THE MPT®

MULTISTATE PERFORMANCE TEST

July 2010 MPTs and Point Sheets

July 2010 MPTs and Point Sheets

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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 2010 MPT. Each test includes two items; jurisdictions that use the MPT select either one or both items for their applicants to complete. 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 by the applicants. They outline the possible issues and points that might be addressed by an examinee. They are provided to the user jurisdictions for the sole purpose of assisting graders in grading the examination by identifying the issues and suggesting the resolution of the problems contemplated by the drafters. Point Sheets are not official grading guides and are not intended to be "model answers." Examinees can receive a range of passing grades, including excellent grades, without covering all the points discussed in the point sheets. User jurisdictions are free to modify the Point Sheets. Grading of the MPT is the exclusive responsibility of the jurisdiction using the MPT as part of its admissions process.

Description of the MPT

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

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

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

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

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

Instructions

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

> 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.

FILE

MPT-1: *In re Hammond*

Spencer & Takahashi S.C.
Attorneys at Law
77 Fulton Street
Gordon, Franklin 33112

DATE: July 27, 2010
FROM: Jane Spencer
TO: Applicant
SUBJECT: In re Hammond—Carol Walker Consultation

We have been retained by Carol Walker, a local attorney, in connection with her representation of William Hammond, a local businessman. Hammond owned the Hammond Container Company and the building which housed it; the building was destroyed by a suspicious fire on May 10, 2010.

Walker has been served with a subpoena duces tecum by the Gordon County District Attorney, compelling her to appear before a grand jury convened to investigate the circumstances of the fire and to testify and produce materials relating to her communications with Hammond. She does not want to have to appear before the grand jury and divulge anything related to the case. Based on my preliminary research, I believe we can successfully move to quash the subpoena. I have prepared a draft of our Motion to Quash, which I would like to file as soon as possible.

Please draft only the "Body of the Argument" for our Motion to Quash arguing that Walker may not be compelled to give the testimony or produce the materials in question, on the grounds that 1) under the Franklin Rules of Professional Conduct, she is prohibited from disclosing client communications, and 2) she has the privilege under the Franklin Rules of Evidence not to disclose confidential communications.

In drafting the body of the argument, follow our firm's briefing guidelines and be sure to remain faithful to our obligation to preserve client confidences under the Professional Rules.

Spencer & Takahashi S.C.
Attorneys at Law

MEMORANDUM August 15, 2003

To: All Lawyers
From: Litigation Supervisor
Subject: Persuasive Briefs

All persuasive briefs shall conform to the following guidelines:

[Statement of the Case]

[Statement of Facts]

Body of the Argument

The body of each argument should analyze applicable legal authority and persuasively argue how both the facts and the law support our client's position. Supporting authority should be emphasized, but contrary authority also should generally be cited, addressed in the argument, and explained or distinguished. Do not reserve arguments for reply or supplemental briefing.

The firm follows the practice of breaking the argument into its major components and writing carefully crafted subject headings that illustrate the arguments they cover. Avoid writing a brief that contains only a single broad argument heading. The argument headings should succinctly summarize the reasons the tribunal should take the position you are advocating. A heading should be a specific application of a rule of law to the facts of the case and not a bare legal or factual conclusion or a statement of an abstract principle. For example, improper: IT IS NOT IN THE CHILD'S BEST INTERESTS TO BE PLACED IN THE MOTHER'S CUSTODY. Proper: EVIDENCE THAT THE MOTHER HAS BEEN CONVICTED OF CHILD ABUSE IS SUFFICIENT TO ESTABLISH THAT IT IS NOT IN THE CHILD'S BEST INTERESTS TO BE PLACED IN THE MOTHER'S CUSTODY.

The lawyer need not prepare a table of contents, a table of cases, a summary of argument, or an index. These will be prepared, when required, after the draft is approved.

Walker & Walker, S.C.
Attorneys at Law
112 Stanton Street
Gordon, Franklin 33111

July 26, 2010

Ms. Jane Spencer
Spencer & Takahashi S.C.
77 Fulton Street
Gordon, Franklin 33112

Dear Jane:

Thank you for agreeing to represent me. A number of difficult issues have arisen in connection with the representation of one of my clients. I am writing in response to your request that I outline the facts.

I represent William Hammond, who established the Hammond Container Company about 10 years ago. Up until May 10 of this year, the company, located on South Main Street in a building owned by Hammond, manufactured disposable food containers for restaurants. On May 10, the company was put out of business when a fire destroyed the building. Hammond requested my advice as to whether he has any criminal exposure and whether he could file an insurance claim.

Thursday, I was served with a subpoena duces tecum by the District Attorney directing me to appear before a grand jury investigating the fire. Of course, I do not want to appear, and Hammond does not want me to reveal any of our communications. I would like your advice on whether I can move to quash the subpoena so that I do not have to appear. If there are grounds for a motion to quash, I would like you to draft the motion and supporting brief.

For your review, I have enclosed (1) the subpoena duces tecum; (2) a file memo summarizing my initial interview with Hammond; (3) a file memo summarizing a telephone conversation with Ray Gomez, Hammond's friend; and (4) a police incident report provided by the District Attorney.

Thank you for your attention to this matter. I look forward to meeting with you soon.

Very truly yours,

Carol Walker

Carol Walker

enc.

Privileged and Confidential

Walker & Walker, S.C.
Attorneys at Law
112 Stanton Street
Gordon, Franklin 33111

Date: May 12, 2010
From: Carol Walker
Memo to file of WILLIAM HAMMOND/HAMMOND CONTAINER COMPANY FIRE

Today I had a confidential meeting with William Hammond and agreed to represent him. On May 10, a fire destroyed a building he owned, housing the Hammond Container Company. He wanted advice as to whether he had any criminal exposure and whether he could file an insurance claim.

Hammond estimated the total value of the building as approximately $500,000, although it was encumbered by a mortgage with an outstanding balance of $425,000. The building was a total loss. It was insured in the amount of $500,000 under a policy issued by Mutual Insurance Company. Hammond claimed he was up-to-date on his premiums and said he had called Mutual for information about his coverage and the requirements for filing a claim.

Hammond said that he had been having financial difficulties in the past six months. He had lost two big accounts and did not have sufficient cash on hand to make the next payroll or mortgage payment. He said that a police officer contacted him on May 11, that he was too upset to talk at the time, and that the officer said he would contact him again soon. Hammond asked if he had to speak with the police—it seemed clear he wanted to avoid doing so—and I told him that he did not and that he should refer any questions to me. I also told him that if he was involved in any way in the fire, he could not collect on the insurance policy and could face criminal charges. I told him to contact me again within the week to allow me time to investigate the matter further.

Hammond appeared nervous during the meeting. He did not explicitly admit or deny involvement in the fire, nor did I explicitly ask about any involvement on his part. He did say that on the date of the fire he was with a friend, Ray Gomez, fishing at Coho Lake, about 60 miles from Gordon.

Privileged and Confidential

Walker & Walker, S.C.
Attorneys at Law
112 Stanton Street
Gordon, Franklin 33111

Date: May 17, 2010
From: Carol Walker
Memo to file of WILLIAM HAMMOND/HAMMOND CONTAINER COMPANY FIRE

Today I received a telephone call from a man who identified himself as Ray Gomez. He said he had been a friend of William Hammond for several years and was calling me at Hammond's request. He said he wanted to help but didn't know what he could do. Hammond had called him on May 13 and asked him to say that the two of them were together on May 10 fishing at Coho Lake. Gomez said he was surprised at the request given that they hadn't been together that day. The police called Gomez on May 14 and asked if he was with Hammond on May 10, and he replied that he wasn't. He didn't tell the police that Hammond had called him earlier. He said he knew nothing about the fire and wanted to help Hammond, but he didn't want to get into trouble himself. When I pressed him, he said he was afraid and probably should seek legal advice. I informed him that I represented Hammond and could not represent him as well. He said he knew that and had already set up an appointment with another attorney.

GORDON POLICE DEPARTMENT INCIDENT REPORT

Date of Report: 5/16/2010 **Case No. 2010-57**

OFFENSE(S): Suspected arson of building, 5/10/2010
ADDRESS OF INCIDENT: 20 South Main Street, Gordon
REPORTING OFFICER: Detective Frank O'Brien
SUSPECT: William Hammond, W/M, D.O.B. 11/5/1959

On 5/10/2010, a fire destroyed the building housing the Hammond Container Company.

