MPT 1 - Sample Answer # 1

Memorandum

TO: Carlotta De Franco

FROM: Applicant

RE: Arbitration Clause for Field Hogs Inc.

1) (a): The initial question presented is whether, under Franklin law, the standard arbitration clause employed by Delmore, DeFranco and Whitfield would cover arbitration of all claims by consumers against Field Hogs Inc. Franklin courts generally favor the use of arbitration clauses to resolve contract disputes and have upheld the use of broadly worded arbitration clauses to resolve contract disputes. *New Home Builders, Inc. v. Lake St. Claire Recreation Association* (Fr. Ct. App. 1999). In *New Home Builders* and in the subsequent case of *Le Blanc v. Sani-John Corporation* (Fr. Ct. App. 2003), the court stated that forceful evidence of intent to exclude a claim from arbitration is required to prevail over a broad contractual arbitration clause. The standard arbitration clause at issue in the instant case is such a broadly worded clause, stating that, "any claim or controversy arising out of or relating to this contract or the breach thereof shall be settled by arbitration." Therefore, absent strong evidence of contrary intent by the parties, the standard arbitration clause should be sufficient to cover all contractual disputes between Field Hogs Inc. and their customers.

The Franklin Courts have distinguished claims that are not contractual in nature, but that arise in tort, and they have been more hesitant to compel arbitration of tort claims based on contractual arbitration clauses. *Norway Farms Dairy and Drovers Union* (Fr. Ct. App. 2001). In that case, the court stated that the court must assume that contractual arbitration clauses were not intended to include tort claims absent a "clear explicit statement in a contract directing an arbitrator to hear tort claims by one party against another." In interpreting an arbitration clause that contained identical "arising out of or relating to" language to that used by the firm's standard arbitration clause, the court indicated that claims "arising out of relating to" a contract must raise some issue, the resolution of which depends on the construction of the contract itself. The court went on to elaborate that duties which the defendant generally owes to others beyond the contracting parties would not be deemed to "arise out of" a contract for the purposes of interpreting an arbitration clause. *Le Blanc* (2003). Our office memorandum indicates that Field Hogs has faced a number of different tort claims in recent consumer litigation. In the *Majeski* and *Johan* cases, plaintiffs asserted negligence and strict liability claims that would be unlikely to be interpreted as "arising out of" a contractual relationship since they are premised on the breach of duties owed to society at large and not just to contracting parties. Thus, these claims would not be covered under the terms of the standard warranty by

Franklin law. Other claims, such as the claims for breach of warranty that were also asserted in the *Majeski and Johan* cases arise from breaches of duty that are contractual in nature, and thus would be covered by the terms of the standard warranty under Franklin law.

Although the terms of the standard warranty would not cover all possible claims by consumers against Field Hogs Inc., the court in *Le Blanc* explicitly rejected the position taken by the Olympia Court of Appeals in *Willis v. Redibuilt Mobile Home Inc.* (Olympia Ct. App. 1995), that consumer tort claims exist completely independently of an underlying consumer sales contract and may never be included in an arbitration clause. Therefore, it is possible that Field Hogs Inc. may succeed in covering consumer tort claims under an arbitration provision that explicitly states an intent to include tort claims.

1) (b): The second question presented is whether the allocation of arbitration costs contained in the firm's arbitration clause would be enforceable against consumers under Franklin law. Franklin law permits courts to refuse to enforce an arbitration agreement to the same extent that grounds exist for the non-enforcement of any contract, including such grounds as duress, fraud, and unconcionability. *Howard v. Omega Funding Corporation* (Fr. S. Ct. 2004). To be invalidated due to unconscionability, a contract clause must be both procedurally and substantively unconscionable. *Id*. Franklin courts have held that the issue of arbitration cost is a matter of substantive and not procedural unconscionability. *Georges v. Forestdale Bank*, (Fr. Ct. App. 1993).

The issue of substantive unconscionability with regard to provisions that allocate the cost of arbitration is unsettled under Franklin law. A key inquiry is whether the clause allocating arbitration costs has a chilling effect on a consumer's willingness to pursue their remedies under the contract. *Ready Cash Loan Inc. v. Morton* (Fr. Ct. App. 1999). In *Georges*, the court upheld a provision requiring the customer to pay a small initial fee with the remainder of cost to be born by the seller as not having such an effect. In *Ready Cash*, the court invalidated a 25/75 percent split of costs that favored the consumer because of the uncertainty involved in the expansion of costs as arbitration proceeded. The court also invalidated a provision that allowed the arbitrator to award costs as likewise being too uncertain. *Athens v. Franklin Tribune* (Fr. Ct. App. 2000). The firm's standard arbitration provision adopts the cost provision of the National Arbitration Organization, which requires the consumer to pay an intital administrative fee of $2000 and half of the arbitrator's fees with a limit of $750 if the dispute is below $75,000 and without any limit if the disputed amount is above $75,000. Given that arbitrators receive $1,000 per day for hearings plus $200 per hour for additional time spent on pre and post hearing matters, this cost structure demonstrates a substantial amount of uncertainty from the consumer's perspective for claims that are above $75,000. It is likely that the provision regarding such claims would be invalidated for substantive unconscionability. The

provision regarding claims under $75,000 is less likely to be invalidated because the consumer's expense is capped at $750, but Franklin courts may find the existence of a chilling effect based on the large up-front payment of $2,000.

