

THE MPT

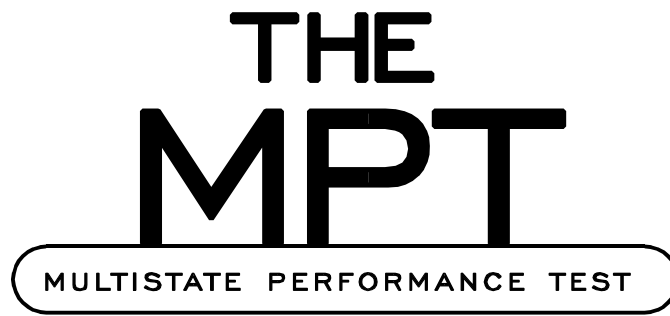
MULTISTATE PERFORMANCE TEST

February 1997 MPTs and Point Sheets

Alexander v. BTI and Bell

In re Hayworth and Wexler





Alexander v. BTI and Bell

February 1997, Test 1



Preface

The National Conference of Bar Examiners inaugurated the Multistate Performance Test (MPT) in 1997. This publication is a reprint of one of the first two MPTs, which are administered in February 1997 in four states: Georgia, Hawaii, Iowa, and Missouri.

The instructions for the test appear on the back cover. For further information regarding the test, see the **MPT Information Booklet**.

Alexander v. BTI and Bell

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FILE

Calomen & Sanchez
2714 Meadowood Drive - Suite 100
Weston Hills, Franklin 33332

MEMORANDUM

February 25, 1997

TO: Applicant
FROM: Armand Calomen
RE: Alexander v. Briarwood Tennis, Inc. and Bell

We represent Briarwood Tennis, Inc. (BTI) and its Tennis Director, Sandy Bell, in a personal injury action for negligence brought by Linda Alexander, a BTI member and the top female player on the BTI team that was entered in last year's Franklin Amateur Championship Tournament. Alexander alleges that she suffered an eye injury after being struck by a ball hit by Bell, an International Lawn Tennis Association (ILTA) certified professional player and instructor. The injury occurred during a final warm-up that preceded what was supposed to be a set of games at the conclusion of the warm-up session.

The injury caused the retina in Alexander's right eye to become detached. She experienced a form of temporary blindness that was eventually relieved by surgery. Because of increased risk of permanent blindness, Alexander now uses protective eyewear when playing tennis and other sports. She claims that the new sport safety glasses she must wear interfere with her ability to play high-level competitive tennis, preventing her from participating in major amateur events such as the Franklin Championships.

I intend to file a motion for summary judgment on the theory of assumption of the risk. As you know, the standard for summary judgment in Franklin is that there must be no disputed material facts. I believe that the undisputed material facts support our argument that Alexander and Bell were co-participants in a tennis game when this injury occurred, that neither BTI nor Bell owed Alexander a duty of care, and that, therefore, primary assumption of the risk is a complete legal defense. I want you to prepare a persuasive brief supporting that argument. The file includes the medical summary we received in discovery and selections from the depositions of Bell and Alexander. I have attached two recent Franklin appellate decisions on assumption of the risk in sports cases. Please prepare the brief in accordance with the guidelines set forth in the attached office memorandum.

Thanks for your assistance.

Calomen & Sanchez
2714 Meadowood Drive - Suite 100
Weston Hills, Franklin 33332

MEMORANDUM

September 8, 1995

TO: All Lawyers
FROM: Director of Litigation
RE: Persuasive Briefs

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, although emphasis is not improper. Select carefully the facts that are pertinent to the legal arguments. In the case of a motion for summary judgment, our arguments must be based on undisputed facts.

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 UNDERLYING FACTS ESTABLISH PLAINTIFF'S CLAIM OF RIGHT. Proper: BY PLACING A CHAIN ACROSS THE DRIVEWAY, BY REFUSING ACCESS TO OTHERS, AND BY POSTING A "NO TRESPASSING" SIGN, PLAINTIFF HAS ESTABLISHED A CLAIM OF RIGHT.

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.

