were available and that they must have misunderstood him. The couple lawfully recorded both the telephone and the in-person conversations, and it is clear from the recordings that there was no possible "misunderstanding."

This chain of events formed the crucial evidence which led to an action by the Columbia State Housing Commission against the

owner of the Taft Houses for housing discrimination. That litigation was settled—the owner confessed to violation of the law, paid a substantial fine, and agreed to a consent judgment precluding such discrimination in the future.

However, after learning through discovery in that action of Brant's role in the ruse, the owner of the Taft Houses filed a complaint against Brant with the State Bar, alleging violation of the Rules of Professional Conduct. After a hearing, the Disciplinary Committee found Brant in violation of Rules 4.1(a) and 8.4(c) and ordered his suspension from practice for six months.

ANALYSIS

First, the fact that non-attorneys, and not Brant, actually carried out the ruse does not exempt Brant from liability for violation of the Rules. Rule 5.3(c)(1) states that "[w]ith respect to a nonlawyer employed or retained by or associated with a lawyer: . . . (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if: (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved . . . ." Here, Brant himself created the ruse and told the legal assistants what to do.

We may deal with the alleged violations of Rules 4.1(a) and 8.4(c) together, as they go to the same point. Rule 4.1(a) provides: "In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person." Here, on its face, Brant (through the legal assistants' statements) made a false statement of material fact to the sales agent while representing the association. Rule 8.4(c) provides: "It is professional misconduct for a lawyer to . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation." Here, also on its face, Brant did (through the legal assistants' statements) engage in misrepresentation.

Some state courts strictly apply the plain language of the Rules and deem any misrepresentation, no matter the motivation, improper. *See, e.g., In the Matter of Devonia Rose* (Olympia Sup. Ct. 2004).

But we believe the Rules are not so rigid as to preclude the sort of activities at issue here, even though those activities are facially contrary to the Rules. Indeed, the commentary to Rule 8.4 states:

> Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. . . . [A] lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category.

Thus, we believe the test under the Rules is whether the conduct goes to the core of the integrity of the profession and adversely reflects on the fitness to practice law.

Some commentators have suggested the use of a conduct-based analysis of attorney behavior in cases involving dishonesty, misrepresentation, or deception. The analysis, which is not specific to any particular Rule but is applied across all relevant Rules in a unitary fashion, requires assessment of four factors: (1) the directness of the lawyer's involvement in the deception, (2) the significance and depth of the deception, (3) the necessity of the deception and the existence of alternative means to discover the evidence, and (4) the relationship with any other of the Rules of Professional Conduct, that is, whether the conduct is otherwise illegal or unethical. *See* Goldring & Bass, *Undercover Investigation and the Rules of Professional Conduct*, 95 FRANKLIN L. REV. 224 (2006).

For example, with respect to factor (2) in a contract dispute, an attorney who, without disclosing that he is acting on a client's behalf, visits an appliance dealership to verify the product lines being sold, has made a minor deception, which poses little, if any, harm to the deceived party (*cf. Devonia Rose*, wherein the deception went to the heart of the attorney-client relationship). As to factor (3), an attorney's misrepresentation or deception to obtain information which could be obtained through standard discovery tools, such as a subpoena, is more likely to constitute an ethical violation. Thus, the conduct-based analysis emphasizes the actual conduct of the attorney.

We see substantial merit in this approach as a general matter, but we think this case can be resolved on narrower grounds. Rather than strictly applying the language of the Rules or following a conduct-based analysis,

we choose a third approach: a status-based analysis focusing on the importance and nature of the role that the attorney plays in advancing the interests of justice. The fact is that in the absence of this type of evidence-gathering, it would be virtually impossible to collect evidence of unfair housing practices. No property owner who engages in discrimination does so by explicitly stating, "We don't sell to minorities." The spirit of the Rules is to see that justice is done, without compromising the integrity of the profession. The type of misrepresentation at issue here—one that would be common to a great many cases which seek to root out violations of civil rights—is not one that goes to the core of the integrity of the profession and adversely reflects on the fitness to practice law.

Indeed, we can envision two other instances when similar misrepresentations would be vital to the proper administration of justice and would neither jeopardize the integrity of the profession nor reflect on the fitness to practice law. One would be when a prosecutor must mislead an alleged perpetrator of a crime in the interests of preventing imminent danger to public safety or of rooting out corruption or organized crime. Another such instance would be when an attorney is investigating the violation of intellectual property rights such as in cases of trademark counterfeiting.

We recognize that such a status-based test differentiates among attorneys, allowing some to engage in activities that would, if undertaken by others, violate the Rules. (Thus, a prosecutor's misrepresentation might be justified, but a defense attorney's might not.) In such cases, we believe that the misrepresentation (to prevent harm to the public or gather evidence of illegal acts) is necessary to achieve justice and does not reflect on the lawyer's fitness to practice.

