Examinee Identification

[redacted]

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In re Field Hogs, Inc.

NATIONAL CONFERENCE OF BAR EXAMINERS

In re Field Hogs, Inc.

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

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

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

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

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

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

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

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

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

Delmore, DeFranco, and Whitfield, LLC

OFFICE MEMORANDUM

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

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

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

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

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

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

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

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

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

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

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

Delmore, DeFranco, and Whitfield, LLC

OFFICE MEMORANDUM

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

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

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

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

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

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

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

National Arbitration Organization:
Procedures for Consumer-Related Disputes

Payment of Arbitrator's Fees

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

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

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

Administrative Fees

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

Arbitrator's Fees

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

LeBlanc v. Sani-John Corporation

Franklin Court of Appeal (2003)

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

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

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

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

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

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

Arbitration promotes efficiency in time and money when a dispute between parties is contractual in nature. However, when a dispute is not contractual but arises in tort,

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

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

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

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

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

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

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

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

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

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

Reversed and remanded.

Howard v. Omega Funding Corporation

Franklin Supreme Court (2004)

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

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

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

The agreement also contains a severability clause, which states that

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

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

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

justify judicial refusal to enforce an arbitration agreement.

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

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

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

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

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

consumer, serving as a greater deterrent to potential disputants."

Finally, in *Scotburg v. A-1 Auto Sales and Service, Inc.* (Fr. Ct. App. 2003), the court of appeal reviewed an arbitration clause that was completely silent on the allocation of costs. The defendant argued that the court should adopt the reasoning of a line of Columbia cases which held that absent a showing by the plaintiff of prohibitive cost, such arbitration clauses were enforceable. The *Scotburg* court rejected that argument and, relying solely on Franklin law, concluded that "the potential chilling effect of unknown and potentially prohibitive costs renders this clause unenforceable as a matter of substantive unconscionability."

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

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

Vacated and remanded.

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.

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MULTISTATE PERFORMANCE TEST

In re Social Networking Inquiry

NATIONAL CONFERENCE OF BAR EXAMINERS

In re Social Networking Inquiry

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

MEMORANDUM

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

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

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

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

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

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

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

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

July 1, 2011

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

Dear Committee Members:

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

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

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

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

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

Very truly yours,

Melinda Nelson

Melinda Nelson

July 25, 2011

NOTES OF MEETING OF FRANKLIN STATE BAR ASSOCIATION PROFESSIONAL GUIDANCE COMMITTEE

RE: MELINDA NELSON'S INQUIRY

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

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

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

Chairman Ballentine asks if this matter involves a crucial misrepresentation.

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

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

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

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

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

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

All agree.

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EXCERPTS FROM FRANKLIN RULES OF PROFESSIONAL CONDUCT*

Rule 4.1 Truthfulness in Statements to Others

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

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

. . .

Comment:

Misrepresentation

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

* * *

Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

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

...

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

...

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

Comment:

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

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

In the Matter of Devonia Rose, Attorney-Respondent

Olympia Supreme Court (2004)

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

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

Instead, Rose offered to impersonate a public defender, and the police lieutenant on the scene agreed. The lieutenant introduced Rose to Patrick on the telephone under an assumed name. Patrick told Rose that he would surrender if given three guarantees: 1) that he be isolated from other detainees; 2) that he be given cigarettes; and 3) that "his lawyer" be present, to which Rose responded, "Right, I'll be there." In later conversations, it was clear that Patrick believed that Rose (under her pseudonym) represented him. Patrick then surrendered to law enforcement without incident and without harm to his two hostages. He asked if his attorney was present, and although Rose did not speak with him, she had the

police lieutenant say that she was. Rose made no subsequent effort to correct the misrepresentations. The public defender who was subsequently assigned to the case found out about the misrepresentations two weeks later, upon listening to the taped conversations and speaking with her client. Shortly thereafter, Patrick dismissed the public defender, represented himself pro se (with advisory counsel appointed by the court), was tried, was convicted, and received the death penalty. The parties dispute whether he dismissed the public defender out of the mistrust precipitated by Rose's earlier deception.

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

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

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

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

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

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

In re Hartson Brant, Attorney

Columbia Supreme Court (2007)

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

BACKGROUND

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

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

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

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

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

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

ANALYSIS

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

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

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

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

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

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

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

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

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

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

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

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

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

Reversed.

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.