2) The final question presented is what the terms of an arbitration clause for Field Hog's consumer sales contracts should be in order to address the concerns voiced by the client and be enforceable under Franklin law. The proposed provision should be re drafted as follows: "Any claim or controversy arising out of or relating to this contract or the breach thereof shall be settled by arbitration. It is the expressed intention of the parties that any tort claims pertaining to the subject matter of this transaction will also be settled by arbitration. The costs of arbitration are to be divided as follows: The consumer shall bear the initial $1,000 of expenses, regardless of claim amount, and Field Hogs Inc. shall bear the rest." The terms of this revised arbitration clause would address the concerns expressed by our client with enforceability, particularly regarding tort claims. Although the cost provision would not achieve the 50/50 split that our client desires, it is unlikely that any provision containing such a division of costs would be held valid by Franklin courts as discussed above. Our client has expressed a desire beyond all else to avoid litigation expenses over the validity of the arbitration clause, and given existing Franklin case law, this provision would be most likely to achieve that result.

MPT 1 - Sample Answer # 2

To: Carlotta DeFranko
From: Applicant
Date: July 26th, 2011
Re: Arbitration Clause for Field Hogs, Inc.

Firm's Clause Coverage of All Potential Claims by Consumers against Field Hogs

The issue is whether the firm's standard clause would cover all potential claims by consumers against Field Hogs, Inc. under Franklin law. The Franklin Court of Appeals has stated 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 the parties did not intend to withdraw such disputes from judicial authority". *Norway Farms v. Dairy and Drovers Union* (Fr. Ct. App. 2001). Based on the previous claims brought against Field Hogs, Inc. in the past seven years, it is clear that Field Hogs' consumers bring tort claims against them, as they were sued for negligence, breach of warranty and strict liability issues in 2004, 2005, 2008 and 2010 (Office Memo, Summary of Tort Litigation Against Field Hogs). Since Field Hogs wishes to protect themselves against similar claims in the future by compelling arbitration, it is vital that they have an arbitration clause that covers tort claims. Franklin courts "generally favor arbitration as a mode of resolution". *LeBlanc v. Sani-John Corporation* (Fr. Ct. App. 2003). The *LeBlanc* court indicates that "parties should clearly and explicitly express an intent to require the arbitration of claims sounding in tort...courts should strictly construe any clause that purports to compel arbitration of tort claims". *Id.* The firm's clause indicates that "Any claim or controversy arising out of or relating to this contract or the breach thereof shall be settled by arbitration." (Delmore, De Franco, and Whitfield, LLC- Standard Commercial Arbitration Clause). This clause is very similar to the clause in *LeBlanc*, which states "Any controversy or claim arising out of or relating to this agreement, or breach thereof, shall be settled by arbitration". However, the court in *LeBlanc* contended that in *LeBlanc*, "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"'. The court further states "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." *LeBlanc.* This indicates that the firm's arbitration clause, which is nearly identical to the arbitration clause litigated in *LeBlanc*, "covers only contract-related claims" and "would not apply [to tort issues]". *LeBlanc*. Therefore, the firm's arbitration clause is not specific enough to require the arbitration of claims sounding in tort, so it is not specific enough to cover all potential claims by consumers against Field Hogs, under Franklin law.

Enforceability of Firm's Clause's Allocation of Arbitration Costs against Consumers

The issue is whether the firm's clause's allocation of arbitration costs would be enforceable against consumers under Franklin law. The Franklin Supreme Court states that the enforceability of an arbitration agreement, including the allocation of arbitration costs, turns on whether the clause is substantively unconscionable. *Howard v. Omega Funding Corp.* (Franklin Supreme Ct. 2004). A clause is substantively unconscionable if the terms of the contract are oppressive and one-sided, and if those costs exceed those that a litigant would bear in pursuing identical claims through litigation. *Id.* The case at bar allowed either party to elect binding arbitration, while Field Hogs intends to bind not only the consumer, but themselves also, to compulsory arbitration. The Franklin Court of Appeals held "the relatively minimal cost of the initial fee [on the consumer] did not render the clause substantively unenforceable." *Georges v. Forestdale Bank* (Fr. Ct. App. 1993). in 1998, in *Ready Cash Loan, INc. v. Morton)*, the Franklin Court of Appeals invalidated a clause that limited "the consumer to paying 25 percent of the total costs of arbitration and required the lender to pay 75 percent", because of the "chilling effect on the [consumer], given the potential expansion of costs involved in disputing substantial claims". The same court also invalidated an arbitration clause in 2000 which "permitted the arbitrator to award costs", because the provision "potentially allocate[d] all the costs to the consumer, serving as a greater deterrent to potential disputes". *Athens v. Franklin Tribune* (Fr. Ct. App. 2000). Again, in 2003, the Franklin Court of Appeals invalidated as a matter of substantive unconscionability a clause which was silent as to the allocation of arbitration costs, because of the "potential chilling effect of unknown and potentially prohibitive costs". *Scotburg v. A-1 Auto Sales and Service, Inc.* (Fr. Ct. App. 2003). For a court to find an arbitration clause is not "one-sided and oppressive", that clause must provide the consumer with a viable option for pursuing their claim, where the costs will not be above the costs of pursuing identical claims through litigation, and where the "unknown and potentially prohibitive costs" do not result in a "chilling effect" on consumers who wish to bring claims. *Howard v. Omega Funding Corp. (Franklin Supreme Ct. 2004).*