Accordingly, we hold that misrepresentations that do not go to the core of the integrity of the profession, and that are necessary to ensure justice in cases of civil rights violations, intellectual property infringement, or crime prevention as indicated above, do not violate Columbia's Rules of Professional Conduct. We emphasize that we limit our reading of permissible actions of this sort only to these circumstances and extend it to no others.

Reversed.

July 2011 MPT

► *POINT SHEET*

MPT-1: *In re Field Hogs, Inc.*

In re Field Hogs, Inc.
DRAFTERS' POINT SHEET

In this performance test, examinees are associates in a small law firm that represents Field Hogs, Inc. Field Hogs manufactures heavy lawn and field equipment. Field Hogs has been sued four times on various products liability and tort theories; the firm successfully defended two of these cases, but in two others juries awarded $1.5 million and $400,000 to the plaintiffs. Field Hogs wants to limit its costs and any unwanted publicity in future litigation. The law firm has been asked to draft an arbitration clause for Field Hogs's consumer sales contracts. Examinees have been given a copy of the firm's standard commercial arbitration clause and have been asked to address two questions and complete one drafting task:

(1)(a) Would this clause cover arbitration of all potential claims by consumers against Field Hogs under Franklin law? Why or why not? The examinee should explain how his or her conclusion is supported by the applicable law.

(b) Would this clause's allocation of arbitration costs be enforceable against consumers under Franklin law? Why or why not? The examinee should explain how his or her conclusion is supported by the applicable law.

(2) Draft an arbitration clause for the sales contracts that will be enforceable under Franklin law, and briefly explain how that draft language addresses the client's priorities, as described in the attached client meeting summary.

The following discussion covers all the points the drafters intended to raise in the problem. Examinees need not cover them all to receive passing or even excellent grades.

I. OVERVIEW

The File includes the task memorandum from the senior partner, a summary of an interview with Bradley Hewlett, Chief Operating Officer of Field Hogs, and a memorandum summarizing the four tort/products liability litigations against Field Hogs. These last two documents provide information about Field Hogs's litigation history and why it wants to use arbitration. In addition, the File contains excerpts from the National Arbitration Organization rules, which are incorporated by reference into the law firm's standard commercial arbitration clause.

The material in the client interview regarding Field Hogs's priorities helps to inform the legal discussion and provides a basis to assess how particular drafts might meet those priorities. Examinees should note that Field Hogs would prefer a clause that will compel arbitration, and that Field Hogs does not want to add to its costs by having to litigate the enforceability of the arbitration clause in court. Thus, examinees should focus not only on whether Field Hogs may ultimately win such litigation, but also on whether the clause will minimize the risk of such litigation.

A good answer will reference at least the following facts:

- Field Hogs manufactures a product that can be dangerous if not used properly. Thus, Field Hogs has exposure to tort claims (likely on a products liability theory).
- Field Hogs has defended multiple tort litigations and has incurred costs (including jury verdicts) that have affected its overall business planning.
- The law firm's standard commercial arbitration clause does not explicitly reference arbitration of tort claims or the shifting of costs of arbitration, but it explicitly incorporates by reference the rules of the National Arbitration Organization.
- The National Arbitration Organization has rules governing the allocation of costs of arbitration between "consumers" and "businesses."
- These rules create a two-tiered system for cost allocation, with different provisions governing claims under $75,000 and claims of $75,000 or more. Regardless of the amount of the claim, consumers must pay a minimum $2,000 administrative fee.
    - Under $75,000: consumers' share of fees is capped at $2,750 ($2,000 administrative fee plus maximum of $750 for arbitrator's fees).
    - $75,000 or over: no cap on fees ($2,000 administrative fee plus one-half the arbitrator's fees, with no upper limit).

II. RELEVANT LAW

The Library contains two Franklin cases:

In *LeBlanc v. Sani-John Corp.* (Fr. Ct. App. 2003), the plaintiff brought a tort claim against the defendant for injuries caused by the chemicals used to clean the defendant's portable toilets. The court addressed the question of whether a clause with general language requiring ar-

bitration of all claims "arising out of or relating to" a contract should be interpreted to require arbitration of a tort claim. The court reviewed three answers to the question: 1) the general language does include tort claims (*New Home Builders, Inc.*); 2) the general language does not include tort claims, but a clause explicitly requiring arbitration of tort claims might do so (*Norway Farms*); and 3) even clauses that explicitly require arbitration of tort claims should be held unenforceable as a matter of public policy (*Willis*, an Olympia case). The *LeBlanc* court adopted the second approach (*Norway Farms*).

LeBlanc is significant in the following ways: 1) it establishes that the firm's existing clause (which uses the phrase "arising out of or relating to this contract") is inadequate to compel arbitration of tort claims under Franklin law; 2) it advises courts to construe any such clause strictly; 3) in the same vein, it requires that drafters of such clauses "should clearly and explicitly express an intent to require the arbitration of" tort claims; and 4) in its quote of the *Willis* language, the court provides alternative language that an examinee might discuss for the Field Hogs clause ("[a]ny claim, dispute, or controversy (whether in contract, tort, or otherwise) arising from or related to" the contract).