On 5/11/2010, I contacted the owner, William Hammond, at his home at 815 Coco Lane, Gordon, at approximately 9:30 a.m. He identified himself and confirmed that he was the owner of the building destroyed in the fire. He stated he was too upset to talk, but did say he had been out of town the day of the fire with a friend and did not return to Gordon until late in the evening at which time he learned of the fire. He confirmed that the building was insured through Mutual Insurance Company but declined to talk further. I left my card and said I would re-contact him.

On 5/12/2010, I confirmed that Hammond was insured by Mutual Insurance Company for $500,000. Claim Manager Betty Anderson said that Hammond had requested claim forms and information but had not yet filed anything. She agreed to let me know when she had further contact with Hammond.

On 5/13/2010, I contacted Bob Thomas, manager of Gordon Savings & Loan, who said that six weeks ago Hammond had sought a business loan. The loan committee denied the loan after reviewing Hammond Container Company's financial condition.

On 5/14/2010, I again contacted Hammond. He identified Ray Gomez as the friend he claimed to have been with on 5/10/2010, but he referred all other questions to Attorney Carol Walker, claiming that she had advised him to do so.

Also on 5/14/2010, I contacted Gomez. He acknowledged that he knew Hammond but denied spending time with him on 5/10/2010.

On 5/15/2010, the Fire Marshal released a report finding no specific evidence of a cause but classifying the fire as suspicious and referring it to us for further investigation of arson. At this time, Hammond is a possible suspect.

cc: Gordon County District Attorney

STATE OF FRANKLIN
GORDON COUNTY DISTRICT COURT

In re Grand Jury Proceeding 11-10,
Hammond Container Company

SUBPOENA DUCES TECUM

TO: Carol Walker
Walker & Walker, S.C.
112 Stanton Street
Gordon, Franklin 33111

YOU ARE COMMANDED to appear in the Gordon County District Court, State of Franklin, at 9:00 a.m. on August 3, 2010, before the Grand Jury convened in that Court to investigate the circumstances of the fire on May 10, 2010, that destroyed the building that housed the Hammond Container Company, located at 20 South Main Street, Gordon, Franklin, and to testify regarding your communications with William Hammond concerning the fire, and to produce all materials constituting or reflecting such communications.

This subpoena duces tecum shall remain in effect until you are granted leave to depart by order of the Court.

Dated this 22 day of July, 2010.

Shirley S. Grant

Shirley S. Grant
Gordon County District Attorney

DRAFT

STATE OF FRANKLIN
GORDON COUNTY DISTRICT COURT

In re Grand Jury Proceeding 11-10,
Hammond Container Company

MOTION TO QUASH SUBPOENA DUCES TECUM

Carol Walker, by and through her attorney, Jane Spencer, moves to quash the subpoena served on her in this matter. In support of this motion, Attorney Walker states the following:

1. Attorney Carol Walker has been subpoenaed to testify regarding her communications with William Hammond, her current client, concerning the fire that occurred at the Hammond Container Company and to produce all materials constituting or reflecting such communications.

2. To the extent that the State seeks to compel the testimony of Attorney Walker and the production of any materials regarding her communications with her client, Mr. Hammond, Attorney Walker asserts that she may not be compelled to appear or produce materials under the Franklin Rule of Professional Conduct 1.6.

3. To the extent that the State seeks to compel the testimony of Attorney Walker and the production of any materials regarding her communications with her client, Mr. Hammond, Attorney Walker asserts that she may not be compelled to appear or produce materials under the Franklin Rules of Evidence.

4. Attorney Walker thus refuses to testify or to produce materials in accordance with the subpoena.

WHEREFORE, Attorney Walker asks this Court to quash the subpoena that seeks to compel her to testify and produce materials in this matter, and for any and all other relief appropriate.

Signed: _____
Jane Spencer
Attorney for Carol Walker

Date:

LIBRARY

MPT-1: *In re Hammond*

FRANKLIN RULES OF PROFESSIONAL CONDUCT

Rule 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) . . . ;

(3) to prevent, mitigate or rectify substantial injury to the financial interest or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

…

FRANKLIN RULES OF EVIDENCE

Rule 513 Lawyer-Client Privilege

…

(b) General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made for the purpose of facilitating the rendition of professional legal services to the client . . . .

…

(3) Who may claim the privilege. The privilege may be claimed by the client . . . . The person who was the lawyer . . . at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the client.

…

(d) Exceptions. There is no privilege under this rule:

(1) Furtherance of crime or fraud. If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud.

. . .

Official Advisory Committee Comments

. . .

[3] A communication made in confidence between a client and a lawyer is presumed to be privileged. A party claiming that such a communication is not privileged bears the burden of proof by a preponderance of the evidence. The party claiming that such a communication is privileged must nevertheless disclose the communication to the court to determine the communication's status if the party claiming that the communication is *not* privileged presents evidence sufficient to raise a substantial question about the communication's status.

Franklin courts have not yet determined whether, to be sufficient, the evidence presented must establish probable cause to believe that the communication in question is not privileged, *see*, *e.g.*, *State v. Sawyer* (Columbia Sup. Ct. 2002), or whether there must be "some evidence" to that effect, *see*, *e.g.*, *United States v. Robb* (15th Cir. 1999).

FRANKLIN CRIMINAL CODE

§ 3.01 Arson of Building

Whoever, by means of fire, intentionally damages any building of another without the other's consent may, upon conviction, be imprisoned for not more than 15 years, or fined not more than $50,000, or both.

§ 3.02 Arson of Building with Intent to Defraud an Insurer

Whoever, by means of fire, intentionally damages any building with intent to defraud an insurer of that building may, upon conviction, be imprisoned for not more than 10 years, or fined not more than $10,000, or both.

. . .

§ 5.50 Fraudulent Claims

Whoever knowingly presents or causes to be presented any fraudulent claim for the payment of a loss or injury, including payment of a loss or injury under a contract of insurance, may, upon conviction, be imprisoned for not more than 5 years, or fined not more than $10,000, or both.

United States v. Robb

United States Court of Appeals (15th Cir. 1999)

John Robb appeals his conviction for mail fraud in the sale of stock of Coronado Gold Mines, Inc. The indictment alleged that Robb caused Coronado's stock to be sold on misrepresentations that the company was producing gold and earning money, that the price of the stock on the New York Mining Exchange was manipulated through such misrepresentations, and that the mails were used to facilitate the scheme.

Robb acquired a gold mine in Idaho that did not produce any ore that could be mined at a profit. The ore extracted contained only an average of $2.00 to $2.50 of gold per ton, with a cost of mining of at least $7 per ton. Robb claimed through advertisements and stockholder reports that the mine was yielding "ore averaging $40 of gold per ton." Robb caused Coronado's stock to be distributed to the public by high-pressure salesmanship, at prices that netted a $158,000 profit.

The sole error alleged on appeal is the district court's decision to admit the testimony of Ralph Griffin, a former attorney for Robb. At trial, Griffin's testimony for the Government showed that Robb controlled all mining operations and that Robb knew that the public information disseminated was false. Robb claims that allowing such testimony violated the attorney-client privilege. We disagree and affirm the conviction.

We have long recognized the attorney-client privilege as the oldest of the privileges for confidential communications known to the common law. It encourages full and frank communication between attorneys and clients. But because the privilege has the effect of withholding information from the fact finder, it should apply only where necessary.

The purpose of the crime-fraud exception to the attorney-client privilege is to lift the veil of secrecy from lawyer-client communications where such communications are made for the purpose of seeking or obtaining the lawyer's services to facilitate a crime or fraud.

To release an attorney from the attorney-client privilege based on the crime-fraud exception, the party seeking to overcome the privilege must do more than merely assert that the client retained the attorney to facilitate a crime or fraud. Rather, there must be some evidence supporting an inference that the client retained the attorney for such a purpose.

Once such evidence is presented, the district court must review, *in camera* (in chambers,

without the parties being present), the attorney-client communications in question to determine their status. The court may properly admit the disputed communications into evidence if it finds by a preponderance of evidence that the allegedly privileged communications fall within the crime-fraud exception.

Contrary to Robb's claim, the Government satisfied the "some evidence" standard here, thereby triggering *in camera* review of the attorney-client communications and ultimately resulting in a decision that the communications were within the crime-fraud exception. The Government's evidence raised an inference that Robb retained Griffin in the midst of a fraudulent scheme; that during this time, Griffin was the primary source of legal advice to Robb, had access to all of Coronado's information, and had regular contact with Robb; and that records of the actual mining results demonstrated misrepresentations in the publicly disseminated information.