The firm's clause requires arbitration to "occur in accordance with the rules and procedures for arbitration promulgated by the National Arbitration Organization". (Standard Commercial Arbitration Clause). The National Arbitration Organization rules indicate that for claims and counterclaims that are less than $75,000, the consumer would be responsible for 50% of the arbitrator's fees, up to $750, plus a one-time $2,000 administrative fee. Under Franklin law, this amount will probably be upheld as not substantively unconscionable, because it is far less than an individual would incur bringing an identical claim in litigation, and the amount is fully predictable. However, the National Arbitration Organization rules provide for the consumer to pay 50% of the arbitrator's fees, with no cap, if the claim is equal to or in excess of $75,000. The courts would likely find this to be substantively unconscionable, as the more the plaintiff alleges in damages, the

more likely they are to reach the $75,000 threshold. The costs for arbitrators, noted as $1,000/day for each day of hearing plus an additional $200/hour for time spent on pre-and post-hearing matters, would likely be considered "unknown and potentially prohibitive" and to have a "chilling effect" on a consumer's ability to bring a claim. *Scotburg v. A-1 Auto Sales and Service, Inc.* (Fr. Ct. App. 2003). There is also a substantial possibility that these costs could "exceed those that a litigant would bear in pursuing identical claims through litigation", so the court would likely find the $75,000 threshold to be too high a burden for consumers, and therefore the clause would be held to be substantively unconscionable, and therefore invalid. *Howard v. Omega Funding Corp. (Franklin Supreme Ct. 2004).*

Draft of Arbitration Clause for Field Hogs, Inc.

Any claim, dispute, or controversy arising from or related to the sale of Field Hogs, Inc. consumer products, whether arising in contract, tort, or otherwise, shall be subject to binding arbitration in accordance with the rules and procedures for arbitration promulgated by the National Arbitration Organization. The consumer's liability for arbitration expenses shall be in accordance with the National Arbitration Organization's Procedures for Consumer-Related Disputes, with an overall maximum of $3,000 for arbitrator's fees, with the balance to be paid by Field Hogs, Inc. The overall maximum shall not apply to the one-time administrative fee outlined in the National Arbitration Organization's procedures related to Administrative Fees.

The above arbitration clause should be effective in court, and not held substantively unconscionable, which will help Field Hogs achieve their goal of compelling arbitration. Since Hewlett believes that arbitration is more likely to yield favorable results for Field Hogs, Inc., and that professional arbitrators are "more predictable than juries", the assurance that the court will not find the clause invalid should be favorable. While Hewlett expressed a desire to split the costs down the middle with the consumer, the court is not likely to look favorably upon that, since Field Hogs, Inc. is considered to be in a more powerful position than the consumer. For this reason, and also to make the costs more predictable for consumers, the draft of the clause limits the consumer's liability for arbitrator's fees to $3000, even in the case of claims exceeding $75,000. This will result in a more enforceable clause, which is more predictable for the corporation overall. Hewlett's statement that avoiding jury trials was the most important thing was the motivating factor for the draft, and the express inclusion of tort claims should cover most claims that would be brought by consumers.

MPT 1 - Sample Answer # 3

To: Carlotta DeFranco
From: Examinee
Date: July 26, 2011
RE: Arbitration Clause for Field Hogs, Inc.

This memo will first consider our firm's Standard Commercial Arbitration Clause (which incorporates procedures of the National Arbitration Organization) and decides that the clause would NOT be suitable for our client, Field Hogs, Inc. This memo will then suggest a new clause which would better effectuate our client's goals.

(1) The Firm's Standard Commercial Arbitration Clause

(a) Coverage of Claims

The firm's standard clause would not satisfactorily cover all potential claims under Franklin Law against Field Hogs. The courts of Franklin have expressly encouraged the use of arbitration to resolve disputes sounding in contract, while the issue of arbitration of tort claims remains unsettled. (See *LeBlanc v. Sani-John*). The primary issue in construing arbitration clauses is whether the clause covers only contract-based claims or also tort-based claims.

