



*February 2001 MPTs
and Point Sheets*

State v. Palm

Steinberg & Son, Inc. v. Wye

*Consumer Protection Division v.
Bernhard's Appliances, Inc.*



The National Conference of Bar Examiners inaugurated the Multistate Performance Test (MPT) in 1997. This publication is a reprint of the three MPTs that were administered in February 2001 in twenty-two jurisdictions: Alaska, Colorado, Delaware, District of Columbia, Georgia, Hawaii, Illinois, Indiana, Iowa, Maine, Minnesota, Mississippi, Missouri, Nevada, New Jersey, New Mexico, North Dakota, Ohio, Oregon, South Dakota, Texas, and West Virginia.

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

The instructions for the test appear on page iii. For further information regarding the test, see the **MPT Information Booklet** or the NCBE website at **www.ncbex.org**.

February 2001 Multistate Performance Tests and Point Sheets

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INSTRUCTIONS

1. You will have 90 minutes to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictitious state of Franklin, in the fictitious Fifteenth Circuit of the United States. In Franklin, the trial court of general jurisdiction is the District Court, the intermediate appellate court is the Court of Appeal, and the highest court is the Supreme Court.
3. You will have two kinds of materials with which to work: a File and a Library. The first document in the File is a memorandum containing the instructions for the task you are to complete. The other documents in the File contain factual information about your case and may also include some facts that are not relevant.
4. The Library contains the legal authorities needed to complete the task, and may also include some authorities that are not relevant. Any cases may be real, modified, or written solely for the purpose of this examination. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read them thoroughly, as if all were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page references.
5. Your response must be written in the answer book provided. In answering this performance test, you should concentrate on the materials provided. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.
6. Although there are no restrictions on how you apportion your time, you should be sure to allocate ample time (about 45 minutes) to reading and digesting the materials and to organizing your answer before you begin writing it. You may make notes anywhere in the test materials; blank pages are provided at the end of the booklet. You may not tear pages from the question booklet.
7. This performance test will be graded on your responsiveness to instructions regarding the task you are to complete, which are given to you in the first memorandum in the File, and on the content, thoroughness, and organization of your response.

FILE

State v. Palm

Fitts, Aspinall and Abelard

Attorneys at Law
145 East Harold Street
Beckley, Franklin 33331
(555)555-2217

To: Applicant
From: Celia Fitts
Date: February 27, 2001
Subject: *State v. Claude Palm*

We are defense counsel for Claude Palm (nicknamed “Springs”), who is charged with two criminal offenses, Possession of Cocaine with Intent to Sell and Possession of Marijuana with Intent to Sell. The strength of the prosecution’s case depends upon whether it can admit as evidence at the trial the fruits of a search of our client’s house. The substances seized from his house have since been tested by the State Toxicology Laboratory, which confirmed that one is marijuana and the other is cocaine.

The search warrant authorized a “no-knock” entry into our client’s house. I believe the search was unconstitutional and violated the Franklin Code of Criminal Procedure. For that reason, I intend to file a pre-trial Motion to Suppress Physical Evidence.

The motion, along with a persuasive brief, is due tomorrow. I have drafted the motion and it is attached. I have also attached the only “no-knock” case decided in Franklin since the U.S. Supreme Court’s recent pronouncements on the subject.

Please draft a persuasive brief in support of the three grounds I’ve asserted in the motion to suppress. Prepare the brief in accordance with the guidelines set forth in the attached office memorandum.

Fitts, Aspinall and Abelard
Attorneys at Law

MEMORANDUM

September 8, 1995

TO: Attorneys
FROM: Maurice Abelard
RE: Persuasive Briefs and Memoranda

All persuasive briefs, including Briefs in Support of Motions (also called Memoranda of Points and Authorities), shall conform to the following guidelines.

All briefs shall include a Statement of Facts. The aim of the Statement of Facts is to persuade the tribunal that the facts support our client's position. The facts must be stated accurately; however, emphasis should be placed on the material facts that best support our client's position. The statement of facts need not be exhaustive but it must contain key facts sufficient to inform the court of the essence of the dispute and the relief sought.

The firm follows the practice of breaking the argument into its major components and writing carefully crafted subject headings that illustrate the arguments they cover. Avoid writing briefs that contain only a single broad argument heading. The argument heading should succinctly summarize the reasons the tribunal should take the position you are advocating. A heading should be a specific application of a rule of law to the facts of the case and not a bare legal or factual conclusion or a statement of an abstract principle. For example, improper: THE POLICE DID NOT HAVE PROBABLE CAUSE TO ARREST DEFENDANT. Proper: THE FACT THAT DEFENDANT WAS WALKING ALONE IN A HIGH-CRIME AREA AT NIGHT WITHOUT PHOTO IDENTIFICATION WAS INSUFFICIENT TO ESTABLISH PROBABLE CAUSE FOR HIS ARREST.

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

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

State of Franklin
v.
Claude Palm

Guernsey County District Court
Guernsey County
February 28, 2001

MOTION TO SUPPRESS PHYSICAL EVIDENCE

The defendant moves the court to suppress all physical evidence seized by the Beckley Police Department from the premises of 1173 Pickford Street, Beckley, Franklin, on November 29, 2000, pursuant to a search warrant issued by the Guernsey County District Court. This motion is pursuant to 14 FCCP § 2B(1) and (4). In support thereof the defendant states:

FACTS

The police battered down the front door of the defendant's home at 6:00 a.m. without first knocking or announcing their authority or purpose.

GROUND

1. The affidavit upon which the search warrant is based fails to state facts sufficient to establish a reasonable suspicion that the evidence would be destroyed were the officers required to knock and announce their purpose.

2. The affidavit upon which the search warrant is based fails to state facts sufficient to establish a reasonable suspicion that the officers would be endangered were the officers required to knock and announce their purpose.

3. No facts arose at the time that the police executed the search warrant and entered the house that created a reasonable suspicion that an announced entry would endanger the officers or lead to the destruction of evidence.

WHEREFORE, the defendant prays that this court find that the search was unreasonable and in violation of the Franklin Code of Criminal Procedure and the Fourth Amendment to the U.S. Constitution and that the fruits thereof be suppressed and excluded from the trial in this matter.

Respectfully submitted,

Fitts, Aspinall & Abelard

By Celia Fitts

Attorneys for Defendant

Excerpts from Interview with Claude Palm

December 4, 2000

* * *

Attorney: So let's go back to the day you were arrested. What happened?

Palm: It was very early in the morning and it was dark outside, like 6 a.m. I was still sleeping in my bedroom—right off the front porch—when I heard this huge noise that woke me up. Before I could jump out of bed, three big guys came into my room with their guns drawn and began hollering at me. Man, I was scared.

Attorney: What did they say?

Palm: “Get up! Beckley Police. Put your hands up.” I got out of bed, stark naked. I must have been shaking. When I grabbed for my pants they stopped me. One of the cops searched the pockets. Then they let me get dressed. Another cop said they had a search warrant and asked me where the drugs were and where my gun was.

Attorney: What happened next?

Palm: Well, they were already tearing the place apart. There were about six cops in the house. The front door was splintered all over the living room floor and I saw this battering ram they used to break it down. The back door into the kitchen was also open. I knew they would find anything I had so I told them to look in the freezer where I kept weed. I said I didn't have a gun.

Attorney: Was that true?

Palm: No, but I had lent it to one of my guys so it wasn't in the house. I didn't tell them about the coke since I thought they couldn't find it. It took about 10 minutes but they found it above a ceiling tile in the bathroom, next to the kitchen. They also took my police radio scanner.

Attorney: The search warrant says you have a pit bulldog.

Palm: Naw. They must mean my brother's dog, Mack.

Attorney: Was the dog there that night?

Palm: No, he only stays with me when my brother needs me to take care of him. He wasn't in my house that night.

Attorney: Anyone else in the house with you when they came?

Palm: Nope, just me.

* * *

Excerpts from Interview with Sarita Nunez

December 5, 2000

* * *

Attorney: OK, Ms. Nunez. You live across the street from Mr. Palm?

Nunez: You mean Springs? Yeah. My house is at 1174 Pickford.

Attorney: Springs tells me you were watching on the morning the cops broke down his front door. Is that right?

Nunez: Yeah. I had just got up to go to work when I saw about four cop cars pull up in the street.

Attorney: Tell me what you saw and heard.

Nunez: Well, I saw about six cops. All these cops, in, like football helmets and flak jackets jump out of the cars. A couple of them went around to the back of the house and the rest of them go charging up Springs' front steps. They didn't say anything. They just took out this big pole and bashed down the door. Then, they go charging inside and I hear all this yelling, "Beckley Police!" and "Get up!" and stuff like that. It was scary, man.

Attorney: How well could you see? I mean, wasn't it dark outside?

Nunez: It was getting light, but it wasn't yet daylight. But, you know, I could see across the street.

Attorney: Was Springs' dog barking?

Nunez: Springs doesn't have a dog. Not that I know of, anyway. But, no. I didn't hear any dog barking.

Attorney: Was there any traffic in the street?

Nunez: Naw. Not at that time of the morning. Anyway, the cops had the street blocked.

Attorney: Do you know whether Springs owned a gun or kept one in the house?

Nunez: Well, I hear rumors. Once, I saw some guy come running out of Springs' house yelling that Springs pulled a gun on him. But I've never seen him with a gun.

* * *

Application for Search Warrant

Premises to be searched: 1173 Pickford Street, Beckley, Franklin
Property, Person, Thing or Things to be Seized: Cocaine, Marijuana, and any other illegal narcotics; paraphernalia for the sale and administration of said substances including scales, plastic bags, and vials; a police radio capable of receiving police communications; and a small-caliber handgun with a white handle.

AFFIDAVIT

Detective Patrick Crawford, having been sworn, states the following in support of this Application for Search Warrant:

1. On or about November 24, 2000, "John Doe," a known and reliable confidential informant who has in the past supplied information to the undersigned that has led to convictions in three previous drug cases, contacted the undersigned regarding drug sales in the Frog Hollow neighborhood of Beckley.

2. "John Doe" reported that sales of cocaine and marijuana were taking place from a white stucco house located at 1173 Pickford Street and that a person he knew as "Springs" lived in that house and was selling the narcotics. He said that "Springs" only sells quantities worth \$25 and up.

3. The undersigned knows from previous investigations of drug and gang activity in the Frog Hollow neighborhood that "Springs" is the street name of Claude Palm. "Springs" is a member of the Brobecks, one of the active gangs involved in the sale of drugs in said neighborhood.

4. The undersigned requested "John Doe" to make a controlled buy of narcotics from Springs at the premises described above and Doe agreed. On November 28, 2000, "John Doe" reported to the 7th precinct and was strip-searched in the presence of the undersigned

and was found to be free of narcotics or other contraband. He was then driven in an unmarked vehicle to 1173 Pickford Street and the undersigned gave him \$50 in currency and then observed him approach and enter the premises. Doe emerged in seven minutes and returned directly to the vehicle and surrendered a small plastic baggie containing a white powdery substance that appeared to be cocaine.

5. Informant Doe reported that Springs took him past the bedroom to the kitchen located at the back of the house. In the kitchen, Doe observed a large amount of cocaine on a scale on a counter next to the kitchen sink and a trash bag containing a substance he recognized as marijuana in the bathroom next to the kitchen. He further stated that a small-caliber pistol was visible in an open drawer in the kitchen. He reported that he heard a dog barking and scratching on a closed door that appeared to lead to a second bedroom and that Springs told him that he had a pit bulldog in case of trouble and a scanner radio to listen for police radio communications.

6. The undersigned detective has four years of experience as a police officer assigned to the investigation of narcotics and has had numerous occasions to apprehend perpetrators who are members of gangs in Beckley. It is the opinion of the undersigned that drug dealers keep firearms as a means to protect themselves from other drug dealers and rival gang members. It is this detective's experience that, because drugs and firearms are a dangerous mix, some officers have been shot during the execution of search warrants where guns and drugs are present.

7. The undersigned requests that because of the presence of the gun and the pit bulldog on the premises and because of the proximity of the drugs to the sink and the toilet, a no-knock warrant be issued. Members of the Brobeck gang are known to use deadly force to protect their drugs and therefore it would endanger the officers to announce themselves prior to entry. In the opinion of the undersigned detective, when felony drug suspects know who you

are, and they see you, they know why you are there, and to protect evidence from being destroyed or to prevent guns from being drawn or somebody escaping out the back door, it is important to make a sudden entry and secure the scene.