Subsequently, Robb had an opportunity to present evidence that he retained Griffin for proper purposes, but he failed to do so. Instead, the Government presented further evidence which was sufficient to enable it to carry its burden to prove by a preponderance of the evidence that Robb retained Griffin for *improper* purposes. As a result, the district court properly ruled that the communications between Robb and Griffin were not privileged.

We understand that the modest nature of the "some evidence" standard could lead to infringement of confidentiality between attorney and client. At the same time, a higher standard could improperly cloak fraudulent or criminal activities. On balance, we are confident that the "some evidence" standard achieves an appropriate balance between the competing interests and that the district courts may be relied upon to keep the balance true.

Affirmed.

State v. Sawyer

Columbia Supreme Court (2002)

Mark Sawyer appeals his conviction after a jury trial for bribery of a public official. Sawyer claims that the trial court erred in excluding the testimony of Attorney Anthony Novak regarding Novak's conversations with his client Connor Krause, the alderman whom Sawyer was convicted of bribing. The court of appeals affirmed Sawyer's conviction. We agree with the court of appeals that the trial court properly excluded the testimony.

Sawyer owned an automobile dealership in the City of Lena, Columbia, which was located on property to which the city had taken title in order to widen the street. As first proposed, the plan required razing Sawyer's business. The plan was later changed so that Sawyer's business would be untouched. A corruption investigation of the City Council led to charges against Sawyer for bribing Krause to use his influence to change the plan.

Before trial, Sawyer subpoenaed Krause's attorney, Novak, to testify. When Novak refused to testify, Sawyer moved the court to compel him to do so, claiming that (i) Krause was currently in prison having been convicted of taking bribes while he was an alderman; (ii) Krause initially told police that Sawyer had not bribed him; (iii) Krause retained and met with Novak, his attorney; and (iv) Krause later agreed to testify against Sawyer in exchange for a reduced prison sentence. On those facts, Sawyer argues that Krause planned to testify falsely to obtain a personal benefit; that he retained Novak to facilitate his plan; and that, as a result, Krause's communications with Novak were not privileged.

Although the attorney-client privilege has never prevented disclosing communications made to seek or obtain the attorney's services in furtherance of a crime or fraud, in Columbia the mere assertion of a crime or fraud is insufficient to overcome the presumption that such communications are privileged. Rather, the moving party must present evidence establishing probable cause to believe that the client sought or obtained the attorney's services to further a crime or fraud.

Upon presentation of such evidence, the party seeking to establish the attorney-client privilege must disclose the allegedly privileged communications to the judge for a determination of whether they fall within the crime-fraud exception. The judge's review of the communications is conducted *in camera* to determine if the moving party has established that the communications fall within the crime-fraud exception.

Some courts have required disclosure of the disputed communications to the court upon the presentation merely of "some evidence" supporting an inference that the client sought or obtained the attorney's services to further a crime or fraud. *See, e.g., United States v. Robb* (15th Cir. 1999). We believe Columbia's "probable cause" standard strikes a more appropriate balance than the "some evidence" test because it protects attorney-client communications unless there is a strong factual basis for the inference that the client retained the attorney for improper purposes.

Applying the "probable cause" standard here, the trial court concluded that Sawyer failed to present evidence establishing probable cause to believe that Krause sought or obtained Novak's services to facilitate any plan to commit perjury. We agree. While the evidence would indeed support an inference that Krause retained Novak to facilitate perjury, it supports an equally strong inference that Krause retained him to ensure that his choices were informed—and that he failed to cooperate earlier because he was afraid he might expose himself to prosecution with no countervailing benefit. A greater showing of the client's intent to retain the attorney to facilitate a crime or fraud is needed prior to invading attorney-client confidences.

Affirmed.

FILE

MPT-2: *City of Ontario*

CITY OF ONTARIO
City Hall
131 West Fifth Street
Ontario, Franklin 33875

M E M O R A N D U M

To: Applicant
From: Lawrence Barnes, City Attorney
Date: July 27, 2010
Re: Liquor Control Commission Procedures

Since becoming City Attorney, I have been reviewing city ordinances for the Liquor Control Commission ("the Commission"). Any establishment in the city that sells or serves alcohol must hold a liquor license, which is issued by the Commission. When a licensee faces charges that could result in a fine or the loss of a license, the licensee is entitled to a hearing before the Commission. The Mayor and City Council believe that the present procedures for such hearings are cost-effective and expeditious. However, I want to ensure that Commission decisions reached following these procedures will be given preclusive effect and so cannot be relitigated in state and federal courts.

I have attached the applicable city ordinances, outlining the Commission's authority and hearing procedures. The only standardized form used in Commission proceedings is the attached "Notice of Liquor Control Violation."

Please prepare a memorandum analyzing whether, under the applicable legal authority, courts would extend preclusive effect to decisions rendered under the procedures set forth in the city ordinances. Your memorandum should:

- Identify which city procedures already comply with the requirements for preclusion;
- Identify which city procedures do **not** comply with the requirements for preclusion, and describe how those procedures should be changed for preclusive effect; and
- Explain how the changes you recommend would affect the city's goals of cost and time-effectiveness.

You need not draft the language of any of your proposed changes; I will draft any changes that may be needed.

CITY OF ONTARIO

MUNICIPAL ORDINANCES

Chapter Two: LIQUOR CONTROL ORDINANCES

2-1. **Liquor Control Commission.** The Mayor and the City Council shall constitute the Liquor Control Commission for the City of Ontario. The Commission is charged with the administration of the Franklin Liquor Control Act and the City Liquor Control Ordinances in the City of Ontario. The Mayor, acting on behalf of the Commission, shall have the following powers and duties:

1. To receive applications, investigate applicants, and grant, renew, or deny liquor licenses;
2. To enter or authorize any law enforcement officer to enter, at any time, any premises licensed under these Ordinances in order to enforce the ordinances of this City;
3. To maintain and update records relating to the granting or denial of liquor licenses;
4. To receive liquor license fees;
5. To conduct hearings and render decisions; and
6. To impose penalties, including fines and loss of license as provided in Section 2-5 of this Ordinance, and to receive any fines.

2-2. **Notice; Hearings.** If any licensee is charged with violation of any applicable law or ordinance, the Mayor shall issue written notice of the charge or charges against the licensee. Except under the emergency procedures in Section 2-6 of this Ordinance, no licensee shall be fined and no license shall be suspended or revoked prior to a hearing pursuant to this Section. Any licensee wishing to contest the charges must request a hearing concerning the charges within 10 business days of the notice. The Mayor shall conduct the hearing, which shall be held no later than five business days after the request.

2-3. **Conduct of Hearings.** The Mayor shall have the power to issue subpoenas for witnesses. The Mayor shall have the power to place witnesses under oath, rule on objections, dismiss charges, conduct the evidentiary hearing in an efficient manner, and issue a fine and/or suspend or revoke a license as provided in this Chapter. The Mayor shall secure a court reporter for the hearing, costs of the reporter to be borne by the City.

2-4. **Burden of Proof; Evidence.** The City shall have the burden of proving by a preponderance of the evidence the charges alleged against the licensee. Without the need for live testimony or other foundation, the Mayor will admit into evidence any report by the police or other investigative authority relevant to the charges. The City may also present evidence through other means. The licensee may cross-examine the witnesses presented by the City and may present evidence in its defense. The City may cross-examine the witnesses presented by the licensee and may present rebuttal evidence. The hearing shall be informal and the Franklin Rules of Evidence shall not apply.

2-5. **Penalties for Violation.** ****

2-6. **Emergency Procedures.** ****

[remaining provisions omitted]

CITY OF ONTARIO

City Hall

131 West Fifth Street

Ontario, Franklin 33875

NOTICE OF LIQUOR CONTROL VIOLATION

Notice to_____(name of licensee)_____

You are hereby notified that you have been charged with violating Section(s) _____ of the State of Franklin Liquor Control Act and/or the City of Ontario Liquor Control Ordinances. As a result of these violations, you will be penalized as provided in Section 2-5 of the City of Ontario Ordinances, including but not limited to fines, suspension of your liquor license, or revocation of your liquor license.

If you seek to contest the charge(s), you may contact the Office of the Mayor of the City of Ontario. Upon contacting the Office of the Mayor, you will receive further instructions about the procedures to be followed in connection with your claim. For further information concerning this process, please see the Ordinances of the City of Ontario, which you may also obtain by contacting the Office of the Mayor.

If you fail to contact the Office of the Mayor, it will be assumed that you do not dispute the charges against you and the penalties being imposed.