Howard v. Omega Funding Corp. (Fr. Sup. Ct. 2004) discusses whether an arbitration clause that permits the arbitrator to shift costs and fees at the end of the arbitration is "substantively unconscionable" and therefore unenforceable. (The defendant in *Howard* conceded that the arbitration clause was procedurally unconscionable.)

The opinion discusses at least four different ways that arbitration clauses might allocate costs and fees, including

- A provision requiring the consumer to pay a small amount toward arbitration costs up front, with the business to pay the balance (*Georges*). The *Georges* court found the clause enforceable.
- A clause that requires consumer and business to pay unequal percentages of the costs (25 and 75 percent, respectively), with no clear upper limit on the amount consumers might be required to pay (*Ready Cash Loan, Inc.*). The *Ready Cash* court found the clause unenforceable.
- A clause that permits the arbitrator to divide costs and fees at the end of the arbitration (*Athens*). The *Athens* court found the clause unenforceable. The *Howard* court explicitly disapproves of a similar clause in its holding, resting its opinion in part on

the fact that a plaintiff asserting identical statutory claims in litigation (as opposed to asserting such claims in arbitration) would be entitled to request costs and fees as the prevailing party; the clause at hand would in theory permit the arbitrator to award costs to the defendant in a way not contemplated by prevailing law.

- A clause that is silent on the allocation of costs (*Scotburg*). The *Scotburg* court used state substantive unconscionability law to find a "silent" clause unenforceable.

Howard offers examinees several important points: 1) it confirms the need to assess cost-allocation questions as a matter of substantive unconscionability, 2) it provides several different examples of cost-shifting devices for examinees to assess, 3) it suggests that examinees should compare the rights that plaintiffs have to obtain costs in arbitration with the rights that they would have in litigation, 4) it makes those comparisons in a case that raises statutory claims (under the Franklin Consumer Fraud Act) in which a claimant likely would have been able to obtain costs through litigation, and 5) it invalidates three out of the four relevant types of clauses.

III. ANALYSIS

The task memo suggests that examinees organize their answers into three separate sections. Good answers should distinguish between the "coverage" question (technically speaking, the "arbitrability" of tort claims) on the one hand and the "fairness" question (cost shifting) on the other. In addition, the task memo asks examinees to draft a clause that will be enforceable under Franklin law, and to assess briefly how that draft addresses the client's priorities. Good answers should assess the different types of arbitration clauses discussed in the cases, should assess how enforceable they may be, and could plausibly use language approved in the relevant cases as the basis for drafting a possible clause.[1]

No particular significance should attach to the sequence in which examinees answer the questions; good answers might take the three sections in any order. Examinees could choose to discuss both aspects of the firm's existing clause (coverage and cost shifting) before presenting a complete draft, or they could analyze each issue and follow it with drafted language embodying their analysis. The discussion below adopts the latter approach.

[1] The task memo specifically instructs examinees not to concern themselves with issues that may arise under the Federal Arbitration Act. Any such discussion is beyond the scope of the task memo.

It should be noted that *Howard* identifies and discusses two different kinds of unconscionability: procedural and substantive. The case holding rests solely on a "substantive unconscionability" discussion—that is, on whether it is fundamentally unfair to shift the costs of arbitration. Nonetheless, examinees may discuss whether including the clause in a standard sales agreement adequately puts consumers on notice of their rights, and whether alternate procedures for highlighting or signing the clause might be required. As stated in *Howard*, procedural unconscionability occurs when "the less powerful party lacked a reasonable opportunity to negotiate more favorable terms and . . . the process of signing the contract failed to fairly inform the less powerful party of its terms." Thus, limited discussion of procedural unconscionability may be appropriate.

Some examinees may also note that a "silent" arbitration clause (one that does not specify how costs might be awarded or whether the clause might apply to tort claims) poses both procedural *and* substantive problems. Points may be awarded to examinees who frame and discuss the question of whether the firm's clause is truly "silent" (given its incorporation by reference of the N.A.O. rules) as to coverage and cost/fee shifting and, if so, whether it fairly puts consumers on notice of their rights under the clause. None of the cases develop this point extensively, so extended discussion of the point is not warranted, but the point is arguably implicit in the *Scotburg* (state common law) discussion of "silent" clauses.

1. Would the firm's standard commercial arbitration clause cover arbitration of all potential claims by consumers against Field Hogs?

In light of the statement of the law as set forth in *LeBlanc*, examinees should recognize and discuss the following points:

- The law firm's existing clause indicates that it covers "[a]ny claim or controversy arising out of or relating to [the] contract."
- Under *LeBlanc*, the clause is ambiguous as to whether it covers all disputes between the parties to the original transaction, including tort disputes, or only covers disputes which require construction of the contract, excluding later tort disputes.
- *LeBlanc* holds that the "arising out of" language, without more, covers only disputes which require construction of the contract and does not cover later tort claims

between the parties, even if the tort claim would not have occurred if the parties had not signed the contract.