ANDRE MOENSSENS, M.D.
Ophthalmology and Retinal Surgery
Worth Lakes Medical Plaza - 305
Worth Lakes, Franklin 33324

MEDICAL SUMMARY

PATIENT: Linda Alexander
REPORT DATE: August 23, 1996

This 32-year-old female was referred by Dr. Carole Henderson following a sports (tennis) injury that caused retinal detachment in the right eye. When seen, patient was in great pain with limited and cloudy vision. Intraocular hemorrhaging was apparent, with substantial amount of blood from capillaries leaking into the vitreous humor, the clear liquid that fills the center of the eye. Iritis, inflammation of the delicate membrane that forms the colored part of eye, was also present. Drug therapy was prescribed, and it reduced throbbing eyeball pain and photophobia.

Emergency laser surgery was scheduled to reattach patient's retina to the choroid. A highly focused laser beam was passed through the cornea to close off the broken blood vessels on the retina. The laser was then manipulated to indent the wall of the eyeball, causing the choroid to meet the retina tissue. Reattachment surgery was successful and normal vision was returned.

Prognosis is excellent. Following normal recovery period, patient will be able to return to usual work and other activities, including sports. In the past, patient has not been wearing safety lenses while playing tennis, a game in which a ball moves at high velocity, often in excess of 90 miles per hour. If patient had been wearing such protective eyepieces when she was struck by the ball, it is almost certain that she would not have experienced a detached retina. Patient has been cautioned to wear protective eyepieces during active sports such as tennis because another trauma of same or similar magnitude could cause permanent blindness. Patient is scheduled for routine follow-up examinations.

EXCERPTS FROM DEPOSITION OF SANDY BELL

1 **Q:** Were you ever a touring professional tennis player?

2 **A:** Yes, for three years I was a qualified ILTA touring pro. I attained a ranking of 22nd in
3 the world in doubles and 116th in singles before leaving the tour to become a teaching club
4 professional.

5 **Q:** What training have you received as a tennis teacher?

6 **A:** Well, I took a number of courses in college in sports management that provided the
7 fundamentals of operating a tennis pro shop, including organizing and managing a teaching program.
8 In addition, I completed several other courses in school on tennis instruction and served as a summer
9 teaching intern at the Weston Hills Country Club after my first and second years in college. When
10 I left the tour, I enrolled in the ILTA's six-month Club Professional Program held in Ft. Lauderdale,
11 Florida. At least forty percent of the program focused on the teaching function, from one-on-one
12 instructional techniques to the supervision of assistant teaching pros. In addition, I have taken
13 follow-up and advanced seminars on teaching over the last ten years. I am a fully certified ILTA
14 instructor with a Class A rating and have served as a visiting member of the faculty in ILTA's Club
15 Professional Program for the past three years.

16 **Q:** How long have you been on the staff of the Briarwood Tennis Club?

17 **A:** I've been at BTI for eight years, all as the Tennis Director, where one of my
18 responsibilities is to coach BTI-sponsored amateur teams. Before that, I spent two years as the
19 Assistant Pro at Weston Hills Country Club, which was my first teaching pro position after I
20 graduated from the ILTA program.

21 *****

22 **Q:** How long has Linda Alexander been a student of yours?

23 **A:** Off and on for the last eight years, ever since I arrived at BTI. When I started working
24 with her she already was a rated player in singles and she steadily improved in doubles. She was the
25 top-ranked woman at BTI and she had an outside shot at capturing the Franklin Amateur singles title
26 last year. Of course, that was before the accident. I wasn't her only teacher at BTI. She worked out
27 with some of the assistant pros, particularly Majel Stein.

28 **Q:** Describe the teaching session that you conducted on the day Ms. Alexander was injured.

EXCERPTS FROM DEPOSITION OF LINDA ALEXANDER

1 **Q:** Can you give us a candid evaluation of your tennis skills before your injury?

2 **A:** I held an ILTA Expert rating, the highest ranking available to an amateur. In the five
3 years prior to my injury, I reached the finals of eleven singles and two doubles events. That's
4 metropolitan, state, and regional amateur tournaments. I expected to be either the second or third
5 seed among the women in last year's Franklin Amateur. I didn't get to play, of course.