Even though the language in our firm's standard clause is broadly written, purporting to cover "any claim or controversy arising out of or relating to this contract or breach thereof," similar language has been held by Franklin courts to only cover contracts claims. A tort might "relate to" a contract in the plain sense of the phrase, but Franklin courts require more. In *LeBlanc*, the Franklin Court of Appeals suggested that for an arbitration clause to cover tort claims, the clause must (1) "clearly and explicitly express" (2) "an intent to require the arbitration" (3) "of claims sounding in tort." The *LeBlanc* court also disagreed with non-binding precedents from Olympia courts that public policy would bar any attempt to require arbitration for tort claims. The *LeBlanc* court suggested that a complete bar on torts would be going too far. It should be noted that the LeBlanc case dealt with a factual circumstance where the arbitration clause only expressly covered contracts claims. Thus, the language in the opinion regarding tort claims may be regarded as dicta. However, without any other cases on point, the Court of Appeals' suggestions in *LeBlanc* remain the best indicator of how to proceed with arbitration clause language in our jurisdiction.

Looking at the Field Hogs, Inc. history of tort litigation, and keeping in mind the goals of the client, it is clear that the firm's standard arbitration clause will not be sufficient for our client's purposes. Our firm should provide a new clause to the client which clearly expresses intent to require arbitration of tort claims. Though it is not certain that even a clause with this heightened standard will be upheld, it

will better protect the client than our firm's standard clause.

(b) Allocation of Costs

The National Arbitration Organization procedures are incorporated into our firm's standard clause. The Organization's provisions as to allocation of costs are potentially subject to disputes as to enforceability in Franklin courts.

Franklin courts have been sensitive to the position of consumer litigants with regard to arbitration costs. The general concerns are whether allocation of costs to the litigant create a "chilling effect" by discouraging pursuit of rights, and whether the cost allocation method provides for too much uncertainty. (See *Howard v. Omega Funding Corp.*).

In construing cost allocation provisions, courts will use contract principles, including possible defenses that would render a contract unenforceable. In *Howard*, the Franklin Supreme Court considered whether an arbitration clause was unconscionable. The court used a two part test, considering (1) procedural unconscionability, and (2) substantive unconscionability. With regard to the first part, the question is whether the parties each had reasonable opportunity to negotiate. The defendant in *Howard* conceded this part. In a case based on allocation of costs our client may also concede procedural unconscionability, on the assumption that a lawn equipment consumer will not have the opportunity at point of sale to negotiate what is in essence a "take it or leave it" standard clause. However, the plaintiff would also need to demonstrate the second part.

With regard to substantive unconscionability, the court will decide whether contract terms are "oppressive and one-sided" (*Howard*). In reviewing cases on allocation of arbitration costs, the Howard court picked out several points from different factual scenarios:

- A minimal initial fee is not substantively unconscionable. (*Georges v. Forestdale*)

- A clause allocating 25% to consumer litigant, 75% to company was invalid because of the "chilling effect" on litigants. (*Ready Cash Loan v. Morton*)

- A clause permitting the arbitrator discretion to award costs was unconscionable. (*Athens v. Franklin Tribune*).

- A clause completely silent on cost allocation is unenforceable because of uncertainty. (*Scotburg v. A-1 Auto Sales*).

The *Howard* court noted that these cases "provide no clear framework" for the facts in *Howard*, and the court suggested a new practical test, which is to determine how much a litigant would spend in arbitration, and if that amount is

more than a litigant "would bear in pursuing identical claims through litigation," the clause will not be enforced.

The best approach regarding our client Field Hogs is to create an allocation of costs provision that avoids any of the problems outlined in the several cases above. Even though the Franklin Supreme Court did not expressly rule out certain methods of allocation, a "better safe than sorry" approach is appropriate for our client. Field Hogs's main goals are to create certainty through arbitration and to keep disputes private. In order to reach these goals, it is a must that the arbitration clause not be subject to a potential claim for unenforceability. Thus, it is better for our client to spend a potentially disproportionate amount on the arbitration process itself, in order to preserve the arbitration requirement. Looking at the National Arbitration Organization Procedures, one can see that a consumer litigant with a large or complex claim may be "chilled" or discouraged from pursuing her rights because of the potentially large fees and the requirement of placing a deposit. The clause our firm provides to the client should allocate to the consumer litigant ONLY a small initial fee. By limiting the fees, this will create certainty and should help any court to reach a favorable decision for our client based on the Howard court's comparison test. The clause should be upheld based on the costs issue because a small and certain initial fee will clearly be less than almost any traditional litigation cost.

(2) Draft of Arbitration Clause for Field Hogs, Inc.

"Any claim or controversy arising out of or relating to this contract or the breach thereof shall be settled by private arbitration. Any claim or controversy in tort arising out of alleged injuries or damages caused by the product sold under this contract shall be settled by private arbitration, including, but not limited to, such claims as for negligence, failure to warn, joint liability, or strict products liability. Arbitration shall occur in accordance with the rules and procedures for arbitration promulgated by the National Arbitration Organization, except with regard to fees. Any person bringing a claim pursuant to this contract or relating to alleged injuries caused by the product sold herein shall be responsible for a one-time initial administrative fee of $750."