- Examinees should conclude (a) that the law firm's existing clause covers arbitration of contractual disputes but does *not* require arbitration of tort claims, (b) that Franklin law permits the arbitration of tort claims between parties to a consumer contract, but (c) that any contract that seeks to cover such tort claims should state the parties' intention to do so explicitly and will be subject to strict construction by the court.

Draft Language: Examinees should not simply repeat the language of the law firm's standard arbitration clause. Instead, they should revise the language to make clear the parties' intention to cover any tort claims that might arise because of the use of the product purchased by the consumer from Field Hogs. The following language suggests one possible approach to this task, incorporating language suggested in *LeBlanc*:

"Any claim, dispute, or controversy (whether in contract, tort, or otherwise) arising out of or related to this contract or the breach thereof shall be settled by arbitration."

The task memo asks for a brief explanation of how the draft language addresses the client's priorities. As to this portion of the draft language, Field Hogs has asked the law firm to draft an arbitration clause that would render future tort claims involving its products arbitrable under the clause. To the extent this clause assures the arbitrability of tort claims under Franklin law, no ambiguity exists as to whether this clause meets the client's expressed wishes. An examinee might briefly state that according to Bradley Hewlett, Field Hogs prefers arbitration on the assumption that handling consumer claims in that manner will be "less public, yield lower awards, and be less expensive than traditional litigation . . . [and] professional arbitrators will be more predictable than juries."

2. Would the law firm's existing clause's allocation of arbitration costs be enforceable against consumers under Franklin law?

Examinees should recognize and discuss the following points:

- The firm's existing clause (standing alone) is silent on the handling of costs; however, it incorporates the National Arbitration Organization's provisions by reference.
- The N.A.O.'s provisions create a two-tier system for cost allocation. For claims under $75,000, the consumer can be held to pay up to a maximum amount in costs of

$2,750. For claims of $75,000 or over, the consumer pays a minimum amount of $2,000 but has no upward limit in costs.

- As to the existing clause, examinees should thus assess whether either a "silent" clause or one that permits an open-ended allocation of costs to the consumer complies with state law. Examinees should conclude that only one kind of provision appears to have been approved by a Franklin court: one that allocates a minimal initial cost to the consumer, with the business bearing the balance of the cost. *Georges v. Forestdale Bank* (Fr. Ct. App. 1993).
- In *Howard*, the Franklin court uses the "unconscionability" doctrine to review allocations of the cost of arbitration. Each of the different cost-allocation provisions discussed in *Howard* represents a different possible way to allocate costs. Several of them match portions of the firm's clause and the N.A.O. rules:
  - Consumer pays a small initial cost; business bears the entire balance: The *Georges* case approved this approach. The portion of the N.A.O. rules which sets maximum fees for the consumer is thus arguably acceptable. However, a question remains as to whether the size of the initial cost presents an unreasonable barrier; examinees might note that the *Athens* case (discussed in *Howard*) involved total costs of arbitration that were comparable to, if somewhat greater than, those the N.A.O. rules require the consumer to bear. This case bears on that portion of the N.A.O. rules that impose an upper limit on the costs to be borne by a consumer (for cases under $75,000).
  - Consumer pays a fixed percentage of the overall costs: the *Ready Cash Loan* case disapproved of this approach because of the "potential expansion of costs involved in disputing substantial claims." The portion of the N.A.O. rules that allocates costs based on a fixed percentage would conflict with this holding, even more so because the consumer's potential share under the N.A.O. rules (50 percent) is larger than in *Ready Cash Loan* (25 percent). The case bears on that portion of the N.A.O. rules that imposes a percentage share of costs on the consumer (for cases of $75,000 or more).
  - Arbitrator decides on cost allocation at the end of the arbitration: The *Athens* court disapproved of this approach, noting that the arbitrator could require the

consumer to pay all the fees, not just a share as in *Ready Cash*, thus posing arguably a greater deterrent to potential disputants. Neither the existing clause nor the N.A.O. rules provide for after-the-fact allocation by the arbitrator; an examinee would discuss this only as one among many options. The case does not bear on any aspect of the firm's existing clause or the N.A.O. rules.

- "Silence" as to costs: The *Scotburg* court rejected the reasoning of a line of Columbia court decisions (which permitted clauses that were silent as to cost allocation except in those cases where the plaintiff could show that costs were prohibitive) and held that the fact that the arbitration clause made no provision for cost allocation had a "potential chilling effect of unknown and potentially prohibitive costs." Examinees might note that even if Field Hogs chose not to use the N.A.O. rules, the firm's existing clause is silent as to cost allocation and would thus face problems under *Scotburg*.
- As to the law firm's standard commercial arbitration clause, examinees should conclude that neither a "silent" clause nor a clause imposing an open-ended obligation on consumers is likely to satisfy Franklin law.