_____

(date & signature)

Mayor

City of Ontario, Franklin

LIBRARY

MPT-2: *City of Ontario*

Thompson v. Franklin State Technical University

Franklin Supreme Court (1986)

The issue is whether the unreviewed decision of a state administrative hearing officer has preclusive effect.

Sarah Thompson filed a grievance against her former employer, Franklin State Technical University ("the University"), alleging that her discharge was the result of sex discrimination. In accordance with University grievance rules, an official from another University department was appointed as the hearing officer to hear the grievance.

At the hearing on Thompson's grievance, the University and Thompson together presented over 20 witnesses and 70 exhibits. Following the hearing, the hearing officer determined that the University had not engaged in sex discrimination but had valid, non-discriminatory grounds to discharge Thompson. The University Chancellor upheld the decision, and it became the University's final decision. Thompson did not seek judicial review of the University's final decision.

Thompson thereafter sued the University for damages in state court, claiming that the University engaged in sex discrimination when it fired her. The trial court granted the University's motion for summary judgment on the basis that the hearing officer's decision precluded Thompson from relitigating the issue in state court. Thompson appealed, arguing that the administrative decision should not have preclusive effect. The court of appeal affirmed. We granted review of this case of first impression.

The doctrine of preclusion gives finality to matters already decided where there has been an opportunity to litigate them. Courts have long applied the doctrine of preclusion to judicial determinations (claims or issues) in the interest of finality. For the same reason, we here apply the doctrine of preclusion to a determination made by an administrative agency.

The United States Supreme Court has created federal common law rules of preclusion, which we now adopt. Only where an administrative agency has the authority to adjudicate disputes and where the agency, in fact, does decide the disputed issues properly before it does the doctrine of preclusion apply. The doctrine of preclusion does not apply where the administrative agency acts "legislatively" in adopting rules, or "ministerially" in implementing action without discretion. The doctrine of preclusion can apply only when the parties had an opportunity to litigate the claim or issue before the agency; thus, the agency procedures must comport

with the minimal requirements of due process.

While due process does not require all the procedural protections available in a court, the more an administrative agency acts like a court, the more sound the reasons for giving preclusive effect to its decisions. An agency acts like a court when it provides the opportunity for representation by counsel and follows basic rules of procedure and evidence.

Courts are more willing to preclude review where the parties litigated after some prehearing disclosure. Aggrieved parties must have the opportunity to present evidence through witnesses and exhibits and to challenge the evidence presented by the other parties through cross-examination and objections. It is critical that adjudicators, whether they be hearing officers, administrative law judges, or persons acting in a quasi-judicial capacity within an agency, be independent of those prosecuting the matter.

In cases where the above indicia of due process are present, the administrative agency's determinations should be accorded the same finality that is accorded the judgment of a court. Bringing a legal controversy to conclusion is no less important when the tribunal is an administrative one than when it is a court.

While the hiring and firing of employees are generally managerial matters, when the University, pursuant to statutory authority, holds a hearing to decide a disputed employment matter, the University acts in a quasi-judicial capacity. In this case, pursuant to University rules, the hearing officer, appointed from another, unrelated University department, was charged to make a decision based on the evidence presented at the hearing. He heard disputed evidence from each party addressing the issue of sex discrimination. He made specific findings of fact and conclusions of law concerning the dispute. These actions are quasi-judicial in nature.

Thompson does not challenge the due process protections she was accorded. Moreover, Thompson had every motivation to litigate fully her allegations before the University. Both her job and her reputation were at stake. She used that opportunity to the fullest.

Giving preclusive effect to an agency decision serves important public policies of adjudicating disputes once, bringing disputes to an end, and conserving judicial resources. Further, this practice encourages the parties to use local administrative procedures with adjudicators who have the greatest expertise in the subject of the dispute.

Thus, the University has met the requirements necessary for the court to apply the doctrine of preclusion.

Affirmed.

Lui v. Polk County Housing Board

Franklin Court of Appeal (2007)

Joe Lui appeals his eviction by the Polk County Housing Board ("the Board"), claiming that his right to due process was violated. After receiving a notice of eviction, Lui was given a hearing before the Board, which upheld the eviction. Lui then challenged the hearing process in Franklin state district court, which granted the Board's motion for summary judgment.

The heart of due process is notice and an opportunity to be heard. Lui argues that the notice of eviction failed to specify dates and times of the offenses charged. Lui concedes that he received a letter from the Board. The letter read:

> You are hereby notified that you have violated Paragraphs 12 and 14 of the lease between you and the Board, in that during June, July, and August, 2006, you failed to pay the rent on time, and on several occasions during the months of July and August of 2006, you failed to keep your dog on a leash when it was outside your home.

While due process requires that the accused know the charges against him in order to respond to them, notice is sufficient if it apprises the accused of the claims against him and gives him sufficient information to defend himself. It need not have the formality or completeness of an indictment. The notice here informed the accused of the specific paragraphs of the lease he was accused of violating. It also described which of his actions allegedly violated the lease and when those actions occurred in sufficient specificity that he could defend against the charges. For these reasons, the Board's notice satisfies the requirements of due process.

Lui next argues that he did not have a fair and independent tribunal. Lui claims that the Board acted as the investigator, prosecutor, and adjudicator, thus violating the requirements of fairness and independence. The Board owns and manages the homes, maintains records concerning the tenants, investigates complaints about tenants, brings complaints about tenants, and conducts hearings into those complaints. The hearing officer is a Board employee.

The due process requirement that there be a fair hearing before an impartial tribunal applies to administrative agencies as well as to courts.[1] Many potential risks to impartiality exist within administrative agencies. For example, impartiality may be impossible when there is a commingling of the investigatory,

[1] We treat city and county administrative agencies as we would state agencies. Because cities and counties are creatures of the state, their agencies are state agencies.

prosecutorial, and adjudicative functions. Similarly, where the adjudicator has personal or institutional financial interests in the outcome, impartiality is at risk. Likewise, where the adjudicator is under institutional pressure to reach a particular result, the danger of partiality is severe.

Administrative agencies serve many functions, and they need not maintain the same degree of separation of these functions as courts are required to do. Nevertheless, where these various functions, especially that of prosecutor or investigator, are mixed with that of the adjudicator within the same agency, the court must inquire whether these functions, as they are actually performed, are adequately separated so that there is no actual prejudice.

Our courts have struck down a procedure in which the adjudicator had access to the investigator's files outside the hearing. They also struck a procedure in which the agency's legal counsel both prosecuted the case on behalf of the agency and advised the agency's hearing officer on the law. However, in *Barber v. Piedmont Housing Authority* (Fr. Sup. Ct. 2004), another case involving public housing, our supreme court ruled that the manager of a public housing building was not so "management oriented" as to be disqualified from presiding over a hearing involving a tenant in a building across the city. In that case, the two managers had no contact other than at occasional management meetings and neither manager was in a position to influence the other. Further, the hearing officer testified that she had received no information about the eviction other than that presented at the hearing.

The Board argues that a requirement to hire independent hearing officers would bankrupt the Board because the Board issues about 1,000 evictions yearly. Due process does not require perfect hearings, but it does require hearings that meet the basic standard of fairness. The parties must be assured that the hearing officers are sufficiently independent that they will issue decisions based on the evidence and not on preconceived notions or institutional pressure. We are aware of instances in which agencies have financed the costs associated with fair hearings (i.e., hiring independent hearing officers, providing a right to counsel and prehearing discovery) from filing fees or from the fees issued for the license being regulated.

However, we need not reach the issue of whether the Board must employ independent hearing officers. In the case before us, the record is not clear as to the relationship between the hearing officer who conducted the hearing involving Lui and the manager who, on behalf of the Board, brought the charges against Lui. Thus, we cannot determine at this time whether the Board's policy of using its managers as hearing officers comports with due process.

We remand to the trial court to determine if the various functions outlined above, as actually practiced, were adequately separated so that there was no actual prejudice to Lui's rights.

Reversed and remanded.

Trenton Nursing Home v. Franklin Department of Public Health

Franklin Court of Appeal (2008)

Trenton Nursing Home ("Trenton") seeks a preliminary injunction to enjoin the Franklin Department of Public Health ("the Department") from proceeding with a hearing to revoke Trenton's skilled care facility license. Trenton complains that the Department hearing procedures violate due process by permitting hearing officers to deviate from the Franklin Rules of Evidence. Specifically, the Department rules permit hearing officers to receive hearsay evidence if it "is probative and if it reveals sufficient assurance of its truthfulness."