Dated November 28, 2000

Signed under penalty of perjury

Det. Patrick Crawford

SEARCH WARRANT

County of Guernsey

Guernsey County District Court

The people of the State of Franklin to any sheriff, marshal, or police officer in the County of Guernsey:

Proof, by affidavit, having been made this day before me by Detective Patrick Crawford of the Beckley Police Department

that there is probable cause for believing that illegal narcotics are being stored on and sold from the premises described below, you are therefore commanded, in the daytime, to conduct a search of the person of Claude Palm and the house situated at 1173 Pickford Street, Beckley, Franklin, including the premises and curtilage.

for the following property, thing, things, or person:

Cocaine, Marijuana, and any other illegal narcotics, paraphernalia for the sale and administration of said substances including scales, plastic bags, vials, a police radio capable of receiving police communications, and a small-caliber handgun with a white handle.

and, in the case of a thing or things or personal property, if you find the same or any part thereof, to bring the thing or things or personal property forthwith before this court.

This warrant shall be executed within 60 days of the date issued and returned to the issuing Judicial Officer within 5 days of its execution.

(Choose)

This warrant shall be executed between the hours of 6:00 a.m. and 8:00 p.m.

() This warrant can only be safely or successfully executed at night-time or under circumstances the occurrence of which are difficult to predict with accuracy, and I authorize the execution of this warrant at any time, day or night.

(✓) I authorize the execution of this warrant without the necessity of knock and announcement prior to entry because I find reasonable cause to believe that:


() the place to be searched is difficult to access speedily.

() the objects to be seized are in danger of imminent removal.

(✓) the objects to be seized are in danger of imminent destruction.

(✓) there is a reasonable probability that the safety of the peace officers will be in danger.

Given under my hand, and dated November 28, 2000


Judge of the District Court.

RETURN

Date of Execution of Search Warrant: November 29, 2000

Items Seized: 14 small plastic bags and one large plastic bag, all containing a white powdery substance appearing to be cocaine, total weight approximately 19 grams. 1 green plastic trashbag containing a green leafy substance appearing to be marijuana, total weight approximately 2.5 pounds, 1 digital portable scale, 1 box of razor blades, \$417 in cash, 17 empty plastic bags, and 1 police radio scanner.

Signed: Det. Patrick Crawford

LIBRARY

State v. Palm

Franklin Code of Criminal Procedure
Subpart 14. Motions to Suppress Physical Evidence
(Cite as 14 FCCP)

Section 2. A defendant may move for the return of property or to suppress as evidence any tangible or intangible thing obtained as a result of a search or seizure on either of the following grounds:

- A. The search or seizure without a warrant was unreasonable.
- B. The search or seizure with a warrant was unreasonable because any of the following apply:
 - (1) The warrant is insufficient on its face.
 - (2) The property or evidence obtained is not that described in the warrant.
 - (3) There was not probable cause for the issuance of the warrant.
 - (4) The method of execution of the warrant violated federal or state constitutional standards.
 - (5) There was any other violation of federal or state constitutional standards.

Section 3. A motion pursuant to Section 2 shall be made in writing and accompanied by a brief in support of the motion. The brief shall set forth the factual bases and the legal authorities that demonstrate why the evidence should be suppressed.

Section 4. Whenever a motion to suppress is made in the district or superior court as provided in this section, the judge shall receive evidence on any issue of fact necessary to determine the motion.

Section 5. If a motion to suppress is granted pursuant to the proceedings authorized by this section, the property or evidence shall not be admissible against the movant at any trial or other hearing.

State of Franklin v. Emerald

Franklin Court of Appeal (1998)

The state challenges the district court's suppression of evidence seized pursuant to a search warrant containing a no-knock provision.

An officer of the Franklin City police department applied to the District Court for a warrant to search the trailer home owned by respondent Jane Emerald. The court authorized an unannounced no-knock, night-time search warrant, and officers executed it on June 28, 1997. The officers seized a rifle, cocaine, and heroin and arrested Emerald. Emerald was charged with controlled substance crimes in the first, second, third, and fifth degrees.

Emerald filed a motion to suppress the evidence and claimed, in relevant part, that the no-knock provision in the search warrant violated her constitutional rights. The district court granted this motion and suppressed all the evidence obtained pursuant to the search warrant. The state appeals from the district court's pretrial suppression order.

The state initially argues that the district court erred in reviewing *de novo* the magistrate's decision to issue a no-knock search warrant.

Ordinarily, the district court should not engage in a *de novo* review of the magistrate's determination that there is probable

cause for a search warrant. Similarly, the district court should generally give great deference to a magistrate's decision to include a no-knock provision in a search warrant.

Here, however, the district court was not simply reviewing the facts but, rather, was making a legal determination in light of a recent United States Supreme Court decision, *Richards v. Wisconsin* (1997), wherein the court stated:

The fact that felony drug investigations may frequently present circumstances warranting a no-knock entry cannot remove from the neutral scrutiny of a reviewing court the reasonableness of the police decision not to knock and announce in a particular case. Instead, in each case, it is the duty of a court confronted with the question to determine whether the facts and circumstances of the particular entry justified dispensing with the knock-and-announce requirement.

It was necessary, therefore, for the district court to review *de novo* the no-knock provision in the warrant.

The state argues that the district court erred in concluding that the no-knock warrant was improperly issued and unconstitutional.

The Fourth Amendment, applicable to the states as a principle of due process through the Fourteenth Amendment, protects “the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” The underlying charge of this provision is that governmental searches shall be reasonable.

In *Wilson v. Arkansas* (1995), the United States Supreme Court held that one of the inquiries required to determine whether the search was reasonable under the Fourth Amendment is whether the police have knocked and announced their authority and purpose before gaining entry pursuant to a search warrant. The Court found that the failure of the police to knock and announce their authority and purpose before executing a warrant is presumptively unreasonable. However, the Court recognized that an announcement is not constitutionally required in every case and certain circumstances may justify an unannounced entry. The Court declined to catalogue all such exigent circumstances, but noted that an unannounced entry may be reasonable where officers have reason to believe there exists a threat of violence or that evidence would likely be destroyed upon an announced entry.

As the Supreme Court stated in *Richards*:

In order to justify a “no-knock” entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be

dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence. This standard—as opposed to a probable cause requirement—strikes the appropriate balance between the legitimate law enforcement concerns at issue in the execution of search warrants and the individual privacy interests affected by no-knock entries. This showing is not high, but the police should be required to make it whenever the reasonableness of a no-knock entry is challenged.

The Franklin Supreme Court in *State v. Meskill* (1989) outlined the governing principles for determining whether an unannounced entry is appropriate.

First, when police seeking a search warrant have reason to believe that an unannounced entry will be required in order to successfully and safely execute the warrant, they must inform the issuing magistrate of the circumstances they believe justify the unannounced entry and obtain specific advance authorization for it.

Second, in order to obtain such authority, the police must make a strong showing of a reasonable suspicion that an announced entry will result in destruction of evidence or danger to the officers executing the warrant.

In this regard, the officer must do more than simply make a showing that drugs are

involved. In fact, we question whether an unannounced entry clause can ever be justified in a warrant to search a dwelling for drugs when there is no indication that the drugs are other than for personal, recreational use and where there is no averment of specific facts indicating that an unannounced entry is needed in order to safely and successfully execute the warrant.

However, if the affidavit contains a showing of necessity—e.g., a showing that the occupants are prepared to destroy evidence whenever the search warrant is executed—then the request for the unannounced entry clause should be granted.

The third governing principle is that even if police obtain advance judicial authorization for an unannounced entry into a dwelling, the police still should make a threshold reappraisal of the need to execute the warrant in this manner.

The fourth governing principle is that if police have no reason to seek advance authorization or if advance authorization is denied, the police still may make an unannounced entry to execute the warrant if facts arising at the threshold strongly indicate that an unannounced entry is necessary in order to safely or successfully execute the warrant.

Despite its articulation of these four governing principles, the Franklin Supreme Court previously permitted no-knock searches solely because a home is suspected to be an outlet for drug sales. *State v. Simpson* (1992)

(stating that a request for an unannounced entry should be granted if “the dwelling is being used as an outlet or a warehouse for a drug business”); *State v. Meskill* (1989) (affirming validity of a no-knock warrant where the affidavit included information that the residence was an outlet for drug sales).

However, after the United States Supreme Court’s decision in *Richards v. Wisconsin*, it is clear that Franklin may not have a blanket rule that drug outlets may automatically be subject to no-knock searches. In *Richards*, the Supreme Court struck down Wisconsin’s blanket rule permitting no-knock search warrants in felony drug cases. The Court noted that there were at least two problems with a blanket rule based on a “culture” surrounding a general category of criminal behavior. First, such a rule relies on an overgeneralization because not every case poses a safety threat or threat of evidence destruction. While a drug investigation frequently does pose special risks to officer safety and the preservation of evidence, not every drug investigation will pose these risks to a substantial degree. For example, a search could be conducted at a time when the only individuals present in a residence have no connection with the drug activity and thus will be unlikely to threaten officers or destroy evidence. Or the police could know that the drugs being searched for were of a type or in a location that made them impossible to destroy quickly. In those situations, the asserted governmental interests in preserving evidence and maintaining safety may not

outweigh the individual privacy interests intruded upon by a no-knock entry. Second, the reasons for the blanket rule may easily be applied to other types of crimes.

Here, the search warrant application and supporting affidavit stated that an unannounced entry was necessary “to prevent the loss, destruction or removal of the objects of the search (and) to protect the safety of the peace officers.” The reasons given to support this request were: (a) officers could not easily access the trailer home without being seen by the occupants; and (b) the applying officer was “aware that persons who traffic in controlled substances are often armed with firearms and other dangerous weapons and will use these weapons.”

The officer’s statement (that because of his experience he knew that the occupants would likely have and use weapons) was merely the officer’s general observation and not particularized to Emerald. The only particularized reason given for the no-knock search here was the fact that approaching officers could easily be seen by the home’s occupants. The search warrant also permitted execution at night, however, which would likely have minimized this problem. Information that Emerald may have been operating a drug outlet in her home is not a particularized reason demonstrating a safety threat to officers or a threat that evidence would be destroyed.

Even if there was insufficient evidence in the warrant application and supporting affidavit

to support a no-knock provision, the officers could have supported a no-knock execution of the warrant by showing that particularized circumstances at the time of execution required entrance without warning. Here, the state introduced no evidence to indicate that the circumstances at the time of execution required execution without knocking.

There were no particularized reasons in the affidavit requesting a warrant that indicate a no-knock provision was necessary in this case, and the state did not introduce any evidence that the facts at the time of execution required an unannounced entry. Because under *Richards* there cannot be a blanket rule permitting no-knock searches based solely on evidence that a home may be being used as an outlet for drug sales, the district court did not commit clear error by concluding that the no-knock provision violated Emerald’s constitutional rights. The search warrant application did not provide sufficient, particularized reasons for requesting a no-knock search.

Affirmed.

FILE

Steinberg & Son, Inc. v. Wye

Shelley, Polikoff and Wolfe
Attorneys at Law
3200 Brooklawn Boulevard
Rosslyn, Franklin 33135
(555) 213-1000

TO: Applicant
FROM: Steven Shelley
DATE: February 27, 2001
RE: *Jack Steinberg & Son, Inc. v. Wye*

Our client, a closely held corporation, Jack Steinberg & Son, Inc., is the plaintiff in a complex lawsuit concerning a contract between the corporation and Murray Wye, an engineering consultant retained to design and supervise the construction of a new plant for the corporation. The litigation has been acrimonious throughout the four years it has been going on. Wye misrepresented his qualifications as an engineer, and the project ended up with huge cost overruns.

The action was begun for our client by Purta & Paul (P & P), a law firm that had represented the corporation and its president, Jack Steinberg, from the time the business was started in 1988 until August 1999. P & P's only office is here in Rosslyn, and the firm has about 20 lawyers. Mr. Steinberg discharged P & P because he believed they committed malpractice on another matter. We were immediately retained and have represented Mr. Steinberg and his company ever since. The defendant in this case, Murray Wye, has been represented by the law firm of Doyle & Davis (D & D) since the inception of this action four years ago.

I learned about a month ago that Philip Fine, an associate at P & P during the entire time that firm represented our client, has left P & P and joined D & D as a partner. Mr. Steinberg remembers dealing with Fine in corporate business matters only. He doesn't remember ever talking to him about this litigation. Nevertheless, Mr. Steinberg is particularly aggrieved by the fact that a lawyer from P & P is now working for the law firm that is representing his adversary.