A better examinee may conclude that (a) Field Hogs faces the greatest risk of litigation over enforceability with a "silent" clause, an "arbitrator decides" clause, or a "no upper limit" clause; (b) Field Hogs would face a lower risk of litigation in using a "fixed consumer cost" clause; and (c) even a "fixed cost" clause faces possible litigation if the amount of the cost is too great. [In addition, a perceptive examinee may observe that in *Howard*, the loan contract at issue contained a severability clause ("If any portion of the Agreement is deemed invalid or unenforceable, it shall not invalidate the remaining portions of this Agreement. . ."), and recommend that Field Hogs include such a clause in its contracts.]

Draft Language: The drafting assignment in the task memo asks examinees to draft an enforceable arbitration clause and "briefly explain how your draft language addresses the client's priorities." In the client meeting memorandum, Bradley Hewlett indicates a desire to split the costs of arbitration down the middle, but he doesn't want to spend a lot of time (or money) liti-

gating the validity of the arbitration clause. Hewlett also states that "avoiding jury trials is the most important thing."

As a drafting matter, an examinee might take one or both of two different approaches:

- First, an examinee might draft a clause that states a fixed maximum cost that the consumer will bear in connection with any arbitration. The case law provides relatively minimal guidance at best on what the amount of this maximum should be. The *Georges* case, discussed in *Howard*, approves what it describes only as a "small initial fee." The *Athens* case, also discussed in *Howard*, disapproves fixed initial costs and a daily rate that are comparable to those stated in the National Arbitration Organization procedures, but the problem in that case was the open-endedness of the potential allocation. Finally, the *Howard* case itself states a relatively open-ended comparative standard for these fixed costs: these should not "exceed those that a litigant would bear in pursuing identical claims through litigation." Given this ambiguity, the best answers will provide a structure for the cost-allocation clause but may leave the specific amount of the maximum blank, subject to further research. Such a clause might read: "Arbitration shall occur in accordance with the rules and procedures for arbitration promulgated by the National Arbitration Organization. The purchaser under this contract shall pay no more than $_____ of the costs of arbitration; Field Hogs will bear all other costs of arbitration as set forth under those rules."
- Second, an examinee might allocate the entire cost of arbitration to Field Hogs. Such a clause might read: "Arbitration shall occur in accordance with the rules and procedures for arbitration promulgated by the National Arbitration Organization, except that Field Hogs will bear the entire cost of all arbitration services under those rules."

The task memo asks for a brief explanation of how the draft language addresses the client's priorities. As to this portion of the draft language, Field Hogs has provided conflicting guidance. On the one hand, Hewlett indicates that he would prefer the cost-sharing arrangements Field Hogs has had in arbitrations with their commercial suppliers, where it has "split costs down the middle." On the other hand, Hewlett has made clear that he wants "to know exactly what [he] can expect" from arbitration, "avoiding jury trials is the most important thing," and finally, he does not want to litigate the validity of the clause itself.

The first draft clause attempts to balance these priorities by asking the consumer to share the costs of arbitration to the extent possible under Franklin law. In so doing, however, it may leave a small but distinct zone of risk that a Franklin court may find the cost allocation unconscionable. The second draft clause eliminates this zone of risk by allocating all costs to Field Hogs. In so doing, however, it overrides Field Hogs's desire for cost sharing, in favor of Hewlett's express concern for certainty of expectation and "avoiding jury trials." Either answer addresses the client's priorities.

July 2011 MPT

▶ *POINT SHEET*

MPT-2: *In re Social Networking Inquiry*

In re Social Networking Inquiry
DRAFTERS' POINT SHEET

In this performance test item, examinees' senior partner is the chairman of the five-member Franklin State Bar Association Professional Guidance Committee. The committee issues advisory opinions in response to inquiries from Franklin attorneys concerning the ethical propriety of contemplated actions under the Franklin Rules of Professional Conduct. The committee has received an inquiry from Franklin attorney Melinda Nelson concerning the propriety of an investigation she wishes to undertake using the social networking pages of a nonparty, unrepresented witness. The inquiry raises an issue of first impression in Franklin. The senior partner has raised the inquiry with the committee at its most recent meeting.

After a cursory discussion, three of the committee members tentatively expressed the opinion that the proposed course of conduct would not violate the Rules, one was unsure, and the committee chair thought the Rules would be violated. The committee members agreed that each would consider the matter on his or her own, after researching the question, and they would further consider and fashion a response to the inquiry at their next meeting.

The committee chair has looked at relevant materials, which have reinforced his belief that his view is correct—that the proposed course of conduct would violate the Rules.

Examinees are asked to draft a memorandum analyzing the issue so as to persuade the other committee members that the chair's view is correct. Examinees need not restate the facts but must explain the basis for their analysis and conclusion that the proposed conduct would violate the Rules and also answer any arguments that might be made to the contrary.