The above clause addresses the problem points raised regarding general enforceability of arbitration clauses: (1) whether tort claims will be covered, and (2) whether allocation of costs will render the clause unenforceable. The above clause follows the most recent law of our jurisdiction in a cautious manner that is most likely to render the clause enforceable. This will help effectuate the client's goals of predictability and privacy, by keeping the matter in arbitration and out of traditional public litigation. And though our client may have to bear the burden of additional costs for the arbitration procedures, the client will come out ahead in the long run by avoiding any potentially large jury awards to litigants.

MPT 2 - Sample Answer # 1

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

MEMORANDUM

Ethics and professional conduct will be compromised under the proposed course of action in the negligence action. The conduct is prohibited under the Franklin Rules of Professional Conduct as well as case law adjudicating similar circumstances. The Franklin State Bar Association Professional Guidance Committee should be advised that the proposed course of conduct is prohibited under Franklin law.

According to the Columbia Supreme Court in *In re Hartson Brant, Attorney*, there are three approaches to analyzing the immediate circumstances under the Rules of Professional Conduct. Although Columbia law is not conclusive in Franklin, it is persuasive law that applies identical Rules of conduct enacted in Franklin. While the Columbia Supreme Court favors the third approach (i.e., the status-based analysis), the proposed course of conduct would fail to conform to the Rules of Conduct under all three. Each approach is as follows:

1. Strict Application of the Rules:

According to the Olympia Supreme Court in *In the Matter of Devonia Rose, Attorney-Respondent*, an attorney cannot compromise her integrity, and that of the profession, regardless of the cause. *In the Matter of Devonia Rose* (2004). The court strictly applies Rule 8.4 (identical to that of Franklin), which states "it is professional misconduct for a lawyer to ... (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation." *Id.* The attorney in question in *Devonia Rose*, offered to impersonate a public defender so as to allow police to actively question the defendant. Such impersonation was in direct violation of Rule 8.4. *Id.* The defendant believed that Rose was an actual public defender and went along with the questioning, which subjected the defendant to trial, conviction, and the death penalty. *Id.* Rose asserted that her actions were justified under the circumstances. The court denied this assertion and reprimanded Rose under the Professional Rules of Conduct. *Id.*

According to the Franklin Rules of Conduct, Rule 4.1 provides that "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." Lawyers in Franklin are required to be truthful when dealing with others on a client's behalf. Furthermore, misrepresentations may occur through partially true but misleading statements. Ms. Nelson is withholding information from the defendant. She is proposing

conduct that would conceal her identity in an effort to extract information. Under Rule 8.4, which mirrors that of Columbia's Rule 5.3, "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 acts of another." This rule is applicable to those not licensed to practice law or conduct the activity of the misrepresenting party. *In the Matter of Devonia Rose* (2004). Accordingly, by rules of imputation, a lawyer may not solicit others to do what she cannot do. Applying the strict language of the Rules, as the Olympia Supreme Court did, Ms. Nelson would engage in misrepresentations by concealing her identity to the defendant and her affiliation with the case to extract relevant information for trial. Thus, neither Ms. Nelson nor her assistant may engage in the course of conduct given that the misrepresentation of the affiliation with the adverse party would be unethical and in violation of the rules of conduct.

2. Conduct-based Analysis:

According to the Columbia Supreme Court in *In re Hartson Brant, Attorney*, the conduct-based analysis "requires the 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 if otherwise illegal or unethical." *Hartson* (2007).

As to the first requirement, Ms. Nelson is directly involved in the deception. Although social networking pages are open to the public, they are only accessible after receiving permission from the owner. Ms. Nelson, as indicated above, is responsible for the actions of those assisting in her misrepresentations. The second requirement is met as the significance of the misrepresentation exposes a witness against her will, thus violating constitutional rights. This is not a "no harm, no foul" approach; rather, it is in direct contradiction to the stated exceptions noted in *Hartson* as well as public policy favoring protection of constitutional rights. It involves a crucial misrepresentation that could change the outcome of the case. Third, the information could be sought through alternative means. Yes, the witness' testimony may be critical to the case, however, it may be obtained through standard discovery tools such as a subpoena. Finally, this course of conduct directly relates to Rules 4.1 and 8.4 of the Franklin Rules of Professional Conduct. This is a case of first impression for the state of Franklin, but there is persuasive case law applying identical rules of law. Thus, there are multiple courts (i.e., Columbia and Olympia) that have interpreted the applicable law. The proposed course of conduct does not satisfy the 4-step test. Thus, it violates the Rules of Professional Conduct under the conduct-based analysis.