Our correspondence file contains the facts we know. I have attached some excerpts from the Franklin Rules of Professional Conduct, which are identical to the ABA's Model Rules, and the only Franklin case I could find decided under our Rules.

To assist me in determining whether to file a motion to disqualify D & D as counsel in this case, please draft a memorandum for me that analyzes the likelihood that such a motion would be successful. Be sure to give me the reasons for your conclusion. If you believe additional facts would assist us in our analysis, identify those facts and tell me why we need them.

Shelley, Polikoff and Wolfe

Attorneys at Law
3200 Brooklawn Boulevard
Rosslyn, Franklin 33135
(555) 213-1000

February 13, 2001

Ms. Dede Allen, Esq.
Doyle & Davis
Attorneys at Law
7603 Maple Avenue
Rosslyn, Franklin 33135

Dear Dede:

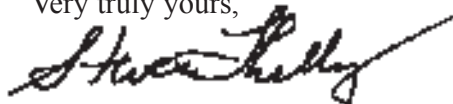
It has come to my attention that Philip Fine, formerly an associate at Purta & Paul, has, within the past several weeks, joined your firm as a partner. I think you already know that Purta & Paul served for a number of years as attorney for our clients, Jack Steinberg & Son, Inc., and its founder, Jack Steinberg. Among other matters that Purta & Paul handled for my client prior to being discharged was the original action that we have scheduled for trial against your client on June 4, 2001. This means, of course, that your continuing to represent Murray Wye, the defendant in *Jack Steinberg & Son, Inc. v. Wye* (Franklin District Court C.A. 97-1255), constitutes a conflict of interest.

Mr. Fine and Purta & Paul represented Jack Steinberg throughout the period during which Mr. Steinberg was organizing his business. Mr. Fine personally counseled Mr. Steinberg as to the form of the business and drafted and filed the articles of incorporation for Jack Steinberg and Son, Inc. Other lawyers in Purta & Paul represented the corporation in several real estate transactions, in all labor and employment matters, and in all litigation from 1988 until August 1999. As a consequence, Mr. Steinberg shared with Purta & Paul his confidences and secrets and those of the company. Although I realize that Mr. Fine specialized in transactional and corporate work, he is presumed to have acquired confidential information that he is required to protect.

My clients will not waive the conflict of interest. Moreover, they continue to assert all privileges regarding any communications with Purta & Paul and any information in the possession of Mr. Fine. We expect that you will immediately withdraw from your representation of Mr. Wye in this matter and that you will so advise the court. Furthermore, we ask that you assure us that you have no other clients whose interests are adverse to those of Mr. Steinberg or the corporation.

In the event that you choose not to comply with this demand, we intend to file a motion for disqualification with the court.

Very truly yours,



Steven Shelley
Attorney at Law

Doyle & Davis
Attorneys and Counselors at Law

7603 Maple Avenue
Rosslyn, Franklin 33135
(555) 213-2300

1010 Pennsylvania Avenue, N.W.
Washington, D.C. 20002
(202) 555-1010

555 Park Avenue
New York, N.Y 10020
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23 Embarcadero
San Francisco, CA 90001
(415) 200-7700

Dede Allen, Esq.
Managing Partner
Rosslyn Office

February 19, 2001

Steven Shelley, Esq.
Shelley, Polikoff and Wolfe
Attorneys at Law
3200 Brooklawn Boulevard
Rosslyn, Franklin 33135

Dear Steven:

This is in response to your letter of February 13, 2001, regarding the litigation between your clients, Jack Steinberg & Son, Inc., and Mr. Steinberg, and ours, Murray Wye. We were well aware of the fact that our newest partner, Philip Fine, worked for the firm that originally represented the Steinberg interests in this litigation. Consistent with the practice of this firm whenever new attorneys join us, we make careful inquiry regarding all conflicts of interest that may result from the affiliation.

Our routine practice, whenever we discover that an imputed conflict of interest has the potential to raise problems in any of the ongoing work of the firm, is to build an ethical wall between the new attorney and the rest of the firm. Even though Mr. Fine was not involved in the current litigation in any way during his previous employment, I want to assure you that we have protected the interests of your clients by isolating Mr. Fine from any involvement in the representation of Murray Wye. He did not bring any files relating to the Steinbergs or to the Steinberg Corporation with him nor has he shared with any member of this firm any confidential information he may have acquired during that representation.

For your information, I have attached the memorandum that I, as managing attorney of this office, sent to all personnel of this firm before Mr. Fine actually joined the firm. I trust this will reassure you as well as your client that nothing improper will occur.

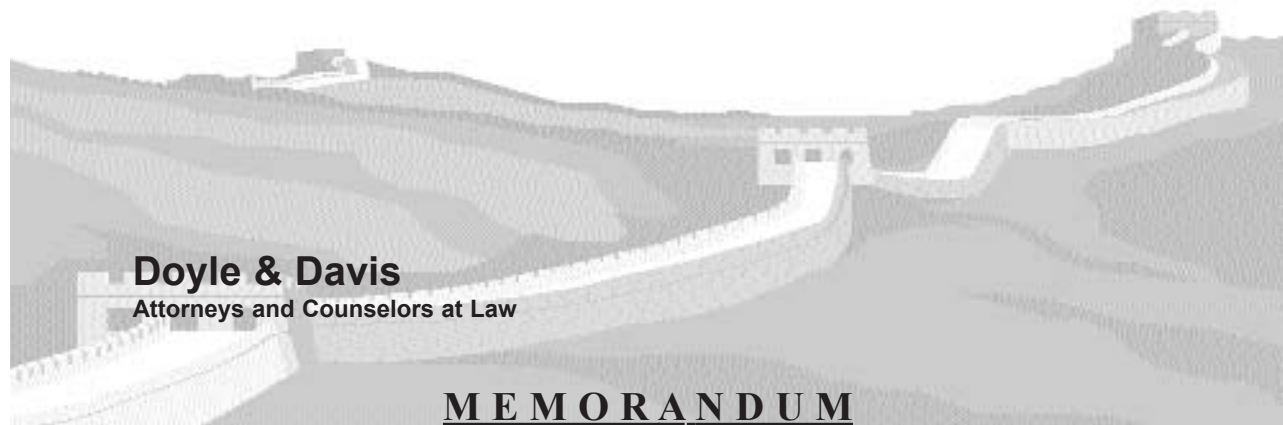
It would constitute an undue hardship for my client to find new counsel at this late stage of litigation that has been going on for more than four years. It would also, no doubt, inflict costs on your client and delay the resolution of the pending cases were new counsel to be brought in now. We will resist any attempt you might make to disqualify us.

Very truly yours,



Dede Allen
Attorney at Law

DA/lt
Enclosure



TO: All Attorneys and Staff
FROM: Dede Allen, Managing Partner
RE: Ethical Wall - *Jack Steinberg & Son, Inc. v. Wye*
DATE: January 2, 2001

This office represents Murray Wye, who is presently a defendant in litigation brought by Jack Steinberg & Son, Inc., and Jack Steinberg. The Steinberg interests were previously represented by Purta & Paul. Philip Fine, formerly an associate with Purta & Paul, will become a partner of this firm on January 29, 2001.

It is our intention to build an “ethical wall” between Mr. Fine and all matters with which he might have a conflict of interest. Therefore, with respect to this litigation or any other matter regarding the Steinberg interests and Mr. Wye, the following rules will apply:

1. Do not discuss this litigation or any matters that might relate in any way to Mr. Steinberg, to the Jack Steinberg and Son, Inc., entity, or to Mr. Wye with Mr. Fine or any member of the support staff assigned to work with him.
2. Do not request any information or documents from Mr. Fine regarding this matter.
3. All files regarding this litigation will remain in the locked file room to which Mr. Fine will have no access.
4. Philip Fine and all new employees will be advised of these procedures as well.

c: Philip Fine

LIBRARY

Steinberg & Son, Inc. v. Wye

Franklin Rules of Professional Conduct

RULE 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation

* * * *

RULE 1.7 Conflict of Interest: General Rule

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

* * * *

COMMENT:

* * * *

Conflict Charged by an Opposing Party

[15] Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. In litigation, a court may raise the question when there is reason to infer that the lawyer has neglected the responsibility Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment.

* * * *

RULE 1.9 Conflict of Interest: Former Client

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

- (1) whose interests are materially adverse to that person; and**
- (2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client consents after consultation.**

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 . . . would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as Rule 1.6 . . . would permit or require with respect to a client.

COMMENT:

* * * *

[2] The scope of a “matter” for purposes of this Rule may depend on the facts of a particular situation or transaction. The lawyer’s involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a wholly distinct problem of that type even though the subsequent representation involved a position adverse to the prior client. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

Lawyers Moving Between Firms

[3] When lawyers have been associated within a firm but then end their association, the question of whether a lawyer should undertake representation is more complicated. There are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many lawyers to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the

result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

[4] . . . One approach to the reconciliation of these competing principles has been to seek per se rules of disqualification. For example, it has been held that a partner in a law firm is conclusively presumed to have access to all confidences concerning all clients of the firm. Under this analysis, if a lawyer has been a partner in one law firm and then becomes a partner in another law firm, there may be a presumption that all confidences known by the partner in the first firm are known to all partners in the second firm. This presumption might properly be applied in some circumstances, especially where the client has been extensively represented, but may be unrealistic where the client was represented only for limited purposes. Furthermore, such a rigid rule exaggerates the difference between a partner and an associate in modern law firms.

* * * *

[6] A rule based on a functional analysis is more appropriate for determining the question of disqualification. Two functions are involved: preserving confidentiality and avoiding positions adverse to a client.

Confidentiality

[7] Preserving confidentiality is a question of access to information. Access to information, in turn, is essentially a question of fact in particular circumstances, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients.

[8] Application of paragraph (b) depends on a situation's particular facts. In such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

[9] Paragraph (b) operates to disqualify the lawyer only when the lawyer involved has actual knowledge of information protected by Rules 1.6 and 1.9(b). Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is

disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict. . . .

[10] Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rules 1.6 and 1.9.

Adverse Positions

[11] The second aspect of loyalty to a client is the lawyer's obligation to decline subsequent representations involving positions adverse to a former client arising in substantially related matters. This obligation requires abstention from adverse representation by the individual lawyer involved, but does not properly entail abstention of other lawyers through imputed disqualification. Hence, this aspect of the problem is governed by Rule 1.9(a). Thus, if a lawyer left one firm for another, the new affiliation would not preclude the firms involved from continuing to represent clients with adverse interests in the same or related matters, so long as the conditions of paragraphs (b) and (c) concerning confidentiality have been met.

* * * *

RULE 1.10 Imputed Disqualification: General Rule

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, . . . , 1.9 or . . .

* * * *

COMMENT:

* * * *

Principles of Imputed Disqualification

[6] The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a) operates only among the lawyers currently associated in a firm. . . .

* * * *

Reyes and RI Partners v. Grobard Builders, Inc.

Franklin Court of Appeal (1993)

This matter comes to us as a permissible interlocutory appeal from the district court. Defendants, Grobard Builders, Inc. (“GBI”), appeal the decision of the district court disqualifying the law firm that had been representing them, Quinto & Grady.

In 1985, plaintiff Thomas J. Reyes became a limited partner in a partnership (the “Partnership”) for the purpose of developing a hotel. The Partnership in turn contracted with Grobard Builders, Inc. to construct the hotel. The Partnership never built the project, however, and the parties have ever since been involved in a legal dispute regarding performance of the Partnership Agreement.

From April 1985 through September 1985, Reyes was, in some capacity, represented by Attorney Mary Stark of the law firm of Nance and Bernard. Stark left the Nance firm in 1986 and joined the law firm of Shust and Stevens, where she practiced for six years. Then Stark joined the law firm of Quinto & Grady (“Quinto”).

Quinto had represented GBI since 1988. Reyes and other partners (the “Plaintiff Partners”), represented by the law firm of Freed, Jonathan & Michaels, commenced a lawsuit in 1989 alleging that GBI breached the Partnership Agreement. Quinto, and specifically Attorney Wallace, a member of the Quinto firm, had represented defendants since the inception of the lawsuit.

Reyes became aware that Stark had joined Quinto on March 12, 1992. Quinto did not obtain Reyes’ consent to its representation against him, and Reyes demanded that Quinto withdraw from further representation on the basis of Stark’s past representation of him.