6 **Q:** And in the aftermath of the eye injury?

7 **A:** I'm a completely different player. The sport safety glasses I've been ordered to wear to
8 protect myself from another injury and possible blindness limit my vision and make it difficult to
9 pick up the ball in flight. As a result, I'm slower by a step or more. That's the difference between
10 a top amateur and an also-ran. I doubt I'll even qualify for ILTA Expert at next year's renewal test.

11 *****

12 **Q:** Take us through the lesson with Sandy Bell on the day you were injured.

13 **A:** Well, I wanted to work on my net game in preparation for the Franklin Championships.
14 I had been hesitating a fraction in going to the net, both on serves and groundstrokes. And then
15 when I got to the net, I felt uncomfortable, not in control. Sandy started out slowly, talking me
16 through the decision making and walking me through the approach and the stroke. I really felt we'd
17 made a lot of progress but I wanted to see how I'd do under game conditions. Sandy said he'd adjust
18 his play, as much as possible, to provide me with opportunities to come to the net. We began our
19 usual pregame warm-ups. I was at the net and Sandy was hitting groundstrokes to me. I'd returned
20 most but missed some so there were a number of loose balls around my feet at the net. After I
21 missed a backhand, Sandy said, "Let's move back to the baseline," or something like that. At that
22 point, something on the sideline distracted me, when all of a sudden I got smacked in the right eye
23 with one of Sandy's patented 80-mile-per-hour forehands. A searing pain and a blinding light
24 exploded in my head and I collapsed. The next thing I remember was Weston Memorial and Dr.
Moenssens talking to me in pre-op about a detached retina.

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Galardi v. Seahorse Riding Club, et al.

Franklin Court of Appeal (1995)

Leslie Galardi sustained personal injuries when she fell from a horse while training for an upcoming horse show. She sued the stables, Seahorse Riding Club, and the instructor, Lisa Jacquin, complaining that they had "negligently instructed, supervised, and controlled plaintiff's activities by advising her to jump over fences that were unreasonably high and improperly designed, located, and spaced." The trial court granted defendants' motion for summary judgment, which was based upon the doctrine of primary assumption of risk, and the plaintiff appealed.

On the day of her injury, Galardi was preparing for an upcoming horse show with her horse, Tomboy, by practicing one-stride jump combinations at the Seahorse Riding Club. The jump combination consists of two individual fence jumps set up so that the horse takes a single stride between each jump. Galardi, an experienced equestrian, had ridden Tomboy for several years in "A-rated" shows involving performance jumps and obstacles of various types, had on many occasions ridden horses that had either balked at a jump or missed a stride when taking a jump, had observed more than 50 horse-related injuries, and understood that jumping a horse creates a greater risk of injury to the rider than does riding on flat terrain.

During the practice, Lisa Jacquin, an instructor at the riding club, twice raised the height of the jumps without lengthening the distance between each obstacle. Deposition testimony reveals Galardi was aware of Jacquin's actions and understood they made subsequent jumps "more difficult and more dangerous." When Galardi attempted the maneuver, her horse successfully jumped the first obstacle. However, the horse landed too close to the second jump, was unable to take a stride, and consequently popped up into the air, knocking down the second jump and causing plaintiff to lose her balance and fall. She sustained injuries to her coccyx and two vertebrae.

In *Knight v. Jewett* (Franklin Supreme Court, 1993), our highest court explained the distinction between primary and secondary assumption of risk cases. Primary assumption of risk cases are those in which the defendant has no duty to protect the plaintiff from a particular risk. In contrast, in instances of secondary assumption of risk, the defendant does owe a duty of care to the plaintiff and,

if there is a breach of duty, some liability attaches even though "the plaintiff knowingly encounters a risk of injury caused by the defendant's breach of that duty." The *Knight* case, like ours, arose from a summary judgment granted in favor of defendant. The plaintiff was a young woman who had engaged in a vigorous game of tag football. Defendant, a player on the opposing team, ran into her, knocked her down, and stepped on her hand. This resulted in an injury to a finger that eventually led to its amputation. The plaintiff, who had played tag football on other occasions, claimed that she cautioned defendant just before the play in which she was injured to "take it easy and not act so rough." Defendant denied hearing such admonition. The *Knight* court concluded that the defendant tag football player owed no duty to plaintiff beyond avoiding reckless and intentionally harmful conduct. Since the case turned on whether defendant owed a duty of due care to plaintiff, it was not necessary to examine the plaintiff's subjective awareness of the danger involved, or whether she impliedly agreed to relieve defendant of a duty. It thus found the case to be one of primary assumption of the risk and affirmed the grant of summary judgment in defendant's favor.