Due process requires that parties be given the opportunity to be heard. Ordinarily, witnesses will testify under oath and be subject to cross-examination. However, due process does not demand such formality. Due process requires only that the person aggrieved be given a chance to defend against the charges. A party may defend the charges by challenging the evidence presented against him, by his own presentation of evidence, or by both means.

In earlier cases dealing with hearing procedures of other Franklin agencies, our courts have ruled that the admission of hearsay evidence alone is insufficient grounds for finding that the protections of due process were violated. Rather, the evidence as a whole must be evaluated. Thus, applicants seeking disability or injury determinations before the Franklin Workers' Compensation Commission are permitted to submit medical reports even though such reports would be inadmissible in court as hearsay under the Franklin Rules of Evidence. *See Glover v. Workers' Compensation Comm'n* (Fr. Ct. App. 1998). Typically, in such a case, the agency has the right to have the party examined by a doctor of its choice. In *Glover*, the court made clear that the agency could challenge the testimony of the applicant's physician by producing its own doctors through a report or live testimony. Similarly, in *Franklin Department of Revenue v. Barnes* (Fr. Ct. App. 2003), the agency offered into evidence an agency-prepared summary of the records of a motor vehicle dealer to demonstrate that he violated tax regulations. Because the dealer possessed the records from which the summary was made, the court found that he was in a position to challenge the evidence, and therefore there was no due process violation.

Further, we note that the Rules of Evidence are designed in part to protect juries from hearing evidence that might unfairly prejudice them. Presumably, hearing officers are sufficiently independent as to not be unduly biased by evidence of a suspect nature.

On the other hand, we have struck down agency decisions that were based on "third-hand accounts" from "unnamed sources," the "accuracy of which" we could not evaluate. *See Lynbrook v. Franklin Dep't of Natural Resources* (Fr. Ct. App. 2007) (agency record comprised in large part of anonymous complaints of dumping hazardous materials could not support agency determination that regulatory violations had occurred).

There is no per se rule that the use of hearsay evidence violates due process. In fact, due process analysis does not demand that courts "check off," as with a laundry list, each of the requirements normally associated with due process. Thus, in *Kord v. New Lennox Hospital* (Fr. Sup. Ct. 1999), the Franklin Supreme Court rejected a due process challenge to the agency's decision even though the plaintiff did not have counsel or the right to prehearing discovery. The court explained that the rights to counsel and prehearing discovery were some, but not all, of the factors to be considered in determining whether the aggrieved party had a full and fair opportunity to be heard.

Because the hearing before the Franklin Department of Public Health has not yet occurred, we are unable to determine whether the hearsay evidence the agency plans to proffer, if any, meets the criteria of "sufficient assurance of its truthfulness" to satisfy the demands of due process.

As a guide to that hearing, we can say that due process does not require strict adherence to the Franklin Rules of Evidence.

The trial court's denial of the preliminary injunction was proper.

Affirmed.

POINT SHEET

MPT-1: *In re Hammond*

In re Hammond
DRAFTERS' POINT SHEET

In this performance test item, applicants work for a law firm. A partner in the firm, Jane Spencer, has received a request for guidance from another attorney, Carol Walker, who represents William Hammond, who, as a result of a suspicious fire, suffered the loss of a building that he owned and that housed his business. Hammond has sought Walker's advice about whether he has any criminal exposure and whether he may file an insurance claim for the loss of the building. Walker has suspicions that Hammond may have been involved in the fire, but Hammond has not explicitly admitted nor denied involvement and Walker has not explicitly asked.

Walker seeks advice from the applicants' firm on whether she can successfully move to quash a subpoena duces tecum issued by the District Attorney compelling her to appear before a grand jury convened to investigate the fire and to testify and produce materials relating to her communications with Hammond about the fire. Walker desires not to appear, and Hammond desires that she not disclose any of their communications.

Applicants' task is to prepare a brief in support of a motion to quash the subpoena on the grounds that under the Franklin Rules of Professional Conduct and the Franklin Rules of Evidence, Walker may not be compelled to give the testimony or produce the materials in question.

The File contains a memorandum describing the task, a memorandum on persuasive briefs, a letter from Walker to Spencer, a memorandum to file by Walker summarizing a meeting with Hammond, another memorandum to file by Walker summarizing a telephone conversation with Ray Gomez (a friend of Hammond), a police incident report, the subpoena duces tecum, and a draft of the motion to quash the subpoena.

The Library contains a provision of the Franklin Rules of Professional Conduct relating to the ethical duty of confidentiality, a provision of the Franklin Rules of Evidence relating to the attorney-client privilege and the crime-fraud exception, and provisions of the Franklin Criminal Code relating to arson. The Library also contains two decisions from jurisdictions outside Franklin bearing on a question, unresolved in Franklin, involving the attorney-client privilege and the crime-fraud exception.

I. Detailed Analysis

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

In arguing the motion to quash the subpoena duces tecum, applicants must address two separate questions: First, may Walker be compelled to appear before the grand jury to disclose her communications with Hammond about the fire, whether by testimony or by production of materials, under the Franklin Rules of Professional Conduct? Second, may she be compelled to do so under the Franklin Rules of Evidence? As will appear, applicants should give a negative answer to each question.

In the call memo, applicants are urged to remain faithful to the Franklin Rules of Professional Conduct and observe client confidences. This requires applicants to distinguish carefully between those facts that are not protected by ethical and evidentiary rules and those that are protected, including any communications between Walker and Gomez and any suspicions Walker may have about Hammond's involvement in the fire.

- Applicants should include in their arguments only those facts that are *not* protected, as the task memorandum underscores the importance of maintaining client confidences.

A. Whether Walker May Be Compelled to Appear before the Grand Jury to Disclose Her Communications with Hammond under the Franklin Rules of Professional Conduct

The first question for applicants to address is whether Walker may be compelled to appear before the grand jury to disclose her communications with Hammond about the fire, whether by testimony or by production of materials, under the Franklin Rules of Professional Conduct.

Under Rule 1.6 of the Franklin Rules of Professional Conduct—which is identical to Rule 1.6 of the American Bar Association's Model Rules of Professional Conduct, the source of many jurisdictions' analogous rules—a lawyer may not, as a general matter, reveal information relating to the representation of a client, whether or not that information consists of a communication between lawyer and client, and whether or not it is confidential.

- It is plain that the communications between Walker and Hammond about the fire fall within the general rule of confidentiality.

    - On their face, they contain information relating to the representation and are confidential communications between lawyer and client.
- There are, however, three exceptions to Rule 1.6. The lawyer may make a disclosure
    - (a) if the client gives informed consent,
    - (b) if the disclosure is impliedly authorized in order to carry out the representation, and
    - (c) if any one of certain circumstances is found to exist—here, specifically, "to prevent, mitigate or rectify substantial injury to the financial interest or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services."

The exceptions to Rule 1.6 do not apply to Walker/Hammond communications

- The first exception, client consent, is not present. Hammond has not given Walker consent, informed or otherwise, to disclose their communications about the fire to the grand jury.
    - Indeed, he specifically requested that she not do so.
- Neither is the second exception present. Disclosure of the communications between Walker and Hammond about the fire to the grand jury or otherwise is not impliedly authorized in order to carry out Walker's representation of Hammond.
    - Again, Hammond has specifically requested that she make no such disclosure.
- Finally, the specified circumstance (the third exception) is apparently inapplicable at the threshold. That circumstance would be applicable only if Walker were to reasonably believe that disclosure of her communications with Hammond about the fire was necessary to "prevent, mitigate or rectify substantial injury to the financial interest or property of another that is reasonably certain to result or has resulted from" Hammond's "commission of a crime or fraud in furtherance of which" he "has used" her "services."
    - The very fact that Walker is seeking to quash the subpoena reveals that she has no such belief—and certainly has no such belief that disclosure *to the grand jury* is necessary.
    - In any event, it appears that "substantial injury to the financial interest or property of another" could result only if Hammond filed a fraudulent insurance claim.

- That Hammond will do so is not "reasonably certain."
- Walker has advised Hammond that if he was involved in any way in the fire, he cannot collect insurance and may face criminal charges.
- At the present time, without knowing the cause of the fire or whether Hammond will file an insurance claim, it is unreasonable, indeed speculative, to conclude that financial injury to a third party (i.e., the insurer) will occur.
- Thus, there is little basis for concluding that Walker has an obligation to reveal any client confidences.

- Further, the language of Rule 1.6(b) is permissive (e.g., "a lawyer *may* reveal information…") not mandatory, so even if an exception applied, the rules would not require Walker to disclose the communications.