Before Stark joined Quinto, the firm performed a conflicts review. At that time, Stark did not disclose her past representation of Reyes. On March 13, 1992, Attorney Gary David of Freed, Jonathan & Michaels, representing Plaintiff Partners, telephoned Stark concerning the matter. Stark told David that she could not recall anything about her past representation of Reyes. In response to David’s concerns, Quinto took measures to insulate Stark from all contact with this case. As part of Quinto’s screening arrangement, all files containing GBI material were separated and kept locked, with access limited to Wallace and a paralegal. In addition, Stark was barred from participating in any discussions related to the merits of this case. Lastly, access codes to any information related to this case stored on electronic software were kept secret.

There are currently 185 lawyers in Quinto’s Franklin City office. Stark and Wallace work on different floors in different departments.

Reyes moved for disqualification of Quinto & Grady on the basis of Attorney Stark’s past

representation of him. The district court found in favor of Reyes, holding that Stark had a conflict of interest and that the conflict should be imputed to Quinto. GBI appeals.

We recognize, of course, that one party's interest in preserving confidential communications conflicts with the opposing party's interest in being represented by the counsel of its choice. Motions to disqualify counsel, moreover, should be resolved with extreme caution because they may be used abusively as a litigation tactic, when, for example, a movant is facing a formidable opponent. A successful movant may thus create both psychological hardship, by requiring an opponent to obtain and trust different counsel, and financial hardship, by requiring an opponent to incur additional fees while new counsel becomes familiar with the litigation.

The scope of Stark's representation, which was the basis for Reyes' motion, is disputed. Reyes alleges that Stark represented him personally with regard to the Partnership Agreement that he signed on May 31, 1985, the hotel project, and the Partnership's affairs. The Nance firm's file cataloguing the Reyes representation firm contains over thirty (30) separate items of written correspondence related to the hotel project. Except one, all are addressed to or from Stark.

Defendants argue that almost all of Stark's work involved a consulting agreement between Reyes and the Partnership. None of those matters is at issue in this case. No correspondence to or from Stark, they claim, makes any reference to the Partnership

Agreement at issue in this case.

The district court found that Stark entered an attorney-client relationship with Reyes in his personal capacity. Among other things, Reyes retained Stark to draft the Consulting Agreement executed by Reyes and the Partnership, review the Commitment and Development Agreements entered into by the franchisor, and review the one-page agreement signed by GBI, Nelson, and Reyes on January 24, 1985. This work is consistent with Reyes' obligations under the Partnership Agreement. Reyes and Stark, therefore, entered an attorney-client relationship. Pursuant to this relationship, Reyes submitted confidential information to Stark with a reasonable belief that she was representing him in his capacity as a limited partner.

Our finding that Stark entered an attorney-client relationship with one or more of the parties involved in the above-captioned matter is enough to satisfy the threshold inquiry. Stark, therefore, was subject to the ethical obligation of preserving confidential communications. Accordingly, Stark could not later use the confidential information she obtained from Reyes, and possibly the other partners, against them on behalf of another client.

The next question is whether Stark's prior representation is substantially related to Quinto's present representation of defendants. Under Franklin Rules of Professional Conduct Rule 1.9, the trial court must apply the substantial relationship test, which

requires a three-part inquiry. First, the court must factually reconstruct the scope of the prior legal representation. Second, it must determine whether it is reasonable to infer that the confidential information could have been given to a lawyer representing a client in the prior matters. It is not necessary to prove that the lawyer actually received useful confidential information, only that the lawyer could have. Third, the court must decide whether that information is relevant to the issues raised in the litigation pending against the former client.

The district court found that Quinto's present representation of defendants was substantially related to Stark's prior representation of Reyes and/or the Partnership. We agree. First, Reyes retained Stark to help him fulfill his obligations under the Partnership Agreement. In drafting the agreements between Reyes and the Partnership, Stark must have been aware of the goals and intentions of the partners in setting up the Partnership. Although Stark may not have been involved in negotiating and drafting the Partnership Agreement—the subject of this litigation—she was clearly privy to information concerning the partners' intentions and goals in entering the Partnership, as well as their performance under the Partnership Agreement.

As to the second prong, it is reasonable to infer that confidential information about the Partnership Agreement could have been given to Stark during her representation of Reyes. In fact, the record indicates that Stark extensively advised Reyes as to his perform-

ance under the Partnership Agreement. On this evidence, it is reasonable to infer that confidential information could have been given to a lawyer in Stark's former position as Reyes' attorney.

Third, the information obtained by Stark is relevant to the issues raised in the pending litigation. A simple reading of the complaint makes this clear. We therefore affirm the district court's finding that Quinto's present representation and Stark's former representation satisfy the three prongs of the substantial relationship test.

Because the two representations are substantially related, a presumption arises that the lawyer received confidential information during his or her prior representation. When a lawyer switches sides in a matter, the presumption of shared confidences is irrebuttable and thus disqualification is proper. See Franklin Rules of Prof. Conduct 1.9(a). However, where a lawyer moves from one firm to another, that lawyer or his or her new firm may represent an adversary of the client of his or her former firm in certain circumstances. In such a case, even if the two matters are substantially related, the lawyer and his or her new firm may rebut the presumption of shared confidences and avoid disqualification.

The presumption is rebutted if, for example, the lawyer whose change of employment created the disqualification issue was not actually privy to any of the confidential information that his or her prior law firm received from the party now seeking

disqualification of his or her present firm. Defendants did not rebut the presumption that Stark was privy to confidential information during her prior representation. They offered no affidavit from Stark, the court notes, stating that she did not receive confidential information. Stark did not sustain her burden of proving that she did not receive confidential information.

The lower court therefore properly disqualified Stark based on defendants' failure to rebut the presumption of shared confidences during her former representation. We also affirm the district court's ruling imputing Stark's conflict of interest to Quinto.

To avoid the firm's disqualification, Quinto must rebut the presumption of intra-firm sharing of confidences as to Stark's former representation. A targeted law firm can rebut the latter presumption by demonstrating that specific institutional mechanisms (e.g., ethical walls) had been employed to prevent the participation of the "tainted" lawyer in the matter in dispute and to screen the flow of any confidential information from the "tainted" lawyer to any other members of his or her present firm.

In this, we hold defendants have also failed. Quinto did make arrangements, the court notes, to screen Stark from the present litigation on March 13, 1992, by denying her access to all files containing GBI materials, restricting her access to any information kept on an electronic database, and banning all discussion of the case with her. The lower court also inferred some insulation of Stark

from the firm's size—185 lawyers in Franklin City. There, Wallace, the lawyer representing defendants, and Stark work on different floors and in different departments.

We find that, although Quinto set up an ethical wall, it was untimely. Screens must be in place when the potentially disqualifying event occurs. We find that Quinto should have been aware of a potential conflict of interest in its representation of defendants and set up an ethical wall on or before March 12, 1992, which is the date Stark joined the firm. The court finds, therefore, that defendants have not rebutted the presumption of intra-firm sharing because Quinto failed to screen Stark when they should have been aware of her conflict.

Defendants have not provided the type of clear and effective proof required to rebut the presumptions of shared confidences. Since any doubt as to the existence of an alleged conflict of interest must be resolved in favor of disqualification, Reyes must prevail.

Judgment affirmed.

FILE

*Consumer Protection v.
Bernhard's Appliances, Inc.*

Office of The Attorney General
State of Franklin
Consumer Protection Division

Benjamin C. Kelly, Attorney General

Shelly Frank, Deputy Attorney General
for Consumer Protection

M e m o r a n d u m

March 1, 2001

To: Applicant
From: Shelly Frank, Deputy Attorney General
Re: Bernhard's Appliances, Inc.

Twice within the past two years we have had conciliation conferences with executives at the corporate headquarters of Bernhard's Appliances, Inc. about their advertising tactics. Some of the newspaper and television ads they've run have crossed over the line and violated the Franklin Consumer Protection Act. Each time we've talked to them, they have given us oral assurances that they would police themselves more carefully, and each time they were okay for a while, but then they slipped back into noncompliance.

A couple of months ago, I ran across a Bernhard's ad in the Franklin City News that concerned me. It promised "free" airline tickets to customers who made significant purchases. I asked our Investigations Unit to conduct an investigation, and my concerns were confirmed.

I want to seek an injunction under § 402(A) of the Act to stop them once and for all. Using the facts developed by our investigators and an analysis of the Act and supporting case law, draft a brief that will persuade the court that Bernhard's travel promotion violates the Act and that we are entitled to an injunction as provided for in § 402(A) of the Act. In your brief,

- state specifically which sections of the Act are violated by Bernhard's promotion;
- explain why the promotion violates those sections of the Act; and
- specify what conduct we want the court to enjoin.

Follow the guidelines in the attached office memo regarding persuasive briefs. The Investigations Unit will prepare affidavits and the documentary evidence necessary to establish the relevant facts. You may assume that all necessary facts will be established by admissible evidence. After I've reviewed your brief, I will write the notice required under § 402(B) regarding relief, so don't concern yourself with forms of relief other than the injunction at this time.

**Office of The Attorney General
State of Franklin
Consumer Protection Division**

Benjamin C. Kelly, Attorney General

John Copper, Deputy Attorney General
for Consumer Protection

MEMORANDUM

September 8, 1995

TO: Attorneys
FROM: John Copper, Deputy Attorney General
RE: Persuasive Briefs and Memoranda

All persuasive briefs, including Briefs in Support of Motions (also called Memoranda of Points and Authorities), shall conform to the following guidelines.

All briefs shall include a Statement of Facts. The aim of the Statement of Facts is to persuade the tribunal that the facts support our client's position. The facts must be stated accurately; however, emphasis should be placed on the material facts that best support our client's position. Select carefully the facts that are pertinent to the legal arguments.

The office follows the practice of breaking the argument into its major components and writing carefully crafted subject headings that illustrate the arguments they cover. Avoid writing briefs that contain only a single broad argument heading. The argument heading should succinctly summarize the reasons the tribunal should take the position you are advocating. A heading should be a specific application of a rule of law to the facts of the case and not a bare legal or factual conclusion or a statement of an abstract principle. For example, improper: THE UNDERLYING FACTS ESTABLISH A VIOLATION OF THE FRANKLIN FAIR EMPLOYMENT PRACTICES ACT. Proper: BY FAILING TO PAY WAGES AT TIME AND ONE-HALF FOR HOURS WORKED IN EXCESS OF FORTY A WEEK, DEFENDANT VIOLATED SECTION 233 OF THE FRANKLIN FAIR EMPLOYMENT PRACTICES ACT.

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

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

FREE AIRFARE FOR TWO
TO THE BAHAMAS

**Buy any appliance over \$ 200 and you'll get a big gift (Round Trip
Airfare for two to the Bahamas)**

TICKETS MUST BE USED WITHIN ONE YEAR

Vacation premiums offered through Vacation Ventures, Inc., which is not affiliated with Bernhard's. Minimum hotel stay required. Applicable taxes apply. See store for details.

Office of The Attorney General
State of Franklin
Consumer Protection Division

Benjamin C. Kelly, Attorney General

John P. Ripka, Director
Investigations Unit

Memorandum

To: Shelly Frank, Deputy Attorney General for Consumer Protection

From: John P. Ripka, Director, Investigations Unit

Re: Report of Investigation of Bernhard's Appliances

Date: February 22, 2001

Dale Margon and Phillip Harter conducted the investigation in this matter. Bernhard's Appliances is a statewide chain of appliance stores that has been in business for fifteen years, but has expanded rapidly in the last five. They have gone from two stores, one in Franklin City (which was the original one) and a second in Jackson (just a hole in the wall started two years later), to eighteen outlets, four of which are in urban locations, with the rest in suburban settings, mostly in shopping malls. The business press has reported that they have been considering expanding out of state. The chain has effectively used very aggressive marketing techniques to attract a high volume of customers. Their prices tend to be in the range of large national chains and local competitors, but they succeed by having a very large selection of brands and models, advertising heavily, and devising gimmicks to bring lots of customers into their stores.

Bernhard's placed the ad you gave me in at least five newspapers around the state and also ran a related ad on television in the major markets in Franklin. The television version contained a visual disclaimer regarding the free airfare. The disclaimer, in fine print at the bottom of the screen, was shown for only a few seconds and was identical to the disclaimer in the print ad. Even the fastest speed reader, however, probably could not have finished reading this statement before it disappeared from view.

After consumers make a qualifying purchase and take delivery of the goods, they are given a Vacation Ventures, Inc. (VVI) brochure and airfare certificate. The airfare certificate is a Bernhard's computer printout that states, "This certificate entitles you to two free airline tickets from virtually anywhere in the U.S. to the Bahamas." The promotional brochure is a three-fold color pamphlet describing the vacation package to the Bahamas.