3. Status-Based Analysis:

According to the Columbia Supreme Court in *In re Hartson Brant, Attorney*, the

status-based analysis focuses on the importance and nature of the role that the attorney plays in advancing the interests of justice. 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 do not violate the Rules of Professional Conduct. *Hartson* (2007). Justice is preserved by preventing imminent danger, rooting out corruption and organized crime. *Id.* The misrepresentation is specific to the attorney's purpose and role during litigation. Such misrepresentations in cases such as those listed, are necessary to achieve justice and do not reflect on the lawyer's fitness to practice. *Id.* In other words, justice is done without compromising the integrity of the profession. However, attorneys are always answerable for offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice. *Id.*

Ms. Nelson is inquiring as to ethical considerations in a negligence action. There is no status-based protection for actions taken in violation of the Rules of Professional Conduct. She does not fall within any exception listed in the paragraph above. The evidence is not needed to prevent imminent danger or crime, it does not involve a civil rights violation, and it does not involve an intellectual property dispute. As explained in the paragraphs above, the proposed conduct is misconduct on its face. It violates the specific language of the Franklin Rules of Professional Conduct. Moreover, it involves dishonesty and breach of trust with the defendant. Thus, Ms. Nelson is answerable for the offense of her and her assistant.

The proposed conduct does not conform to any of the three approaches applied by the Olympia or Columbia Supreme Courts. As indicated above, it is not a harmless misrepresentation, as some may argue. It would violate the defendant's constitutional rights and change the course of the trial. Franklin rules hold attorneys accountable for any such misconduct. Condonation of this type of behavior and ethical violation would be a negative mark on the integrity of the legal profession and could encourage others to engage in similar conduct. Thus, this is not a "no harm, no foul" situation; it is a harmful proposal that could subject Ms. Nelson to sanctions. Ms. Nelson should abandon the proposed course of conduct and adopt an ethical approach to obtaining the information from the defendant.

MPT 2 - Sample Answer # 2

Professional Guidance Committee - Memorandum re Nelson inquiry
Melinda Nelson's proposed course of conduct would violate the Rules of Professional Conduct. Because this is an issue of first impression here, I have looked to the nearby jurisdictions for guidance and have discovered that there are three different approaches to determining whether the conduct of Ms. Nelson (MN) would violate the Rules: a strict compliance analysis, a conduct-based analysis, and a status-based analysis. Under any of the three analyses, MN's conduct constitutes a violation of the Rules.

1. The first approach is strict compliance with the Rules. Under this approach, MN certainly is in violation.

The Rules require a lawyer to be truthful in dealing with others, which prohibits incorporating or affirming false statements by other persons and prohibits partially true statements that may be misleading. 4.1 CMNT. Misconduct occurs where a lawyer knowingly assists or induces another to violate the Rules, or does so through the acts of another. 8.4. Lawyers cannot engage in dishonesty, deceit or misrepresentation and are subject to discipline when they request or instruct an agent to do so on their behalf. 8.4, CMT. Lawyers should be held in violation for conduct reflecting lack of characteristics relevant to law practice, which includes dishonesty and breach of trust.

The Olympia Supreme Court has applied these rules using the strict compliance approach in Rose, where a deputy D.A. impersonated a public defender, engaged in conduct that led the defendant to believe she was his lawyer, and failed to correct those misrepresentations. She claimed she did so for justice, justified by the peaceful resolution of a potentially dangerous hostage situation. Nonetheless, the Olympia court strictly applied the rules and suspended the D.A. for one month, even while noting her public safety intent. The court cited the rules and stated that "even a noble motive does not warrant departure from the rules." Rose. The court noted that she had other options available, therefore the misrepresentation was not truly "necessary." Ethics for lawyers, the court wrote, "leaves no room for deception. [DA] cannot compromise her integrity, and that of our profession, regardless of the cause."

In this case, MN is proposing to, with knowledge and approval, to ask a non-attorney agent to seek information from an unrepresented nonparty that MN would not be able to obtain were she truthful. The agent would not inform the nonparty of her purposes for soliciting social network site approval; she would not reveal any affiliation with MN. MN would be sponsoring a partially true but misleading statement or omission, 4.1, and would be engaging in some kind of deceit through the acts of another. Applying the strict compliance standard, MN would be in violation regardless of her motive - to find information she believes the witness is lying about for impeachment purposes. Motive is irrelevant.

Lawyers must adhere to "the highest moral and ethical standards, which apply regardless of motive." In Rose, the DA was in violation by engaging in deceitful conduct and by failing to correct known misrepresentations, inducing reliance of the unknowing party. The same is true here.

2. MN also would be in violation of the conduct-based analysis. The conduct-based analysis has four factors: 1) directness of lawyer's involvement in deception, (2) depth and significance of deception, (3) necessity of deception and lack of alternatives, and (4) other illegality from the conduct. This is sort of a totality of the circumstances rule based on what the lawyer does. A minor deception with no significant harm to deceived party might be OK under 2, while a lawyer who uses deception to get information he or she could obtain through standard discovery tools would be more likely a violation under 3. See Brant (Columbia S. Ct).