In light of the foregoing, applicants should argue that Walker may not be compelled to appear before the grand jury to disclose her communications with Hammond about the fire, whether by testimony or by production of materials, under the Franklin Rules of Professional Conduct.

B. Whether Walker May Be Compelled to Appear before the Grand Jury to Disclose Her Communications with Hammond under the Franklin Rules of Evidence

The second question for applicants to address is whether Walker may be compelled to appear before the grand jury to disclose her communications with Hammond about the fire, whether by testimony or by production of materials, under the Franklin Rules of Evidence.

Summary of the applicable law

Under Rule 513 of the Franklin Rules of Evidence (which is similar to the lawyer-client evidentiary privilege in many jurisdictions), a client "has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made for the purpose of facilitating the rendition of" a lawyer's services. There is no privilege, however, if the client sought or obtained a lawyer's services in furtherance of a crime or fraud.

A confidential communication between a client and a lawyer is presumed to be privileged. To rebut the presumption, a party claiming otherwise must carry the burden of proof by a preponderance of the evidence. A party claiming that a confidential communication is privileged

must nevertheless disclose the communication to the court to determine the communication's status if a party claiming that the communication is *not* privileged presents evidence sufficient to raise a substantial question about the communication's status. Franklin courts have not yet determined whether, to be sufficient, the evidence presented must establish probable cause to believe that the communication is not privileged, *see*, *e.g.*, *State v. Sawyer* (Columbia Sup. Ct. 2002), or whether there must merely be "some evidence" to that effect, *see*, *e.g.*, *United States v. Robb* (15th Cir. 1999).

- The Walker/Hammond communications are presumed to be privileged.
- From all that appears, all communications between Hammond and Walker about the fire were confidential and all were made for the purpose of facilitating the rendition of Walker's services as a lawyer to Hammond as a client.
- Therefore, all the communications in question are *presumed* privileged because they were confidential and are *in fact* privileged because they were not only confidential but were also made with a view toward the rendering of legal services.
- Hammond has impliedly (if not expressly) authorized, and instructed, Walker to claim the privilege on his behalf and to refuse to disclose any of the communications to the grand jury through his expressed desire that Walker not disclose *any* communications.
- As things stand, the Gordon County District Attorney cannot carry her burden of proof by a preponderance of the evidence that any of the communications between Hammond and Walker about the fire were not privileged by virtue of the crime-fraud exception.
- The District Attorney's evidence establishes the following:
  - the building housing the Hammond Container Company was destroyed by fire;
  - Hammond owned the business and the building;
  - Hammond had insured the building;
  - Hammond has made inquiries about filing an insurance claim, but has not filed such a claim;
  - Hammond sought a bank loan prior to the fire, and was turned down because of his company's financial condition;
  - the Fire Marshal classified the fire as suspicious in origin;
  - Hammond has not been willing to fully cooperate with the police;

- there is a discrepancy between what Hammond and his friend Gomez said they were doing the day of the fire; and
- Hammond retained Walker two days after the fire.

- To be sure, this evidence supports an inference that Hammond may have committed arson with the intent to defraud the insurer of his building and may intend to carry through by filing a fraudulent insurance claim.
  - Even if he caused the fire, Hammond has not violated Fr. Criminal Code § 3.01, Arson of Building, because that makes it a crime to damage with fire the building of another, not one's own building.
- But the evidence does not support an inference that Hammond *sought or obtained* Walker's services to further any such crime or fraud. True, the evidence allows conjecture about Hammond's purpose in retaining Walker, but it does not point to an improper purpose—to further a crime or fraud—rather than a proper one—to defend against an accusation of a crime or fraud.

- Whether the Gordon County District Attorney has sufficient evidence to require Walker to disclose her communications with Hammond about the fire for the court to determine their status (*in camera*) as privileged or nonprivileged depends upon whether the District Attorney has evidence sufficient to raise a substantial question about their status.
  - Whether the District Attorney has such evidence may depend in turn on whether the court would apply the stricter "probable cause" standard or the looser "some evidence" standard. Applicants should argue that the stricter standard applies.
  - If the court should apply the "probable cause" standard, the Gordon County District Attorney's evidence would be insufficient to require Walker to disclose her communications with Hammond about the fire for the court to determine their status as privileged or nonprivileged.
    - As explained, although the evidence supports an inference that Hammond may have committed arson with the intent to defraud the insurer of his building and may intend to carry through by filing a fraudulent insurance claim, it does not support an inference that Hammond sought or obtained Walker's services to further any such crime or fraud.
      - Hammond requested claim forms and information from Mutual Insurance before he hired Walker (*see* Police Report). Thus, it is unlikely that he sought advice

from Walker about how to submit an insurance claim—he had already obtained such information.

- Moreover, the nature of the potential crime in this instance—insurance fraud—is not comparable to the complex financial fraud perpetrated by the defendant in *Robb*. In short, it is not the type of crime for which one would necessarily need legal advice to commit.
- There is evidence that Hammond had a motive to commit insurance fraud, but the police report notes only that the bank denied Hammond's application for a business loan. The more damaging information—Hammond's statements to Walker that he had been having financial problems and could not make his next payroll or mortgage payment—is found only in the privileged attorney-client communications at issue. Thus those statements are not available to the district attorney at this stage in the proceedings.
  - Applicants who divulge what Hammond told Walker regarding his dire financial straits may receive less credit for their discussion, as they will have violated client confidentiality.

- If the court should apply the "some evidence" standard, the Gordon County District Attorney's evidence would arguably remain insufficient to require Walker to disclose her communications with Hammond about the fire for the court to determine their status as privileged or nonprivileged.
  - It is true that the "some evidence" standard may apparently be satisfied by a client's retention of a lawyer "in the midst of a fraudulent scheme." *United States v. Robb* (15th Cir. 1999).
  - But whether Hammond is indeed involved in a "fraudulent scheme" is the very question to be resolved. To assume that he *is* involved simply begs the question. As stated, he sought advice about *whether* he could file an insurance claim, not *how* he could do so.
    - The Fire Marshal's report failed to find specific evidence of the cause of the fire, but classified it as suspicious. At this point in time, there is no determination that the fire was intentionally set. [Contrast with *Robb*, in which there was clear evidence of manipulation of the price of the mining stock.]
    - Just burning down his own building is not arson. Frank. Crim. Code § 3.01.

- By contrast, in *Robb*, there was evidence available to the government that the defendant had employed his lawyer in the midst of his fraudulent mining scheme, and the actual mining records revealed the misrepresentations in the publicly disseminated information. Accordingly, the government met the "some evidence" standard required to trigger *in camera* review of the attorney-client communications.
- The Walker/Hammond relationship appears much closer to that in *State v. Sawyer* (Columbia Sup. Ct. 2002): "While the evidence would indeed support an inference that Krause retained Novak to facilitate perjury, it supports an equally strong inference that Krause retained him to ensure that his choices were informed—and that he failed to cooperate earlier because he was afraid he might expose himself to prosecution with no countervailing benefit."
- There is an equally strong inference that Hammond, realizing that his financial situation made him a prime suspect in an arson investigation, retained Walker to ensure that he had sound legal advice in responding to police inquiries.

- Finally, it can be argued that the same public policy underlying the existence of the attorney/client privilege—encouraging clients to fully and frankly disclose matters to their attorneys—also supports the Franklin courts adopting a probable cause standard.
  - "[T]he attorney-client privilege [is] the oldest of the privileges for confidential communications known to the common law. It encourages full and frank communication between attorneys and clients…." *Robb*.
  - *Robb* recognized that the low "some evidence" standard had the potential to lead to infringement of confidentiality between attorney and client. But the *Robb* court reasoned that because of the risk that a higher standard could "improperly cloak fraudulent or criminal activities," the "some evidence" standard was appropriate. *Id*.
  - It could be argued that the *Robb* standard encourages fishing expeditions into privileged communications and that it could have a chilling effect on the attorney-client relationship. *Sawyer* is the better approach. Franklin should join Columbia in requiring a "strong factual basis for the inference" that the crime-fraud exception applies and the privileged communications should be submitted to the court for *in camera* review.
  - Opting for the probable-cause standard, as in *Sawyer*, will better protect the importance of maintaining the confidentiality of attorney-client communications and yet is

not an insurmountable bar to those parties who believe that there is a substantial question regarding whether such communications are entitled to the privilege.

- In any event, no matter which standard the court might apply, and even if the court might end up requiring Walker to disclose her communications with Hammond about the fire so as to determine their status as privileged or nonprivileged, the result would likely be the same: The court would likely conclude that the communications were in fact privileged inasmuch as they are presumed to be such in light of their confidential character and the presumption is not rebutted by a preponderance of evidence proving the crime-fraud exception.