The brochure contains a page of terms and conditions and a “registration request form” (the RRF). The terms and conditions list the costs for the twelve-day minimum hotel accommodations, ranging from \$85 to \$190 per night, double occupancy, and require that the non-refundable \$15-per-person processing fee be mailed in with the RRF. Other terms and conditions include: (1) the RRF must be completed and received by VVI at least 45 days in advance of the earliest requested date of departure; (2) the RRF must include three valid choices of departure dates; (3) the balance of the vacation cost must be paid at least 45 days prior to departure; and (4) certain “black-out” dates apply. When a consumer sends in the completed RRF and processing fee, VVI provides the consumer with a “confirmation of availability.” The confirmation sets forth the cost of the vacation and specifies the down payment and the terms for payment of the balance.

Bernhard’s purchased 21,000 brochures from VVI at \$5.35 apiece. We could not discover how many brochures were distributed, but so far VVI has received 128 RRFs from consumers as a result of the ad. Of the 128, only eleven consumers actually took vacations offered through VVI.

We have interviewed seven consumers to date. A summary of each interview follows.

1. Errol Levelle, age 71, said that he bought his washing machine at Bernhard’s because, in addition to the fact that he needed a new washer, he had heard about the free airfare offer on television. To him, it “sounded like a good deal.” He was not given a copy of the VVI brochure until after he made his purchase, and until then, he did not know about the minimum hotel stay requirement. Once Mr. Levelle reviewed the brochure, he made cost calculations regarding the VVI offer and compared them to vacation prices he saw listed in newspapers. He concluded, “I could safely disregard Bernhard’s offer because I could get the same transportation far cheaper through regular reservations.” He therefore decided not to send in the RRF.

2. David Biggs said that he bought a television set at Bernhard’s because of the airfare offer he had seen advertised on television. He did not recall seeing a disclaimer on the TV screen. He actually took a trip to the Bahamas and stayed 12 nights at a hotel. He discovered while there that he could have saved \$300 on the hotel cost by booking directly with the hotel, more than the cost of the “free” airfare.

3. Michael Shiffler also made his purchase at Bernhard’s based on a television ad publicizing its “free” airfare. He said that when he requested information in advance of his purchase, the salesperson told him that he would not receive the travel certificate until after he made his purchase. He initially thought that Bernhard’s would give him “two tickets at the store.” After

making the required purchase and receiving the VVI brochure, he realized that he would have to pay for hotel stays “at certain places of [VVI’s] choice for a set number of days.”

4. Lorraine Johnston had seen the Bernhard’s television and newspaper advertisements. Her husband wanted to go to Bernhard’s to buy a VCR, and she agreed because of the airfare offer. She asked a Bernhard’s salesperson about any “gimmicks” involved in the offer and was told that there were none and that she would get written information about the promotion upon delivery of her merchandise. Ms. Johnston said that she had not seen the “minimum hotel stay required” in the advertisements. After she made her purchase, she did not send in the RRF because of the hotel prices.

5. Sasha McCoy purchased a clothes dryer at Bernhard’s because she read of Bernhard’s airfare promotion in a newspaper ad. She decided to send in the RRF, along with the processing fee. After receiving the confirmation from VVI, she decided not to take the trip because (1) the confirmation required her to respond with a \$300 deposit; (2) any cancellation would result in forfeiture of the deposit; and (3) among her requested dates of travel and all of the blackout days, she had only one date for travel.

6. Houd Zidan was a walk-in customer who had not seen or read the ad. After a salesperson told him about the sales promotion, Mr. Zidan bought a CD player. He sent in an RRF and was told by VVI that he could not get any of the travel dates he requested because they were “blacked-out,” but that, if he were willing to pay extra, the dates could be secured for him. Moreover, according to Mr. Zidan, he could get “much more” through other travel agents he had contacted for the price charged by VVI.

7. Karen Ingersoll, Ph.D., said she saw Bernhard’s ad on TV. She recalled that the ad indicated that free airfare for two was available with a minimum purchase. Because she was already planning to buy an air conditioner, she went to the store in Mayfield to get the details of the offer. She was given the written brochure and the salesperson explained the offer. When she asked him for the details, he explained that the airfare would be granted if she bought a minimum stay at a choice of hotels through a travel agency. Through a travel agent, she had previously priced a vacation package to travel to the Bahamas at \$2,400. The airline tickets alone at that time cost \$740 for two. When she computed the cost of the Vacation Ventures package, she realized it would cost only \$2,100, saving her \$300. Therefore, she decided to purchase the air conditioner at Bernhard’s rather than somewhere else. Dr. Ingersoll also stated that she enjoyed her vacation through VVI and that she “never felt misled.”

LIBRARY

*Consumer Protection v.
Bernhard's Appliances, Inc.*

Franklin Consumer Protection Act

SUBTITLE 3. UNFAIR OR DECEPTIVE TRADE PRACTICES

§ 301. Unfair or deceptive trade practices defined. Unfair or deceptive trade practices include any

(A) False, falsely disparaging, or misleading oral or written statement, visual description, or other representation of any kind which has the capacity, tendency, or effect of deceiving or misleading consumers;

(B) Failure to state a material fact if the failure deceives or tends to deceive;

(C) Deception, fraud, false pretense, misrepresentation, or knowing concealment, suppression, or omission of any material fact with the intent that a consumer rely on the same in connection with the promotion or sale of any consumer goods, consumer realty, or consumer service.

§ 302. Prohibited practices. A person may not engage in any unfair or deceptive trade practice in

(A) The sale, lease, rental, loan, or bailment of any consumer goods, consumer realty, or consumer services;

(B) The offer for sale, lease, rental, loan, or bailment of consumer goods, consumer realty, or consumer services.

* * * *

SUBTITLE 4. ENFORCEMENT AND PENALTIES

§ 401. Conciliation.

(A) **General.** If the Division determines that there are reasonable grounds to believe that a violation has occurred, it may attempt to conciliate the matter by methods of conference and persuasion with all interested parties and their representatives.

(B) **Assurance, agreement, or order may include certain stipulations or conditions.**

(1) A written assurance of discontinuance, settlement agreement, or any cease and desist order provided for by this subtitle may include a stipulation or condition for

(a) The payment by the violator or alleged violator of the costs of investigation by the Division; and

(b) The restitution by the violator or alleged violator to the consumer of money, property, or any other thing received from the consumer in connection with a violation or alleged violation of this title.

(2) These stipulations and conditions do not preclude the Division from using any other stipulation, condition, or remedy necessary to correct a violation of this title.

§ 402. Injunction.

(A) Attorney General may seek injunction. The Attorney General may seek an injunction to prohibit a person who has engaged or is engaging in a violation of this title from continuing or engaging in the violation. This injunction may include any relief necessary to

- (1) Prevent any prohibited practice;
- (2) Restore any money or real or personal property acquired by means of any prohibited practice.

(B) Notice of relief sought. At least seven days before the action for an injunction is filed, the Attorney General shall serve notice on the alleged violator of the general relief sought.

§ 403. Civil penalty—Merchants.

(A) First violation. A merchant who engages in a violation of this title is subject to a fine of not more than \$1,000 for each violation.

(B) Subsequent violation. A merchant who has been found to have engaged in a violation of this title and who subsequently repeats the same violation is subject to a fine of not more than \$5,000 for each subsequent violation.

(C) Factors affecting penalty amount. The Division shall consider the following in setting the amount of the penalty imposed in an administrative proceeding:

- (1) The severity of the violation;
- (2) The good faith of the violator;
- (3) Any history of prior violations; and
- (4) Whether the issuance of a cease and desist order, including restitution, is sufficient for the protection of consumers.

§ 404. Criminal penalties.

Any person who willfully violates any provision of this title is guilty of a misdemeanor and, unless another criminal penalty is specifically provided elsewhere, on conviction is subject to a fine not exceeding \$10,000 or imprisonment not exceeding one year or both, in addition to any civil penalties.

Consumer Protection Division v. Reliable Transmission Systems, Inc.

Franklin Court of Appeal (1992)

Reliable Transmission Systems, Inc. (“Reliable”) owns many automotive transmission repair facilities in Franklin. In 1988, the Consumer Protection Division of the Franklin Attorney General’s Office filed a complaint against Reliable in the District Court alleging that Reliable engaged in unfair and deceptive trade practices under the Franklin Consumer Protection Act (“CPA”). The State asserted that Reliable was selling unnecessary internal transmission inspections to its customers by misleading them into believing that such inspections were required before an estimate of the repair costs could be made.

The facts show that there are invariably two prices that are known in advance: the minimum price is the cost of time and materials that must be expended (called a “soft parts” overhaul); the maximum price is the cost of a completely rebuilt or exchanged transmission. These can be quoted reliably without the need for a costly internal inspection of the transmission, and Reliable withheld this information from its customers.

The trial court judge held that Reliable’s withholding of diagnostic and price information from consumers constituted a deceptive practice, imposed a \$100,000 civil penalty, and issued a permanent injunction requiring Reliable to “no longer withhold from consumers material price and diagnostic

information immediately after performance of any road test and external transmission inspection and before the consumer commits to paying for an internal transmission inspection.”

The trial judge found that by withholding diagnostic and price information from consumers before the consumers commit to an internal transmission inspection, Reliable was withholding information that was material to consumers and that the practice was a deceptive practice under § 301(B) of the CPA and in violation of § 302 of the CPA.

Citing *Golt v. Phillips Brothers* (1991), the trial court stated that: “An omission is considered material if a significant number of unsophisticated consumers would attach importance to the information in determining a choice of action. For consumer protection purposes, the meaning of any statement or representation is determined not only by what is explicitly stated, but also by what is reasonably implied.”

We agree with the trial court in this case that the withholding of diagnostic information is a violation of the CPA, because a consumer would attach importance to learning that an overhaul is needed, prior to committing to an internal inspection that is marketed as necessary to determine that very fact. Omission of this information is a deceptive

business practice because when a transmission repairperson externally inspects a vehicle's transmission a diagnosis always occurs.

Reliable may not like quoting prices to its customers but information about potential cost is also material. Failure to mention the known minimum and maximum prices is a deceptive practice. The projected cost of repair is of vital concern in order for the consumer to make an informed choice as to whether to proceed with the repair. We hold that price information must be given consistent with the diagnosis, and an injunction was proper.

Reliable contests the judge's exercise of discretion in assessing a civil penalty when injunctive relief would cure the situation. We disagree. The CPA provides that, for a first violation, a "merchant who engages in a violation of this title is subject to a [civil] fine of not more than \$1,000 for each violation." § 403(A). A civil penalty of \$100,000 was entered against Reliable. The trial court record reflects that, based on the total number of transmission repair customers, Reliable committed at least 100 violations of the CPA within the statute of limitations period. The trial court was justified in imposing the penalty. The CPA confers broad discretion on the courts and the Consumer Protection Division in the assessment of a civil penalty.

Judgment affirmed.

Consumer Protection Division v. Opal Realty, Inc.

Franklin Court of Appeal (1998)

Opal Realty, Inc. (“Opal”) owns a series of luxury rental apartment buildings in Franklin. The buildings are designed to appeal to people with busy lifestyles who do not want the responsibilities of property ownership yet seek the amenities of high-priced homes. The kitchens have top-of-the-line appliances, granite counters, and tile floors. The bathrooms are equipped with jacuzzis and separate showers. Dressing rooms and extensive closet space are provided. Many units have balconies. Each of Opal’s buildings has a reception room and a landscaped garden/patio area with benches and fountains, tennis courts, and a health club. Opal residents typically pay between \$200 to \$500 per month for health club memberships, depending on the facilities to which the resident has access. In addition to the monthly membership fees, residents pay hourly rates for court time and rental fees for the use of equipment. In May 1996, Opal opened its fifth apartment building, the Oakton Opal. Rents at the Oakton Opal, which has 500 units, range from \$1,500 to \$3,000 per month. Leases are available for one or two years.

To promote the opening of the Oakton facility, Opal ran advertisements from May through October in the Oakton Times offering new tenants a “free three-month regular membership” in its health club. The club includes an indoor pool, two hot tubs, an aer-

obics room, an exercise equipment room, a free weights room, an indoor track, squash and racquetball courts, and a juice bar. Opal’s ad did not specify membership levels, prices, or additional fees. At the bottom of the ad was the statement, “Information about specific membership terms available at rental office.”