Applying these factors to MN, I note that MN seeks to affirmatively ask the non-attorney agent to engage in the potentially deceptive and dishonest conduct to gain information she otherwise could not get. The non-agent apparently would not have sought the non-party's permission to enter her profile without the lawyer's involvement, which makes it substantial for the conduct-based analysis prong 1 test. Her involvement is, in fact, what is at issue here. The prong 2 depth and significance of deception factor may not appear at first glance to be as strong against MN, but it is important to note the potential significance and depth at issue. With approval by deception, the agent could gain access to a wealth of critical information for MN, that could be all appearances end the matter entirely and immediately. MN says as much in her letter. It also allows for substantially more information to flow to MN than she otherwise is entitled to under discovery tools. Regarding the prong 3 necessity/alternative factor, there is no indication that MN could not otherwise obtain some of the relevant information by other sources, i.e., other depositions and requests to other persons involved. A little more investigation might easily reveal some of the same information without the deception being necessary. Also, the interests in this case (trip-and-fall negligence claim), probably do not rise to the level of the kind of public harm that justified the conduct in Rose yet was still considered insufficient. The prong 4 other illegality/impropriety factor here may not be as strong, although it is important to note the nonparty is not represented by counsel and that there may be requirements under the social networking site that access cannot be used for certain purposes (like deception). In short, because MN would be directly involved in the deception by ordering it specifically, because the deception could potentially be very significant for the case and lead to a wealth of relevant information, and because there probably are other means available to get some of the sought-after info, MN's proposed conduct likely violates this conduct-based analysis.

3. MN's conduct also would violate the status-based analysis adopted by Columbia, which essentially balances harms. Under this test, a lawyer's

deceptive conduct will violate the Rules unless it does not go to the core of the integrity of the profession, and is necessary to ensure justice in certain cases. Specially, the Columbia court in Brant states that this test applies to civil rights violations, intellectual property infringement, or crime prevention. Applying this test to overturn a Rules violation for a lawyer who engaged in deception to obtain evidence against a civil rights race-discrimination violator, the court stressed that it limited its reading of permissible actions under this test only to these circumstances and extend it to no others. This seems to indicate that the justice at issue, the one for which the deception is justified, must be specific to certain harms and probably substantial. The court also notes that the test applies differently to different actors, which means there is no clear standard. This inquiry also requires that the deception be relevant to the fitness to practice law, that it go to the core of integrity.

The MN inquiry involves trip-and-fall negligence and the discovery of potential information that may (or may not) be relevant from an unrepresented nonparty. It does not involve civil rights, infringement or crime prevention. Also, I submit that affirmatively asking agents of attorneys to seek out information that otherwise would not be obtainable under the truth does reflect poorly on the core of the integrity of the profession, which is supposed to hold to the highest standards. The knowledge and justified potential concern of lay persons that attorneys could within the rules engage in this kind of conduct without their knowledge is precisely the kind of thing the rules are meant to protect. Because MN's case does not meet the sufficient interests of justice of the certain crimes for which this test is allowed, and because this conduct would in fact reflect poorly on the core of the integrity of the profession, MN's conduct would violate this test as well. MN's conduct may seem harmless, it may seem justified, but the Rules of Professional Conduct set a high standard. No deception, no misrepresentations, not even through non-attorney agents, especially if it could reflect poorly on the profession. MN's proposal violates the rules, it violates a balancing test (per se weighing the profession's integrity), and it violates a status test because of type of case. Therefore, I submit that we should advise MN not to engage in this activity, and I propose we begin preparing a rule or comment addressing such violations for future adoption.

MPT 2 - Sample Answer # 3

MEMORANDUM

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

Mr. Ballentine and Fellow Committee Members:

Upon careful review of Franklin's Rules of Professional Conduct (FRPC) and applicable case law from neighboring jurisdictions (as this is a case of first impression under Franklin's Rules), I am of strong opinion that the proposed course of conduct by Ms. Melinda Nelson would violate the FRPC. The relevant case law sets forth three approaches to resolving this type of issue and under each approach, Ms. Nelson's proposed conduct would be in violation of the FRPC.

1. Applying the Plain Language of the Franklin Rules of Professional Conduct, Ms. Nelson's Proposed Conduct is a Clear Violation of Such Rules

Pursuant to FRPC 4.1(a), a lawyer must not knowingly make a false statement of material fact or law to a third-person. Comments to this Rule reveal that a misrepresentation can occur when a lawyer incorporates or affirms a statement of another person that the lawyer knows is false or by partially misleading statements which are the equivalent of affirmative false statements. Additionally, FRPC 8.4 (a) and (c) state that it is professional misconduct for a lawyer to "violate or attempt to violate the Rules of Professional Conduct, knowingly assist another to do so, or do so through the acts of another; and to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." The Comments to Rule 8.4 indicate that while there are many kinds of illegal conduct which adversely reflect on one's fitness to practice law, only certain offenses indicating a lack of characteristics relevant to law practice, such as dishonesty and breach of trust, violate the rules.