In light of the foregoing, applicants should argue that Walker may not be compelled to appear before the grand jury to disclose her communications with Hammond, whether by testimony or by production of materials, under the Franklin Rules of Evidence.

POINT SHEET

MPT-2: *City of Ontario*

City of Ontario
DRAFTERS' POINT SHEET

In this performance test, applicants work for the City Attorney's Office for the City of Ontario. Their task is to prepare an objective memorandum analyzing whether courts are likely to grant preclusive effect to decisions reached by an administrative agency, the City of Ontario Liquor Control Commission ("the Commission"). City ordinances provide that the mayor and city council constitute the Commission. The mayor, on behalf of the Commission, has the authority to grant and suspend licenses and to conduct hearings when a licensee objects to a Commission decision. The hearing procedures are set forth in the ordinances. The City Attorney wants to avoid litigating matters twice and wants Commission decisions to be given preclusive effect by the courts, while maintaining cost-effective and expeditious procedures.

The File contains the instructional memorandum from the supervising attorney, excerpts from the City of Ontario Liquor Control Ordinances ("LCO"), and the Notice of Liquor Control Violation form used by the City. The Library includes three cases.

The following discussion covers all the points the authors of the item intended to incorporate, but applicants may receive passing and even excellent grades without covering them all. Grading decisions are entirely within the discretion of the user jurisdictions.

I. Overview

In preparing their objective memoranda, applicants should extract the requirements of preclusion from the cases and assess the City's hearing procedures in light of those requirements. Applicants are instructed not to draft the proposed changes. No particular format is given for the memorandum, but the call memo instructs applicants to identify what procedures currently comply with the requirements for preclusion, to identify those procedures that do not comply with preclusion requirements, and to describe what changes are necessary to conform to those requirements. Applicants must also discuss the effect of their recommended changes on the City's goals of having cost-effective and expeditious procedures for handling LCO violations.

Applicants may organize their answers as set forth in the task memorandum (which procedures comply, which do not, necessary changes, and time/cost implications), by LCO number or title (i.e., Notice, Conduct of Hearings, etc.) or by the due process requirements themselves and whether each LCO aspect comports with due process or does not, what changes are needed, and the time/cost implications thereof.

Summary of the Law of Preclusion

Thompson v. Franklin State Technical University (Fr. Sup. Ct. 1986) sets out the federal common law of preclusion, which the Franklin Supreme Court has adopted. Courts will grant preclusive effect to decisions of administrative agencies if

(1) the agency had the authority to adjudicate,

(2) the agency acted in an adjudicative manner (as opposed to a legislative or ministerial manner) and decided issues in dispute properly before it, and

(3) the agency adheres to procedures that offer some level of due process.

While it is more likely that a court will extend preclusive effect when the proceedings at the agency level have included more due process, the doctrine does not require that agency proceedings provide the full complement of procedural protections found in courts.

In determining whether agency proceedings afford sufficient due process, the first inquiry is the notice given to the party whose rights are affected. The notice must be sufficient to apprise an accused of the charges and provide sufficient information to defend against them. *Lui v. Polk County Housing Bd.* (Fr. Ct. App. 2007). The second requirement is that the party against whom the doctrine of preclusion is being applied must have had a full and fair opportunity to litigate or to be heard before the agency. A key component of a fair hearing is a fair and independent tribunal. Agency hearings where the investigative, prosecutorial, and judicial functions are commingled in the same person do not comport with the impartiality requirement. *Id.* The standard does not require the same degree of separation as is required of a court, but agencies must show that the functions of investigator, prosecutor, and adjudicator, as they are actually performed, are separated adequately so that there is no actual prejudice to the accused. *Id*.

Other aspects of due process include the right to counsel, the right to prehearing discovery or disclosure, and the right to present evidence and challenge evidence presented. *Thompson*. Not all of these rights must be afforded to satisfy due process. Courts look at the procedures as a whole to determine whether the party whose rights are affected had the opportunity to be heard. *Kord v. New Lennox Hospital* (Fr. Sup. Ct. 1999) (cited in *Trenton Nursing Home v. Franklin Dept. of Public Health* (Fr. Ct. App. 2008)). Due process requires only a fair hearing, not a perfect one. *Lui.*

The issue of cost- and time-efficiency may be addressed as part of the due process analysis. While more costly and elaborate processes might provide greater due process, they may not be necessary if the Commission provides the basic elements of fairness as specified above.

II. Detailed Analysis

1. The agency must have the authority to adjudicate and must, in fact, adjudicate.[1]

- The Commission's authority to adjudicate alleged violations of the Liquor Control Act and related City ordinances is set forth in § 2-1.
- An agency adjudicates when it holds hearings, takes evidence, makes findings of fact and conclusions of law, and renders a decision. *Thompson*. The Commission acts in a quasi-judicial capacity when it holds a hearing under the procedures set forth in the Liquor Control Ordinances. The procedures provide for notice (§ 2-2), set out the burden of proof (§ 2-4), set out a procedure for evidence (§ 2-4), and provide for issuance of fines or suspension (§ 2-5). Applicants should conclude that the Commission acts in an adjudicative capacity when it follows these procedures.
- It could be argued that the hearings conducted under the current ordinances so violate due process as to raise a question whether the City is in fact adjudicating, but it is unlikely that a court would so conclude.

2. The agency's procedures must meet the requirements of due process.

a. Notice

- Applicants might note that the fact that the City affords a hearing (§ 2-2) before imposing sanctions on a licensee is a factor that weighs in favor of due process compliance. But the key is recognizing whether the hearing itself gives licensees a full and fair opportunity to litigate. *See Trenton*.
- Notice must be sufficient to apprise the accused of the charges and give the accused sufficient information to defend him- or herself. *Lui*.
- Section 2-2 of the ordinances simply provides that the mayor issue written notice of the charge(s) against the licensee. However, the ordinances do not meet the threshold for adequate notice because they do not require the identification of the law or ordinance allegedly being violated, the actions that constitute the violation, or when those acts were committed.
- The City's current Notice of Liquor Control Violation form demonstrates that the City's procedures do not provide sufficient notice. The form has a blank

[1] Note that a decision by a local government agency such as a county or city is treated the same as a state agency decision. *See Lui.*

for listing the section(s) of the Liquor Control Act or Ordinances that have been violated. However, the notice fails to identify what behavior by the accused is at issue or when that behavior allegedly occurred. Although more formal than the letter at issue in *Lui*, the City's notice does not give the accused sufficient information to adequately defend against the charges. Thus, the City's procedures will fail for lack of notice.

- The City must change its notice procedures to identify the behavior(s) that allegedly constitutes a violation of the Liquor Control Act or Ordinances and the approximate times when the accused engaged in that behavior.
- Astute applicants might suggest training City personnel who complete the notice form to include more, rather than less, specificity about violations.
- Making the notice more complete should have only a minor effect on the time- and cost-effectiveness of the procedures. Also, some time and expense will be necessary to properly train City staff who fill out the notice.

b. The right to a full and fair opportunity to litigate

An independent tribunal—the hearing officer—is key to a full and fair opportunity to litigate. Combining investigative, prosecutorial, and adjudicative functions in one person may constitute a denial of due process. *See Lui*. On the other hand, pure separation of the functions (as with courts) is not required. Agencies can appoint hearing officers from the same agency if they show that the functions as they are performed are adequately separated so that there is no prejudice. *See Lui; Thompson*.

There are several concerns about the independence of the City's hearing officer.

- The mayor cannot be an independent adjudicator. He has the power to conduct hearings and also to impose fees and fines. If the City budget relies on license fees or fines for revenue, the mayor, as hearing officer, may feel pressured to issue rulings that maximize revenue to the City, regardless of the evidence.
- The ordinances appear to commingle the functions of investigator, prosecutor, and adjudicator. For example, the mayor has the power to enter, or authorize any law enforcement officer to enter, licensed premises to enforce the City ordinances. § 2-1. Thus, the mayor appears to act as an investigator.
- The mayor appears to be both prosecutor and adjudicator. He is charged with giving notice and he signs the notice form, both of which are prosecutorial functions. The mayor also acts as hearing officer, an adjudicatory function.