When prospective tenants indicated they wished to sign a lease, they were given a brochure explaining the terms of club membership, which included an application form. They also got a “Free Membership Certificate” (to be sent in with the health club application) which stated that, upon the signing of a lease, the tenant would be entitled to a waiver of the “regular membership fee” for the health club for one person for three months.

There are four membership levels, ranging from “basic” to “deluxe,” but none is called a “regular” membership. When tenants sent in their certificates with their applications on which they indicated the desired membership level, they were enrolled at the “basic” level, which includes only limited use of the facilities. If they requested a higher level, they were informed that they needed to pay the additional cost. The evidence shows that those additional costs averaged \$300 per tenant.

The Consumer Protection Division (the “Division”) of the Franklin Attorney General’s Office filed a complaint alleging that the ads violated §§ 301 and 302 of the Franklin Consumer Protection Act (“CPA”)¹ and seeking to restrain Opal from advertising and providing health club membership certificates to consumers in the course of renting property when the advertisements misrepresent that they provide free memberships, fail to disclose the cost and terms and conditions of redeeming the certificates, and constitute an unlawful prize promotion. The Division also sought restitution for injured consumers. During the District Court hearing, the Division called five consumer witnesses, all of whom testified that they had been attracted by the free health club membership ad, that when they saw the brochure they thought they could choose the membership level that best suited them, and that excellent exercise facilities were important to their decision to choose the Oakton Opal.

The Court held that Opal’s ads contained misleading representations and omissions of material facts as defined in CPA §§ 301(A), (B), (C) and prohibited by § 302. The Court then issued an injunction and a General Restitution Order. The Order: (1) prohibited Opal from using advertising that had the

¹ The sections of the CPA address distinct aspects of the law: § 301(A) deals with prohibited affirmative statements; § 301(B) deals with misleading omissions; § 301(C) introduces the intent-to-induce reliance element; § 302 prohibits the practices described in § 301.

capacity to deceive or that failed to state a material fact; and (2) required Opal to ensure that its advertisements were non-deceptive by, *inter alia*, disclosing statements “clearly and conspicuously,” placing all statements relating to a particular matter “reasonably adjacent to each other,” and not making ambiguous statements. The Order also provided restitution for eligible consumers. Opal appeals the decision of the District Court.

The purpose of the CPA was to take strong protective and preventive steps to investigate unlawful consumer practices, to assist the public in obtaining relief from these practices, and to prevent these practices from occurring in Franklin.

The test to be applied is the “total impression” test. Under that test, the tendency of advertising to deceive must be judged by viewing it as a whole, without emphasizing isolated words or phrases apart from their context. Section 301(B) defines an unfair or deceptive trade practice to include omitting a material fact if the omission tends to deceive. An omission is material if a significant number of unsophisticated consumers would attach importance to the information in determining a choice of action. Plaintiff has to show only that the omitted information would influence individuals in making their choices, not that “but for” the deception individuals would not have made their decisions. Moreover, the measure for judging the defendants’ actions is the purchasing deci-

sion expected of an unsophisticated consumer.

There was substantial evidence that the total impression produced by Opal's ads resulted in deception because consumers were likely to have been misled. Several consumers who had seen the ads anticipated that, upon signing their leases, Opal would give them three months of a full membership at the health club, not partial access to facilities. The limited disclaimer in the ad did not inform them otherwise.

The District Court also correctly applied the materiality element when it stated that "it is material to any consumer that an offer of a health club membership is conditioned upon the payment of \$300 per month more than the consumer expected to pay." There was substantial evidence that the lack of disclosure about the details of the offer was material. Several consumers testified that they had seen the free health club offer and decided to rent at the Opal because of the benefit. They also testified that they learned of the details only after they had signed their leases. Whether the ad was the sole reason for a consumer's rental decision is irrelevant.

The District Court interpreted § 301(C)'s definition of deceptive trade practices to require that Opal must have intended only that consumers rely on its misrepresentations or its material omissions. The Division did not need to show that Opal intended to make

a misrepresentation or a material omission. Opal clearly sought consumer reliance.

Opal argues that the District Court's Order is too broad, claiming that the Legislature has empowered the Court to require the violator to cease and desist from the violation but not to forbid the violator from engaging in other violations. We disagree. Under CPA § 402(A), the District Court has the power to stop Opal from engaging in unfair and deceptive trade practices now and to prohibit Opal from engaging in unfair and deceptive trade practices in the future.

Finally, we reject Opal's claim that the Consumer Protection Division failed to prove consumer reliance. Actual proof of reliance is not required to prove a violation of § 301(A) or (B). However, actual proof of consumer reliance on the false impression created by Opal's advertisement is required to make out a violation of § 301(C). A consumer testifying that he or she relied on the false impression of the Opal advertisement, absent any contrary evidence, is sufficient to prove reliance for purposes of § 301(A). In the instant case, the Court properly allowed eligible consumers to prevail based on their testimony that they relied on the misrepresentations in the Opal advertisement. No more is required.

Affirmed.

POINT SHEET

State v. Palm

State v. Palm
DRAFTERS' POINT SHEET

In this criminal procedure performance test, the applicants are defense counsel for Claude Palm, an alleged drug dealer. Applicants are asked to draft a persuasive brief in support of a motion to suppress physical evidence. The motion is in the File. The File also contains a memorandum from the partner, an office memorandum on writing persuasive briefs, excerpts from the interviews of the defendant and his neighbor, an application for a search warrant, and a search warrant. The Library contains sections of the Franklin Code of Criminal Procedure, and a case involving the constitutionality of no-knock searches.

Claude Palm is charged with possession of cocaine with intent to sell and possession of marijuana with intent to sell. Pursuant to a search warrant that authorized a no-knock entry, the police entered the defendant's house without knocking or announcing their authority or purpose. During the search, police found cocaine, marijuana, drug paraphernalia, and a police radio. The strength of the prosecution's case depends upon whether the fruits of the police search can be admitted as evidence at trial.

Defendant's motion to suppress is made on the three grounds specified in the motion itself: (1) The affidavit upon which the search warrant is based fails to state facts sufficient to establish a reasonable suspicion that the evidence would be destroyed without a no-knock entry; (2) The affidavit fails to state facts sufficient to establish a reasonable suspicion that the officers would be endangered without a no-knock entry; and, (3) No facts arose at the time the police executed the search warrant and entered the house that created a reasonable suspicion that officers would be endangered or evidence destroyed without a no-knock entry. Thus, the applicants should have no trouble identifying the three legal theories they are supposed to discuss.

The following points are all the ones the applicants might cover in their briefs. They can, of course, receive passing or even excellent grades without covering all of them.

1. General format and organization. Applicants are to follow the instructions in the memorandum from the partner and the Office Memorandum on Persuasive Briefs.

- Applicants are to write a brief that is persuasive; writing an objective memorandum (i.e., on-the-one-hand, on-the-other hand approach) would not be responsive to the instruction.

- The office memorandum gives applicants the format for the brief, including how to present the statement of facts and the proper use of argument headings. It also directs that arguments analyze applicable legal authority and persuasively discuss how the material facts and law support the positions taken. Graders should be looking for well-crafted headings and ensuing arguments that support and follow logically from the headings.
- In better answers, the product will look like a brief one would expect to see filed by an attorney.

2. Persuasive brief.

- The statement of facts should inform the court how the search came about. The facts must be stated accurately, but with an emphasis on those that best support the client's position.
- Statement of facts: The following facts might be included in the applicants' briefs, and one would expect that these facts would be used later to support the arguments that the facts asserted in the affidavit for the search warrant and the facts as they appeared at the time of the search were insufficient to justify the no-knock entry into the defendant's home.
 - A police informant told Detective Patrick Crawford that defendant Claude Palm was a drug dealer and gang member.
 - On November 28, the informant made a "controlled buy" of some cocaine at Palm's home. The informant reported having been led past the bedroom, at the front of the house, to the kitchen, at the back of the house.
 - The informant said he saw a large amount of cocaine on a scale on the counter next to the kitchen sink, a trash bag containing marijuana in the bathroom next to the kitchen, and a pistol in an open drawer in the kitchen.
 - The informant also claimed to have heard in another room a dog, which Palm allegedly identified as a pit bull.
 - The informant also alleged that Palm told him he had a police scanner.
 - The affidavit asserts Detective Crawford's opinion that drug dealers and gang members keep firearms and dogs to protect themselves and that "sudden entry" is necessary to prevent evidence being destroyed, guns being

drawn, or suspects from escaping.

- On November 29, at about 6:00 a.m., six police officers dressed in full riot gear arrived at Palm's home on Pickford Street while Palm was asleep in his bedroom off the front porch. It was quiet and dark.
- The police did not hear a dog.
- Two of the police officers went to the back of the house and the rest of them smashed down the front door of Palm's home with a battering ram.
- Before breaking down the door, the police did not knock or announce their authority or purpose.
- The police charged inside, guns drawn, and yelled, "Get up! Beckley police. Put your hands up."
- The police refused to let Palm put on any clothes until they searched his pants pockets. They found nothing.
- During the search, police found cocaine above a ceiling tile in the bathroom, marijuana in the freezer, a portable scale, razor blades, \$417 in cash, plastic bags, and a police radio scanner.
- Although Palm sometimes keeps his brother's dog at the house, Palm does not own a dog. There was no dog at Palm's house the day the police broke down the door. Although the informant said he heard a dog, no one has seen a dog at Palm's home.
- During the search no gun was found on Palm or in his home.
- Argument: The instruction from the partner tells applicants to draft a persuasive brief in support of the three grounds asserted in the motion to suppress. Therefore, the brief should contain at least three argument headings, one dealing with each of the three grounds. Applicants should not simply repeat the three grounds in the motion but, rather, they should adapt them to the facts. Examples follow:
 - I. THE FACTS RECITED IN THE AFFIDAVIT DO NOT MAKE THE REQUISITE STRONG SHOWING NEEDED TO SUPPORT A NO-KNOCK ENTRY ON THE GROUND THAT THERE WAS A RISK THAT THE EVIDENCE WOULD BE DESTROYED IF THE OFFICERS ANNOUNCED THEIR PRESENCE AND PURPOSE.

- The general law involving protections against unreasonable search and seizure should be recited, probably at the beginning of the first argument. This would include Franklin Code of Criminal Procedure Section 2B(1) and the Fourth Amendment.
- An unannounced entry may be reasonable where officers have a reasonable suspicion that knocking and announcing their presence would inhibit the effective investigation of the crime by allowing the destruction of evidence. *Wilson; Richards*. But such an entry is *presumptively* unreasonable. *Wilson*.
- In order to obtain a no-knock search warrant, police must make a strong showing of necessity which, based on the facts, they have failed to do.
 - The mere fact that drugs are involved does not justify a no-knock entry. *Richards*.
- Palm was sleeping in his bedroom at the *front* of the house, just off the front porch.
- The drugs were found in the kitchen and bathroom at the *back* of the house.
 - It is not likely that Palm could have gotten to the back of the house to destroy the drugs in time to avoid seizure of the drugs.
- The quantities of drugs were sufficiently large that it would not have been possible to destroy them before the entry.
 - Moreover, the drugs were stashed in places (the ceiling and the freezer) inconvenient for quick access.
- It is unlikely that Palm's police scanner was turned on at 6 a.m. or that, if it was on, it would have awakened and alerted him.
 - In any event, the police could have avoided talk about the search on their radios.
- Two officers were at the back of the house, thus ensuring that no one would exit that way with the evidence.

II. THE FACTS STATED IN THE AFFIDAVIT FAIL TO ESTABLISH A REASONABLE SUSPICION, BASED ON PARTICULARIZED REASONS, THAT AN ANNOUNCED ENTRY WOULD BE DANGEROUS TO THE OFFICERS INVOLVED.

- An unannounced entry may be reasonable where officers have a reasonable suspicion that knocking and announcing their presence would be dangerous. *Wilson, Richards*. However, the no-knock warrant must be based upon particularized reasons why the danger is present, not merely upon stereotypical generalizations.
- The law requires an *actual showing* that Palm was likely to use force to repel the police. *Richards*.
- The affidavit recites the affiant's general experiences in drug cases.
 - However, it lacks the specificity required, i.e., that Palm is likely to use violence to avoid arrest.
 - In addition to the fact that no gun was found, there is no reason to believe that Palm would have used a gun against the police.
 - Palm's alleged gang membership is not necessarily evidence of violent propensities.
- The fear that there might have been a guard dog in Palm's house does not satisfy the requirement for a particularized showing.
 - In fact, if there had been a dog (which there wasn't), a sudden entry would likely have provoked an attack by the dog, posing an even greater danger to the officers.
- Moreover, the officers were decked out in riot gear and were presumably well-protected from chance of injury.