The File contains 1) the instructional memorandum, 2) the letter from the Franklin attorney making the inquiry and setting forth the background and facts which give rise to it, and 3) notes of the committee meeting. The Library contains 1) the applicable Rules of Professional Conduct in force in Franklin and its two sister states, Olympia and Columbia (including commentary on the Rules), and 2) two cases—one from Olympia and one from Columbia—bearing on the legal issues posed by the inquiry.

The following discussion covers all the points the drafters intended to raise in the problem. Examinees need not cover them all to receive satisfactory or even excellent grades.

I. OVERVIEW

Examinees must, first, master the relatively simple facts at issue; second, master the somewhat more complex excerpted set of Franklin's Rules of Professional Conduct; third, as the question is one of first impression in the State of Franklin, discern the relevance of, and guidance to be derived from, the three differing applications of those Rules in other states, as set forth in the Olympia and Columbia cases, to situations which may in some ways be analogous to that posed by the inquiry; fourth, synthesize those differing approaches; and fifth, set forth the resulting analysis in the form of a memorandum which will persuade the members of the committee that the proposed course of conduct would violate the Rules, and refute any arguments to the contrary.

Examinees should address the following provisions of the Rules:

1) Rule 8.4, dealing with attorney misconduct: Is the proposed conduct of the attorney's assistant such that it constitutes "dishonesty, fraud, deceit or misrepresentation"?

2) Rule 4.1, dealing with truthfulness of statements to others: Does the proposed conduct of the assistant "make a false statement of material fact" to a third person?

3) Rule 5.3 (identical in Franklin), holding that an attorney is responsible for a nonattorney's conduct.

Examinees will be expected to analyze the applicability of each of these Rules. In doing so, as the question is one of first impression for Franklin, examinees should explain their conclusions as to the applicability of the three approaches used elsewhere, as set forth in the Olympia and Columbia cases. Thus, examinees should persuasively analyze application of the Rules to this fact situation using 1) the plain language of the Rules, 2) a status-based test, and 3) a conduct-based test. Examinees should then conclude that the proposed conduct is not within the Rules under any of the three tests.

II. DISCUSSION

A. Facts

Although examinees are instructed not to restate the facts, they must master those facts properly to apply the Rules. Melinda Nelson, the inquiring attorney, represents a defendant res-

taurant that is being sued for negligence in a "trip-and-fall" case. She has deposed a nonparty witness who is unrepresented by counsel and whose testimony is adverse to Nelson's client. In the course of that deposition, Nelson learned that the witness maintains several accounts with social networking Internet sites (such as Facebook and MySpace) and that the pages on these accounts may contain relevant information which would impeach the witness at trial. Specifically, the witness testified that neither she nor the plaintiff had been drinking alcohol on the evening in question. Nelson believes that information on the witness's social networking sites will show that the witness and the plaintiff had, in fact, been drinking.

As a general rule, as set forth in Nelson's inquiry, access to these accounts and the information on them is only by permission of the account holder or user, but that permission may be granted either with no inquiry or with detailed inquiry about the person seeking access, as the user wishes. Such persons granted access are called "friends." During the deposition, Nelson determined that the witness allows access to her social networking accounts to virtually anyone. However, Nelson does not wish to seek access herself, for the witness, who was very hostile to her at the deposition, would likely recognize her name and role in the litigation, and deny access.

Rather, Nelson proposes to instruct an assistant who is not an attorney to seek to "friend" the witness and so gain access to the pages on the accounts that may contain the suspected information. That assistant would not make any false statement (e.g., would use his or her real name), but would not reveal that he or she was acting at the direction of Nelson, nor reveal the purpose of the request to "friend" the witness. Attorney Nelson asks if this proposed course of action violates Franklin's Rules of Professional Conduct.

B. Analysis

1. Attorney Responsibility for Acts of an Agent

As an initial point, examinees should note that the proposed conduct of Nelson's assistant is attributable to Nelson as an attorney. As reported in *In re Hartson Brant*, an attorney in that case instructed two legal assistants to undertake a misrepresentation to ferret out housing discrimination. The Columbia Supreme Court applied Columbia's Rule 5.3, which is identical to

Franklin's, holding the attorney responsible for the legal assistants' conduct, noting that the attorney himself created the ruse and told the legal assistants what to do. In addition, Rule 8.4(a) proscribes violation of the Rules even when done "through the acts of another."

Here, as in the Columbia case, Nelson is determining the conduct and instructing the nonlawyer to undertake it. Hence, examinees should initially note that Nelson is responsible for the nonlawyer's conduct and, should it violate the Rules, would be responsible for that violation.