- The mayor may influence the gathering of evidence, an investigative function. As hearing officer, the mayor is to admit into evidence reports from the police or other investigative bodies and may be inclined to give undue weight to the findings of city agencies that presumably report to him, and city employees preparing the reports may be inclined to slant the reports against licensees.
- The mayor may have access to information outside the hearing. Because the mayor has the duty to maintain records relating to action on liquor licenses and the authority to investigate license applicants, he/she may have access to the files prior to the hearing and thus to inadmissible evidence or at least to evidence that the licensee does not know has been considered.

Applicants should conclude that the commingling of the investigative and adjudicatory functions in the City's procedures is suspect and likely violates due process. To ensure that City procedures afford due process, the City should make several changes:

- The City should hire an independent hearing officer, perhaps not a City employee. Or the City should change the procedures so that the hearing officer has no role in law enforcement or investigation and no role in prosecuting the case.
- If the mayor remains as hearing officer, the City should ensure that the head of the police department does not report to the mayor and that the mayor cannot view the evidence prior to the hearing.
- These changes will affect both time- and cost-effectiveness. Hiring an independent hearing officer not employed by the City will clearly incur additional costs for the City. It may also add to the time needed prior to a hearing if there is a time lag in engaging an independent hearing officer.
- Alternatively, restructuring the mayor's duties as Commission chair may meet the due process requirements with less cost. Such restructuring will require time to redraft the ordinances and, presumably, some time to enact them. Once enacted, the changes may or may not affect the time-effectiveness of the procedures, depending on what they are.

c. *Evidence*

The more an agency acts like a court, the more a court is likely to grant preclusive effect to its decisions. *See Thompson*. One aspect of court-like process is the opportunity to present evidence through witnesses and exhibits, subject to cross-examination and objections. *Id*. Allowing hearsay evidence is not *per se* a violation of due process,

but due process requires that evidence be evaluated as a whole. The standard is not whether the Rules of Evidence apply but whether the hearing is fair. Further, there must be adequate assurance of the truthfulness of the proceeding. *Trenton Nursing Home.* Due process requires that the accused be able to challenge the evidence presented. *Id.* (discussing case in which opponent of hearsay evidence had a right to submit its expert's report and case in which opponent could challenge hearsay (a records summary) with the original evidence).

- Applicants might note that LCO procedures that are indicative of due process include permitting licensees to present evidence, having witnesses testify under oath, making objections, and cross-examining witnesses. Hearings are also recorded by a court reporter. (§§ 2-3, 4). The City bears the burden of proof by a preponderance of the evidence. (§ 2-4).
- However, the City's procedures require the hearing officer to admit into evidence the police report or the report of any investigative body. Such a report is hearsay—an out-of-court statement being offered for the truth of the matter asserted. Yet there is no assurance that the licensee can challenge the evidence unless given the opportunity to cross-examine the preparer of the report.
- Accordingly, City procedures do not provide safeguards for the challenge of hearsay evidence similar to those in the cases discussed in *Trenton Nursing Home*. Depending on the type of hearsay in, for example, a police report, the opponent may or may not have adequate opportunity to challenge the evidence. There is no reason to believe that the contents of such reports are otherwise available to the accused or are based on information in the hands of the accused as was the case in *Lui.* Nor is there assurance that the preparer of a police report has "sufficient truthfulness." *See Trenton Nursing Home.*
- Applicants should recommend that the City revise its procedures to require that the police or other investigators appear in person before the hearing officer and be subject to cross-examination.
- Additional due process concerns arise from the facts that the hearing is to be informal and that the Franklin Rules of Evidence do not apply. *See id.*
- While due process does not require all the procedures of court, it is troublesome that the ordinances allow the City to present evidence through "other means" without specifying what those "other means" are. Any "other means" of presenting evidence must satisfy due process.

- Applicants should conclude that it is questionable whether the City procedures meet the "sufficient truthfulness" standard. *See Trenton Nursing Home*.
- The procedures should be rewritten to provide that the evidence as a whole must be probative and meet the "sufficient truthfulness" test. One option would be to delete the phrase "through other means" in § 2-4 and replace it with language using the "sufficient truthfulness" test. Complying with this standard may require additional time and impose costs on the City because the investigator/police officer will have to testify in person, taking him/her from job duties and/or possibly requiring the City to pay overtime.
- The City may continue to provide an informal hearing in which the Rules of Evidence do not apply so long as the evidence as a whole meets due process.
- The ordinances place the burden on the City to prove a violation by a preponderance of the evidence. § 2-4. This provision may not be required as part of due process but helps ensure that the licensee has a full and fair opportunity to be heard. Accordingly, applicants should conclude that no change is necessary regarding the allocation of the burden of proof.
- Likewise, there is no need to change the requirements that the licensee have the chance to cross-examine the City's witnesses and present evidence.

d. Prehearing discovery

One aspect of acting like a court is affording litigants the opportunity for prehearing discovery. *See Thompson*. Franklin state courts may not require prehearing discovery as an element of due process, but it is more likely that an agency decision will be given preclusive effect if the proceedings include some amount of prehearing discovery. Again, the standard for a reviewing court is whether the procedures, taken as a whole, provide for a full and fair opportunity to be heard. *Id*.

- As written, the City procedures are silent on prehearing discovery. Indeed, the hearing is to be conducted within five business days of the request for a hearing. Such short notice of the hearing offers little opportunity to inspect the evidence to be presented even if it were available.
- This issue is a close one. Applicants may conclude that the failure to provide prehearing discovery and the short prehearing period may violate due process, especially because the current notice form fails to provide the licensee with enough information to defend against the charges. The lack of prehearing discovery may be another factor courts would consider, along with the other

procedures that arguably violate due process, to conclude that the City procedures are so lacking as to not warrant preclusive effect. Applicants may conclude that if the notice provisions are made to be more informative about the charges and if the other recommended changes are made, due process may not require prehearing discovery.

- Astute applicants will recommend that the City change its procedures to provide more time between notice of the violation and the hearing or a chance to request more time to allow for prehearing discovery. The City might also change its procedures to permit some prehearing inspection of evidence. These changes will affect the timeliness of the proceedings but will not significantly impact the City's costs.

e. Right to counsel

While the *Thompson* court appears to require the right to counsel as an aspect of due process, *Kord* (cited in *Trenton Nursing Home*) is not as clear on the issue. The *Kord* court reviewed the right to counsel as one of the several factors to be considered in a due process challenge to an agency decision. Here, the ordinances are silent on a licensee's right to counsel.

- Again, this is a close call. Some applicants may conclude that there is no due process right to counsel. Better applicants might conclude that providing licensees with the right to counsel would help ensure that agency procedures meet due process requirements. However, astute applicants may note that the short time between notice and hearing, without provision for continuances, may undermine any such right to counsel. It is unrealistic to believe that a licensee could find counsel who would be prepared in just five business days.
- Applicants might conclude that the City need not make any changes. However, better applicants will note that though the City need not provide counsel, it also should not preclude the right to counsel. Therefore, the City might permit extensions of time to make the right to counsel meaningful.
- On the other hand, applicants might recommend that the City amend its ordinances to provide that the licensee may be represented by counsel at the licensee's expense. This would require more time before the hearing.
- Applicants should conclude that such changes will affect the timeliness of the procedures, likely by extending the time to hearing. Extending the time may be necessary to better ensure preclusion. Most of the suggested changes will

not affect the cost of the procedures, although adding a right to legal representation could increase costs and increase the complexity of cases.

3. Procedures should be cost- and time-effective.

Applicants are told to consider the City's goals of cost- and time-effectiveness. *Lui* notes two means of financing hearings (via filing/licensing fees). Applicants need not determine budget figures or make cost projections, but should acknowledge that some procedures will be costly (i.e., hiring an independent hearing officer) and identify which are necessary and which are not. The points listed above incorporate time- and cost-effectiveness considerations.

III. Conclusion

Applicants should conclude that the City needs to make several changes to its hearing procedures if it wishes to increase the likelihood that Commission decisions will be given preclusive effect. The City must make its Notice of Liquor Control Violation more informative. It should also provide for an independent hearing officer or restructure the mayor's duties so that the mayor is independent, eliminate its procedure for admitting police or other investigative reports without the preparer of the report being subject to cross-examination, and not prevent licensees from having counsel. Certain issues/procedures present a closer call as to whether changes are needed: whether the City should permit prehearing discovery or disclosure, grant the right to counsel, and be willing to extend some deadlines to accommodate counsel and prehearing disclosure. If added, such changes would increase the likelihood that the City's procedures would be granted preclusive effect. Most of these procedural changes will have minimal financial impact on the City, except possibly for hiring an independent hearing officer. Almost all the changes will increase the time needed for the hearing.