III. EVEN IF THE WARRANT WAS VALID, THE NO-KNOCK ENTRY WAS UNREASONABLE BECAUSE THE REQUISITE THRESHOLD REAPPRAISAL WOULD HAVE LED TO THE CONCLUSION THAT AN UNANNOUNCED ENTRY WAS UNNECESSARY.

- Under Franklin Code of Criminal Procedure Section 2B(4), a search or seizure with a warrant may be unreasonable if the method of execution of the warrant violates federal or state constitutional standards.
- Under the Fourth Amendment, even if police obtain advance judicial authorization for an unannounced entry into a dwelling, they should still make a threshold reappraisal of the need to execute the warrant in this manner. *Meskill*.

- Had the police made a fresh determination, they would have concluded that the no-knock entry was not necessary.
 - The house was quiet and dark when police arrived because Palm was asleep.
 - No dog barked or appeared. Therefore, there was no evidence that a lack of immediate surprise would have compromised the safety of the officers or the preservation of the evidence.
 - The police knew from their informant's description that the bedroom was at the front of the house and that the drugs were kept at the rear of the house. Thus, there was little danger of destruction of evidence.

POINT SHEET

Steinberg & Son, Inc. v. Wye

Steinberg & Son, Inc. v. Wye
DRAFTERS' POINT SHEET

This performance test item requires the applicants to prepare an objective analysis of an ethics issue arising under the Franklin Rules of Professional Conduct, which are identical to the ABA's Model Rules. An attorney formerly employed at a law firm that represented the plaintiff in a pending lawsuit has become a partner at the firm that represents the defendant in the same lawsuit. The applicants are asked to evaluate whether a motion to disqualify the latter firm will be likely to succeed and to identify and explain the necessity for any additional facts that might help in the analysis.

The firm of Shelley, Polikoff & Wolfe has recently undertaken the representation of Jack Steinberg and his closely held corporation, Jack Steinberg and Son, Inc. (JSS), in a lawsuit against Murray Wye. The suit, *JSS v. Wye*, has been pending for four years. Wye has continuously been represented by Doyle & Davis (D & D).

Until 18 months ago, Steinberg and JSS were represented by Purta & Paul (P & P), a law firm where Philip Fine was employed as an associate. About a month ago, Fine joined D & D as a partner.

The facts we know from the file are as follows:

- Steinberg started business in 1988;
- Until 18 months ago, he and his corporation were represented generally and continuously by P & P, a firm of about 20 lawyers with its only office in Rosslyn, Franklin;
- The suit against Wye was filed about four years ago;
- Fine was an associate at P & P throughout the period, and in 1988 he personally counseled Jack Steinberg regarding the formation of JSS;
- Fine was a transactional and corporate attorney;
- Other attorneys at P & P represented JSS in real estate transactions, labor and employment matters, and litigation;
- About a month ago, Fine joined D & D as a partner;
- Judging from its letterhead, D & D is a large firm with multiple offices;

- A couple of weeks before Fine actually joined the firm, the managing partner of D & D sent to all staff and attorneys an “ethical wall” memo expressing an intent to isolate Fine from any involvement in D & D’s representation of Wye.

The Library contains excerpts from the Franklin Rules of Professional Conduct and accompanying comments, not all of which are relevant. There is also a case from the Franklin District Court which deals with the subject matter but which is distinguishable from the situation at hand.

Although it is possible for applicants to come out either way, the most plausible result in the present case is that a motion to disqualify D & D will not succeed.

The following analysis covers all the points intended by the drafters. Applicants need not cover them all in order to receive passing or even excellent grades.

1. In General: The ultimate question is whether the firm of D & D should be disqualified because Fine is now a partner in that firm. The inquiry proceeds as follows:

- As an associate at P & P, Fine represented Steinberg in corporate matters;
- In that capacity, Fine acquired information that he is required to keep confidential;
- There is a conclusive presumption that a lawyer who has personally switched sides in a matter is disqualified. However, if the attorney can prove that he has not personally switched sides and if his presumptive disqualification comes only by way of imputation, he can rebut the presumption by showing that he was not privy to confidential information.
- Because P & P represented Steinberg and JSS generally (i.e., as to all legal matters) and was a relatively small firm, there is an argument (which would be stronger if Fine had been a partner at P & P) that Fine is presumed to possess, by imputation, all the information that P & P possessed about Steinberg;
- Moreover, because of the attorney-client relationship that existed between Steinberg and P & P, Steinberg need not prove that Fine actually received confidential information about the suit against Wye; it is enough that Fine *could have*;

- Since the “matter” at Fine’s old firm is substantially related to the “matter” being handled at his new firm (indeed, it is the *same* matter), Fine, as an individual attorney, would probably have a hard time overcoming the presumption of imputation and would probably be disqualified from doing any work on the Wye matter as a partner at D & D.
- The question, however, is not whether Fine is disqualified but, rather, whether D & D should be.
- The answer to that question turns on two points:
 - The presumption that Fine obtained, by imputation from P & P, confidential information concerning the Wye litigation can be rebutted by an affirmative showing that he was not privy to any such information. If that showing is made, then there is nothing to impute from Fine to D & D, his new firm, and D & D should not be disqualified. In light of Fine’s prior personal representation of Steinberg and JSS, it would be a stretch to make such a showing.
 - However, even if Fine is *personally* disqualified by imputation because of his tenure at P & P, his new firm can rebut the presumption that Fine as a partner is deemed to share that information with the D & D partners by showing that a timely, effective ethical wall has been established to prevent the sharing of such information and to isolate Fine from access to or involvement in the Wye litigation.

2. Points to be covered: There are some overarching issues that applicants should deal with somewhere in their analyses:

- They should recognize the admonition, stated more than once in the materials, that motions to disqualify attorneys and firms must be “resolved with extreme caution” to avoid abuse by the movant and hardship on the other party.
- They should recognize the differences between moving to disqualify an individual attorney because that attorney either has or is presumed to have confidential information about the common client, and moving to disqualify an entire firm of attorneys on the ground that the knowledge of the targeted attorney is imputed to the members of the new firm.

- They should recognize, as stated in some of the comments to the Rules of Professional Conduct (especially comments [3] and [4] to Rule 1.9) that the Rules need to be interpreted to accommodate the increasing tendency of lawyers to move from firm to firm several times during their careers.

3. Issues related to Fine’s association with P & P: Part of the analysis is to determine Fine’s relationships while he was at P & P.

- It is clear that Steinberg and JSS had an attorney-client relationship with Fine. Fine actually provided legal services to Steinberg regarding the organization of his business. Thus, Fine acquired *some* information from Steinberg as to which Fine had a duty to maintain confidentiality. (Rule 1.6.)
- Moreover, the attorney-client relationship between P & P and the Steinberg interests was imputed to Fine. It is therefore possible to argue that, by imputation, Fine possesses all the information imparted to P & P by Steinberg throughout the period of P & P’s representation.
 - Comment [4] to Rule 1.9 raises the question whether it makes a difference as to the degree of imputation that the targeted attorney was an associate rather than a partner in the former firm. The policy argument seems to be that it should not make a difference.
- The facts strongly suggest that Fine’s involvement with Steinberg was limited to transactional and corporate matters. Others in the firm did the real estate, labor and employment, and litigation work for Steinberg.
 - Applicants are going to be tempted to engage in the “three-part inquiry” used by the court in *Reyes* to determine whether the prior representation is substantially related to the present representation. It is not a necessary part of the analysis because the *JSS v. Wye* suit is necessarily a substantially related matter because it is the *same* matter.
 - Nevertheless, applicants who do engage in such a discussion should not be penalized.
 - Moreover, they might legitimately use the third prong of the “three-part inquiry” to discuss whether information

obtained by Fine was “relevant to the issues raised in the pending litigation.”

- The current lawsuit against Wye relates to the construction of a new plant, litigation involving real estate, so it is not likely that Fine did any of the work on that matter while he was at P & P.
- Additional facts that might help on this point: It is known from the facts that P & P was a one-office firm of about 20 lawyers. It will help if Steinberg’s new attorneys are able to establish that P & P did not have institutional means of limiting access to information among the lawyers in the firm, e.g.,
 - All files were open to all attorneys;
 - Corporate and litigation attorneys worked in adjacent offices and they talked frequently about their respective matters;
 - Corporate and litigation attorneys shared secretarial and paralegal staff.
- Although Mr. Steinberg did not remember talking to Fine about this litigation, inquiry should still be made regarding whether Fine was consulted from time to time during the pendency of this four- year litigation about Steinberg’s affairs insofar as they might have related to the lawsuit.
 - On this point, it might be possible to subpoena Fine’s time records and billings from P & P showing work done for Steinberg.
 - Better applicants, however, might note that they might be better off relying on the rebuttable presumption in Steinberg’s favor and leave it up to Fine to produce the records if they help him.

4. Issues relating to Fine’s status as a partner at D & D: The argument here is that there is a presumption that whatever information Fine actually or impliedly acquired while an associate at P & P is known by imputation to all his new partners at D & D. (See comment [4] to Rule 1.9.)

- This would be especially so because P & P represented Steinberg generally rather than for limited purposes.
- But this presumption can be rebutted if it can be shown that Fine had acquired no information about the Wye litigation and had not participated in it in any way. (*See Reyes.*)
- In that event, there would be nothing to impute to Fine’s new partners and there would be no reason to disqualify D & D.
- On the other hand, if the “additional facts” referred to above could be established, the presumption imputing all of P & P’s knowledge to Fine could be reinforced.
- But even if Fine, while at P & P, had acquired confidential information regarding the Steinberg interests as they relate to the Wye litigation, the mere fact that the representation at D & D involves the substantially related matter (i.e., the same Wye litigation) as was being handled at Fine’s old firm does not automatically disqualify D & D from continuing as counsel.
 - As long as Fine does not get involved in D & D’s representation of Wye (Rule 1.9(b)), and as long as he is prevented from using or revealing any information about the Steinberg interests to the D & D attorneys (Rule 1.9(c)), D & D may continue to represent Wye. (See comment [11] to rule 1.9.)
 - D & D can do this by establishing an effective “ethical wall.” (*See Reyes.*)
- The question then becomes whether the ethical wall memo from D & D’s managing partner satisfies the requirements.
 - On its face, the memo isolates Fine from inquiry or information about the Wye litigation and prevents him from getting access to the files.
 - Moreover, it appears to have been timely, i.e., issued before he actually joined the firm (in contrast to the late-coming memo in *Reyes*).
 - Additional facts that might help on this point: It appears from its letterhead that D & D is a large, multi-office firm, but it might be worth inquiring into the size of its local office and institutional practices for enforcing ethical wall restrictions. For example, if it

can be shown that the local office is small and that corporate and litigation attorneys work in close proximity to one another (as opposed to working on different floors or blocks of offices) and freely exchange information about their cases, it might be inferred that the information separation is not effective. This might be so if it can be shown that security of files is not maintained.

- This information might be developed in depositions of D & D personnel, especially recently departed personnel; for example, it might be discovered that files are often left on desks and not kept under lock and key, or that case documents are stored on D & D computers to which staff and lawyers have general access.

5. Conclusion: It appears most probable that a motion to disqualify D & D would fail:

- Fine's knowledge of and involvement in the Wye litigation is most likely minimal so there is probably not much Steinberg information relevant to the Wye litigation to be imputed to the D & D partners;
- Even if there were such information, D & D is effectively isolating Fine so as to avoid any taint;
- At this late stage in the litigation (about three months away from trial), it would probably inflict an undue hardship on Wye to have to retain new counsel.

POINT SHEET

*Consumer Protection v.
Bernhard's Appliances, Inc.*

Consumer Protection Division v. Bernhard's Appliances, Inc.
DRAFTERS' POINT SHEET

In this test item, the applicants are attorneys in the Consumer Protection Division of the Attorney General's office. Their task is to draft a persuasive brief in support of an application for an injunction under the Franklin Consumer Protection Act.

Bernhard's Appliances, Inc., a statewide chain of retail household appliance stores, has a history of questionable advertising and sales promotion practices. A recent Bernhard's newspaper and TV ad offering "free airfare for two" to customers who make purchases, has come to the attention of the chief of the Consumer Protection Division. Past conciliation efforts to curb Bernhard's practices have failed, and this time, the Division wants to enjoin Bernhard's "once and for all."