In the case at hand, Ms. Nelson's proposed conduct violates both FRCP 4.1(a) and 8.4(c). In an attempt to obtain crucial testimony for her client, Ms. Nelson wishes to fraudulently obtain access to a witnesses' private Facebook account. Further, she attempts to engage in this fraudulent conduct by means of her assistant, whose name will not be revealed to the witness. In this day in age when technology is advancing and social networking sites are plentiful, it is crucial that one act with honesty and integrity when dealing with such online sites. Although Ms. Nelson indicates that her assistant would only state truthful information to the witness, the whole purpose and reasoning behind seeking

access to the Facebook page would remain unknown to the witness, thus inducing her to reveal her private information by means of dishonesty.

In the Olympia Supreme Court case of *In the Matter of Devonia Rose*, a Chief Deputy District Attorney misrepresented herself as a public defender in order to alleviate a hostage scenario. The Court noted that although Rose's act of deception may have been "justified" under the circumstances, "even a noble motive does not warrant departure from the Rules." In our case, while some members of the Committee reason that it may be "worthwhile to expose a lying witness" or that harmless misrepresentation should be allowed in the pursuit of justice, the court in *in the Matter of Devonia Rose* specifically held that an attorney has a responsibility to enforce the law and this responsibility "does not grant them license to ignore those laws or the Rules of Professional Conduct." Additionally, an important part of the court's analysis appeared to be the fact that Rose has options other than acting deceptively. Similarly, in our case, Ms. Nelson is not justified in creating such deception to access a witnesses's private Facebook account. Although her motive may be noble, in that she wants to reveal the truth for her client's case, this motive does not eliminate a violation of the Rules. Further, Ms. Nelson even indicated that she *may* be able to obtain access to the Facebook account simply by asking the witness. Therefore, it seems that she has other methods than to engage in acts of deception. It's important to note that even though Ms. Nelson herself is not doing the deception, Rule 5.3(c)(1) states that a lawyer shall be responsible for conduct of a non-lawyer that would be a violation of the rules if such conduct is ordered or ratified with the knowledge of the lawyer.

2. Ms. Nelson's Proposed Conduct Constitutes a Violation of the Franklin Rules of Professional Conduct under a Conduct-Based Analysis

The Columbia Supreme Court in *In re Hartson Brant* set out two tests, one of which the court refers to as a "conduct-based analysis." This four-part test requires an assessment of: (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 existence of alternative means to discover the evidence and (4) whether the conduct is otherwise illegal or unethical.

In regards to the first factor, as mentioned above Ms. Nelson's conduct is not directly involved, however she would specifically be directing the action of her assistant, which results in a violation under Rule 5.3. As to the second factor, the significance of the deception is great. Although the Committee may argue that there is little if any harm posed to the witness, her Facebook account contains many private things. One's Facebook page may include personal contact information, private pictures, notes, and the like. The whole purpose behind Facebook privacy settings is to withhold your personal information from others and only share information with those that you may know. As to the third factor, Ms. Nelson's inquiry could be obtained through other means, such as asking the

witness directly if she may access all or part of her Facebook account (which Ms. Nelson's letter indicates she has yet to do) or seek the court's permission in allowing Ms. Nelson to re-depose the witness in order to seek relevant information.

3. Ms. Nelson's Proposed Conduct Constitutes a Violation of the Franklin Rules of Professional Conduct under a Status-Based Analysis

In addition to the four-part conduct-based analysis, the court in *In re Hartson Brant* set forth a status-based analysis which focuses on the "importance and nature of the role that the attorney plays in advancing the interests of justice." Under this test, the Committee may argue that Ms. Nelson's proposed conduct does little harm to the witness and merely aids the interests of justice. However, Ms. Nelson's proposed conduct is the type which goes directly to the integrity of the legal profession. Every lawyer has a duty to uphold the laws and Rules of Professional Conduct and a proposed action which would allow an attorney, by means of her assistant, to dishonestly and deceitfully obtain a witnesses's Facebook information, to be used against her in a court of law, falls more in line with entrapment than it does with advancing the interests of justice. In *Hartson Brant* the General Counsel of the Columbia Fair Housing Association engaged in a "sting" operation to expose discrimination against minorities. The Court ultimately held that Brant's misrepresentation was one which seeks justice, without comprising the integrity of the profession. The Court, however, carefully limited its holding to situations involving imminent danger to public safety, rooting out corruption or organized crime, and investigating the violation of intellectual property rights. None of these limited situations are applicable in our case. Ms. Nelson's conduct is not necessary to ensure justice. This is not an action to ensure justice in the case of civil rights violations (as in *Hartson Brant*) nor is it a case involving crime or intellectual property rights. Therefore, even under such a status based test, Ms. Nelson's proposed conduct would be a violation of the FRPC.

Based upon the above tests, case law and Franklin Rules of Professional Conduct, Ms. Nelson's proposed conduct is not permissible. Although it is true, as many in the Committee may argue, that access to the witnesses' Facebook could reveal crucial information to Ms. Nelson's case and can serve to impeach the witness at trial, this does not justify a violation of the Rules. Every lawyer takes an oath upon being sworn in to uphold the law and the Rules of Professional Conduct and such deviation from the Rules should not be permitted in this instance.