2. Rule 8.4

Rule 8.4 applies to actions that constitute professional misconduct. First, generally, any violation of the Rules constitutes professional misconduct. Rule 8.4(a). More specifically, Rule 8.4(c) proscribes "conduct involving dishonesty, fraud, deceit or misrepresentation." In the facts presented, it is more than likely that a deception is involved—the nonlawyer is not revealing that he or she is acting for the inquiring attorney. But does that deception amount to a violation of the Rule? As the Olympia decision in *In the Matter of Devonia Rose* and the Columbia decision in *In re Hartson Brant* reveal, there are three different approaches to the application of this Rule.

a. Strict Interpretation

Some courts have adopted the *Rose* approach—that there is an absolute bar to using deception. In *Rose*, the suspect, a confessed murderer, was holding two hostages while surrounded by police and in contact with them by telephone. The suspect said that he would surrender, without harming the hostages, on certain conditions, one of which was that his lawyer be present. The lawyer he requested was unavailable, and so he asked for a public defender. In that situation, law enforcement authorities would not allow any defense attorney to speak with the suspect, for a defense attorney would surely advise him to refrain from speaking with the police, and the communication link was vital if the murderer was to be apprehended without further loss of life. Rose, a deputy district attorney on the scene, with the agreement of law enforcement, posed as a public defender and engaged in telephone negotiations with the suspect, who eventually surrendered without further incident. It is worth noting that even after his surrender, the deputy district

attorney did not reveal the ruse—it was only discovered by the actual public defender who took on the case two weeks later.

The Olympia State Attorney Regulation Counsel charged Rose with violation of Rule 8.4(c) of the Rules of Professional Conduct. The Olympia Supreme Court upheld a finding of violation. The court said that, no matter what the motive, the Rule against deceit must be absolute to uphold the integrity of the legal profession. The court noted that there were other avenues which could have been pursued without deception to induce the murderer to surrender. The court rejected Rose's request to craft limited exceptions to the Rule.

Thus, strict application of the plain language of Rule 8.4 would proscribe the proposed conduct. Examinees should note that the language of Franklin's Rule 8.4 is identical to the language of Olympia's Rule as applied by the *Rose* court, and so strict application of the plain language would be warranted for the reasons given by the *Rose* court. Further, the issue in the case at hand is negligence, not the far more momentous question of potential imminent criminal harm to the public found in *Rose*. If deceptive conduct to prevent harm to the public in *Rose* was not exempt, why then would deceptive conduct in the far less significant issue of negligence be found exempt? Perceptive examinees will note that, as the Olympia court remarked, even the best intentions and a sincere belief that the misrepresentation was preventing danger to the public do not justify a misrepresentation which harms the integrity of the profession.

b. Status-based Test

Other courts, however, have found that, notwithstanding the absolute language of the Rule, there should be limited exceptions to its absolute application, based on the status of the investigating attorney. Examinees should note, as *Brant* remarks, that such exceptions based on the attorney's status could be criticized because they do not treat all attorneys alike for engaging in similar conduct.

Brant, a Columbia decision, is an example of a status-based exception to Rule 8.4. There, an attorney for a private-sector, not-for-profit association dedicated to fair housing received complaints of discrimination by the owner of a condominium development for sale. Brant instructed two minority-group legal assistants to pose as a married couple and seek to buy a

condominium to determine whether such discrimination existed. Brant furnished them with a fictitious backstory. When the legal assistants telephoned the sales agent and recounted their fictitious credentials, the agent offered to sell them a condominium unit; but when they appeared in person (and their minority status became apparent), the sales agent said no units were for sale. This provided the necessary evidence for the Columbia State Housing Commission's successful (through settlement) lawsuit for housing discrimination.

The Columbia court acknowledged that the attorney (through the legal assistants) did make a misrepresentation. However, the court noted the Commentary to Rule 8.4, which indicates that the type of misrepresentation to be proscribed is that which "reflect[s] adversely on fitness to practice law" and concluded that this situation did not fit that standard. Rather, the court said, in some cases misrepresentation is necessary to achieve justice, for it is the only way to gather evidence, and thus is not contrary to the Rules. The court specified three situations in which an exception would apply—where the misrepresentation was by a prosecutor to prevent crime, or by attorneys to prove civil rights or intellectual property rights violations. The court was explicit that the exception it had crafted applied only to those three situations.

Examinees should argue that here, even those status-based exceptions established in the Columbia *Brant* case would not apply to Nelson's proposed conduct. A deception would be occurring: the nonlawyer seeking access to the witness's account pages would be omitting a highly material fact—that is, that the purpose of the request for access was to obtain information to impeach the witness's testimony in a lawsuit. None of the specific exceptions allowed by the Columbia court in *Brant* are applicable here—this case involves negligence, not criminal conduct or violations of civil rights or intellectual property rights. Thus, the use of the deception would be to gain an advantage in litigation which would not be possible without the deception. That purpose *does* adversely reflect on the fitness to practice law—Nelson is pursuing this ruse because she is sure the witness would not otherwise allow her access. That the witness seemingly allows all who request access to have it does not excuse the deception. Further, there could have been other means of gaining this evidence: Nelson presumably could have asked the witness about the evidence during the deposition. Hence, examinees should conclude that, even if a status-based exception were applied, the proposed conduct would violate Rule 8.4.

c. Conduct-based Test

Brant notes that the third approach, a conduct-based test, should not be analyzed with reference to a particular Rule, but rather across all Rules; that analysis is set forth separately below (see section 4). Nevertheless, it is possible that examinees will analyze the conduct-based test in the context of each individual Rule. They should not lose credit for doing so.