The ad ostensibly promises to give free airfare for two to the Bahamas. The printed ad contains a disclaimer stating that the program is offered through Vacation Ventures, Inc. (VVI), an entity that is "not affiliated with Bernhard's," and that a "minimum hotel stay" is required; the TV ad flashes the disclaimer too quickly for most people to read.

The ad fails to advise the consumers that eligibility depends upon paying for and taking delivery of the appliance, making application through VVI, paying a non-refundable \$15 processing fee, signing up for a double occupancy minimum hotel stay at the destination, and paying for the package in advance.

The factual materials in the File consist of a memo from the supervising attorney, the offending newspaper ad, and a report of the investigation commissioned by the chief of the Division. The report itself contains summaries of interviews conducted with seven consumers who responded in one way or another to Bernhard's ad.

The Library contains relevant (and irrelevant) provisions of the Franklin Consumer Protection Act (CPA) and two cases that elucidate the statute.

The applicants are told to focus on the injunctive provisions of the Act and to draft a brief following the format set out in the office memo regarding persuasive briefs. The following is an outline of all the points considered by the drafters of the item to be encompassed within the problem. Applicants can receive "passing" or even excellent grades without covering all the points.

1. **In general:** Part of the task is to turn out a work product that has the facial appearance of a brief that a lawyer would file. The format is suggested in the office memo in the File.

- The brief should consist of at least two parts: a statement of facts and an argument.
 - Applicants might opt either to set out the facts fully in their statement of facts or to do so sparingly and to use the facts more extensively in the argument sections of the briefs. Either is acceptable, but those who decide to do the latter must include at least enough in the statement of facts to inform the court of the nature of the dispute.
 - One would expect to see the argument broken up into more than one heading, each followed by narrative arguments that follow logically from the language of the heading. The footnote in *Opal Realty* is a very strong hint to the applicants as to what the breakdown should be.

2. **Statement of facts:** This section should contain a sufficient factual description of the problem to inform the court of the nature of the dispute. As directed in the office memo, applicants should select and emphasize the facts that will be most helpful to the Division's position.

- Thrust of the case:
 - It arises under the CPA;
 - Bernhard's has published and aired an ad that violates the CPA;
 - Bernhard's has a history of questionable advertising and promotional practices;
 - Prior efforts to bring Bernhard's into compliance through conciliation have failed;
 - Bernhard's does not compete on prices; rather, it relies on promotional gimmicks to attract large volumes of customers to its stores.
- The particulars of the promotion, the mechanisms for obtaining the promised benefits, and the effects on the consumers:
 - The promotion:
 - Promises "Free Airfare for Two" to the Bahamas;
 - Requires the customer to buy "any appliance" to be eligible for the round trip airfares;

- Contains a disclaimer, in small print, which tells the consumers that the program is offered through VVI, an entity not affiliated with Bernhard's, that a "minimum hotel stay" is required, and that "taxes apply."
 - The TV version flashes the disclaimer on the screen too quickly to be read by most consumers.
- The mechanism for obtaining the benefits of the promotion:
 - After making the purchase and taking delivery of the qualifying merchandise, customers are given a VVI brochure which describes the available vacation packages and an "airfare certificate" generated on Bernhard's computer.
 - Customers are given no information other than what appears in the ad at the time they go into the store and, if they ask, they are told in most cases that they will be given details after they have completed their purchases.
 - Bernhard's bought 21,000 brochures from VVI at \$5.35 each;
 - 128 of the airfare certificates have been "redeemed" so far with VVI;
 - Eleven consumers have so far taken vacations offered through VVI.
 - The VVI brochure contains a page of "terms and conditions" and a "registration request form" (RRF);
 - The brochure lists the costs of the twelve-day minimum hotel accommodations, which vary depending on the destination and place of departure (prices ranging from \$85 to \$190 per night and requiring double occupancy);
 - The brochure requires the consumer to mail in a non-refundable \$15-per-person processing fee with the RRF;
 - The RRF must be submitted at least 45 days before the earliest date of departure selected by the consumer and must include three choices of departure dates;

- The consumer must make a specified down payment upon receipt from VVI of a “confirmation of availability” and pay the balance in full at least 45 days prior to departure;
 - Various fees and taxes are not included in the package, and there are “blackout” days.
- Effect of the promotion on the consumers: The summaries of the interviews with the seven consumers show varied reactions to the promotion, but the helpful facts are:
 - All but one were attracted to the store by the promotion, which seemed to promise a “free” benefit;
 - One walk-in customer was induced to buy as the result of representations made by a salesperson about the promotion.
 - The consumers did not expect to get a price break on the merchandise they intended to purchase;
 - One did not recall seeing any disclaimer;
 - Most did not realize that a minimum hotel stay was required;
 - One thought he would actually get two airline tickets at the Bernhard’s store and did not realize he would have to book through VVI;
 - ”Blackout” days made desirable travel arrangements hard to schedule;
 - One consumer was told by VVI that he could book on “blackout” days if he were willing to pay more;
 - One did not realize until receipt of the “confirmation notice” that she would have to make a deposit which would be forfeited if she cancelled the trip;
 - One did some research after he took the trip and concluded that he could have saved money by booking directly through the hotel. (Another consumer, however, took the trip because she found she could save money.)

3. **Argument:** The instructions from the supervising attorney specifically tell the applicants to do each of the following things: draft a persuasive brief (thus, it

should not be an objective on-the-one-hand/on-the-other-hand type of memorandum); specify which sections of the Act are violated by Bernhard's promotion; explain why the promotion violates the Act; and specify what conduct it is that the court should enjoin. They are also specifically told not to concern themselves with other remedies, so one would not expect to see discussions of the restitutionary relief available under the Act and the cases.

A logical sequence for the argument might be as follows:

- The statutory authority for the court's power to issue an injunction;
- The operative prohibitory sections of the CPA;
- The violations and why they are violations;
- The terms of the requested injunction.
- The court is empowered under § 402 of the CPA to issue a broad prohibitory injunction:
 - The Act allows the court to enjoin ongoing and prospective violations of the Act.
 - Under the *Opal Realty* case, § 402(A) extends to prospective violations of like kind.
 - Under § 402(C), the court may enter whatever kind of order is necessary to prevent the use of a prohibited practice.
 - In the present case, there is a continuing risk that the violations will persist because the facts tell us that Bernhard's purchased 21,000 VVI brochures, of which only 128 have been accounted for.
 - Given the fact that Bernhard's paid \$5.35 for each brochure, it is likely that, unless enjoined, Bernhard's will try to utilize all 21,000 before ending the promotion.
- The CPA prohibits unfair or deceptive trade practices and prizes conditioned on purchases:
 - § 301(A) defines statements that have the "capacity, tendency or effect of deceiving or misleading consumers";
 - This section relates to *affirmative* statements that have the prohibited effects;
 - § 301(B) defines failure to state material facts;

- This section relates to *omissions* that deceive or tend to do so;
- § 301(C) introduces the intent element, i.e., intent to induce reliance by consumers in connection with promotions or sales;
 - Under *Opal Realty*, it is enough that the merchant intended to induce reliance by consumers; there is no need to show in addition that the merchant intended to make a misrepresentation or material omission.
- § 302 prohibits unfair practices, as defined in § 301, in the sale or offer for sale of consumer goods.
- The specific violations and why they are violations:
 - Principles that apply across the board:
 - As stated by the court in *Opal Realty*, the CPA is designed to take “strong protective and preventive steps . . . to prevent [unfair] practices from occurring in Franklin.”
 - Thus the statutory prohibitions are to be applied broadly.
 - The test to be applied in determining whether a promotion is misleading is the “total impression” test. (*See Opal Realty*.)
 - I.e., the promotion must be viewed “as a whole, without emphasizing isolated words or phrases apart from their context.”
 - A statement or omission is material if a significant number of unsophisticated consumers would attach importance to it. (*See Reliable Transmission* and *Opal Realty*.)
 - Affirmative statements that constitute violations under § 301(A):
 - The “total impression” when the ad is viewed in print is that the purchaser will receive two free airline tickets upon making a qualifying purchase.
 - This is because the terms “FREE AIRFARE” and “Tickets” are printed prominently on the face of the ad.

- To the extent that the summaries of the interviews with the seven consumers are a representative sampling of the consumer population, it is fair to infer from the statement of the one consumer who said he thought he was going to receive two tickets right at the Bernhard's store that others would have thought so, too.
 - As the court stated in *Reliable Transmission*, the Division need not prove the precise number of violations; it is given broad discretion in assessing the penalties.
- This implied affirmative representation is not mitigated by the small-print disclaimer, first, because it does not negate the inference that tickets will be distributed then and there, and, second, because it is in small print impliedly calculated not to draw attention to it. This is especially true of the TV commercial because of the inability of consumers to read the disclaimer.
- It is self-evident that the juxtaposition of the two terms "free airfare" and "tickets" on the face of the ad have "the capacity, tendency, or effect of deceiving or misleading [unsophisticated] consumers." CPA, § 301(A).
- More to the point, omissions that constitute violations under § 301(B):
 - This is where the bulk of the applicant commentary should be. The omissions, both those on the face of the ad and those resulting from Bernhard's withholding the VVI brochure until after customers make a qualifying purchase, are the most serious vices in Bernhard's sales promotion.

- The situation here is analogous to that in *Reliable Transmission*, where the court found that withholding information that was material to the ability of consumers to make the purchase decision was a violation of the Act.
- Likewise, here information about the true cost and the qualifying factors was withheld, thus depriving the customers of material pre-purchase information:
 - The disclaimer, even if readable, does not inform the unsophisticated consumer that there are significant costs associated with the benefit of Bernhard’s offer; i.e., the meanings of the terms “minimum hotel stay required” and “applicable taxes apply” are not readily apparent to the typical consumer.
 - This much is clear from the summaries of several of the interviews in the investigation report.
- It is not explicit on the face of the ad that the consumers will not be given information about the promotion until after they have purchased merchandise.
 - In fact, the statement, “See store for details,” suggests otherwise and is misleading.
- It was not until after they had completed the purchase that most of the consumers interviewed could fully learn that, rather than airline tickets, they would receive only a Bernhard’s “airfare certificate” and a VVI brochure. Further, it was only then that they could possibly understand what was in the VVI brochure:
 - The requirement of a non-refundable \$15 processing fee;
 - The significant cost of the minimum hotel stay;
 - The significant travel restrictions (i.e., “blackout days”);

- The requirements of paying a forfeitable deposit and the balance 45 days before departure;
- Certain fees and taxes not included in the price; etc.
- That the consumers interviewed were induced by and relied upon the ad is clear from their statements, principally that they were not drawn to Bernhard's because the price of the appliance was less than elsewhere, but rather because they saw the ad.
- Likewise, that the statements and omissions were material to them is evident from the facts elicited in some of their statements that, once they found out the true costs, they declined to proceed with the VVI vacation plans.
 - Again, according to the court in *Reliable Transmission*, the Division is entitled to draw broad inferences from the evidence and to infer reliance of most consumers from the statements of a few. (*See also Opal Realty*: consumer reliance can be proved from the testimony of consumers that they did in fact rely.)
- The requirement of § 301(C) that the deception, omission, etc., be with the intent that the consumer rely on it is proved in this case by the facts that the pricing of Bernhard's merchandise was clearly not the inducement. To the contrary, the inducement was the widespread publication and airing of an ad that promised a "free" gift that was not really "free." Bernhard's reputation from its prior similar promotional campaigns for using gimmicks to attract customers also helps establish this element.
- The injunction: The applicants should articulate the specific things the Division wants the court to enjoin. It is all right if they push to the edges of the envelope, but there should be a rational basis for the requested terms

of the injunction, not just a broad, scattershot approach. Bernhard's should be ordered to:

- Withdraw the offending promotion and cease further publication or airing of the ad;
- Cease further distribution of the VVI brochures unless it is done in compliance with the terms of the injunction;
- Prevent sales personnel from communicating the substance of the promotion without making full disclosure and furnishing the details in writing before the sale;
- In the future, refrain from publishing any ad or engaging in any sales promotion in any market area served by any of its stores which is deceptive or contains any material omissions;
- In any future ad or promotional campaign that has any "giveaway" component, state prominently on the face of all publications in connection with it that no purchase is necessary in order to participate;
- In any future ad or promotional campaign that offers any special considerations and is intended to induce customers to rely, state explicitly that interested consumers can obtain all details by calling a store and asking for the information and, in all events, make available to interested consumers in writing and in plain language all the particulars of the program before they make any commitment to purchase merchandise.

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