3. Rule 4.1

Rule 4.1(a) proscribes knowingly "mak[ing] a false statement of material fact or law to a third person." Again, Nelson is responsible if she knows that the person she instructed is making such a statement. Rules 5.3(c) and 8.4(a).

Here, the nonlawyer seeking access to the witness's account pages is not making a directly false statement of material fact to the witness—as Nelson's letter of inquiry indicates, the nonlawyer will only give truthful information (such as his or her name). But, as Nelson's letter also indicates, the nonlawyer will not reveal his or her association with Nelson or the reason for the request for access to the witness's account pages.

The Commentary to Rule 4.1 states: "Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements." Examinees should point out that omitting the nonlawyer's association with Nelson and the reason for the request for access would be the equivalent of an affirmative false statement.

a. Strict Interpretation

Nelson believes that if the witness knew she was seeking access, the witness would not grant it. As the nonlawyer is, in essence, standing in the shoes of the lawyer, the same could be said for the nonlawyer—the witness would not grant access to the nonlawyer for the same reasons that she would not grant access to Nelson. The only way Nelson would gain access is by an affirmative false statement—i.e., using a fake name. For all intents and purposes, this is what she would be doing by having a nonlawyer to use the nonlawyer's name to gain access. That is the equivalent of an affirmative false statement and is contrary to the plain meaning of the Rule.

b. Status-based Test

Although the Columbia court, in *Brant*, excused false statements of this sort under Rule 4.1, it again limited that exception to situations not applicable here, based on the status of the attorney. Nelson is not a prosecutor seeking to prevent crime, nor is the subject matter of the litigation a civil rights or intellectual property rights violation. Thus, again, even if Franklin were to adopt the status-based exceptions set forth in *Brant*, those exceptions would not apply here. Nelson's proposed course of conduct would violate Rule 4.1(a) as well.

4. Conduct-based Test

Examinees should also consider that Franklin might adopt neither Olympia's strict interpretation set forth in *Rose* nor Columbia's status-based test set forth in *Brant*, and instead use a conduct-based test as referenced in *Brant*, which would be applicable across all the relevant Rules. Applying the factors proposed for that test, examinees should make the following points:

1) *The directness of the lawyer's involvement in the deception:* Here, Nelson's involvement would be direct, as she would instruct the nonlawyer to undertake the deception.

2) *The significance and depth of the deception:* The depth of the deception is minor, but its significance is major. It may result in impeachment of the witness's testimony, which would not have occurred without the deception.

3) *The necessity of the deception and the existence of alternative means to discover the evidence:* Whether the deception is necessary is questionable—one might ask why Nelson did not ask the witness at deposition what the content of the pages was and whether she would be allowed access to them. Nelson may have had and may still have other means—all untested—to discover the evidence. She could have asked the witness what her social networking pages said regarding the night in question. She could simply ask for "friend" access or could have asked about getting "friend" access in the deposition. She could have and still can subpoena the social networking site pages.

4) *The relationship with any other of the Rules of Professional Conduct:* Here, there is an interaction between Rules 8.4 and 4.1, both of which lead to a conclusion that the Rules bar the proposed course of conduct.

5. Response to Arguments that the Conduct Would be Permitted Under the Rules

In their preliminary discussion, some board members thought the conduct would be permissible because it was "harmless enough," worthwhile to expose a lying witness, and only accessed information that was already available to the public.

With regard to the notion that the deception is minor and thus within the Rules, examinees might concede that, while the deception is minor, it nonetheless could have significant consequences for the case outcome and for the witness's credibility. If the witness knew the assistant's relationship to the case or her motive in friending the witness—to get impeaching evidence—the witness would not grant access.

Rose and *Brant,* representing two possible approaches a Franklin court might take, make it clear that exposing a lying witness does not justify the use of deception. The *Rose* court refused to make an exception even where lives were in danger. *Brant* did carve out an exception for such a situation and extended it to situations that involve exposing discrimination or protecting intellectual property rights.

Finally, the argument that the information is already publicly available conflates the notion of publicly accessible websites with the accessibility of the information posted on an individual's pages. Even if the witness here is indiscriminate about allowing access to her personal information, someone trying to gain access to it must first seek her permission. And, as discussed earlier, the witness would not grant access to Nelson or her associate if she were informed of the associate's relationship with Nelson.

C. Conclusion

Attorney Nelson should be advised that the proposed course of conduct is not permissible under Franklin's Rules of Professional Conduct.

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