The *Knight* court noted that, at least with the more active sports, players and operators owe no duty to co-participants for injuries that are considered to be inherent risks of the sport. It pointed out, however, that "although defendants generally have no legal duty to eliminate (or protect a plaintiff against) risks inherent in the sport itself, it is well established that defendants do have a duty to use due care not to increase the risks to a participant over and above those inherent in the sport." And the court emphasized that the scope of a defendant's legal duty in the sports context will depend not only on the nature of the sport itself, but also on the defendant's "role in, or relationship to, the sport" and that "in the sports setting, as elsewhere, the nature of the applicable duty or standard of care frequently varies with the role of the defendant whose conduct is at issue in a given case."

In *Tan v. Goddard* (California Court of Appeal, 1995), the court held that although co-participants in a sport ordinarily owe no duty to each other, "coaches and instructors often owe a duty of due care to persons in their charge." In *Tan*, a student horse jockey and novice horse rider fell from a horse during training and sued the horse racing school and his coach. The injured jockey complained that he had been given an unsuitable horse to ride, that he had not received sufficient instruction, and that the condition of the track was unsafe. The court reversed the trial court's granting of summary

judgment, finding the doctrine of primary assumption of the risk inapt, because the defendant's role "as a riding instructor to an inexperienced rider was such that he owed a duty of ordinary care."

In the instant case, in deciding whether summary judgment is warranted, we must determine whether, in light of the nature of the sporting activity in which defendants and plaintiff were engaged, defendants had a legal duty of care to plaintiff.¹ In applying this analytical framework, we must look both to the nature of the sport and to the roles and relationship of the parties. Clearly, the sport of horse jumping has the inherent risk that both horse and rider will fall and suffer injury. The basic character of the sport involves engaging increasingly higher jumps and at shorter intervals until at some point the competitors can no longer clear the obstacles without substantial contact. Collisions with the jumps and ensuing falls are thus an integral part of the sport. Riders may also fall from the horse as the result of other conditions such as a balking or stumbling mount. Such risks were clearly among those which Galardi knowingly encountered during her training, when the jumps were raised and intervals became more hazardous.

Here, the occasion of Galardi's fall and injury was not during competition with other riders. Instead, she had placed her training in the hands of defendants, who were employed to instruct and coach her. Their responsibilities were directly to her. Other riders, as co-participants, would not have any special duty of care to Galardi during competition to insure she did not fall. However, the defendants, who, we may infer, had knowledge and experience concerning the sport of horse jumping superior to that of Galardi, certainly had a duty to avoid an unreasonable risk of injury to her and to take care that the jumping array was not beyond the capability of horse and rider.

Having determined that defendants had a duty of care, a breach of which was a possible cause of plaintiff's injury (a matter which ultimately must be decided by the trier of fact), this case necessarily falls into the category of secondary assumption of risk. In such circumstance, it is for the trier of fact

¹ In reviewing a motion for summary judgment, we first determine whether there are disputed material facts. There may be disputed facts, but if they are not material, they will not prevent the granting of a motion for summary judgment.

to determine the cause of the injury and to apportion the loss resulting from the injury; in so doing it may consider the relative responsibility of the parties. Hence, in this case the motion for summary judgment should have been denied.

Watt v. Cincinnati Reds, Inc., et al.

Franklin Court of Appeal (1996)

Jeffrey Watt, a 17-year-old high school baseball player, read in the *Plantation Herald* that the Cincinnati Reds major league baseball team would hold local "tryouts" for experienced amateur players between the ages of 16 and 21. Having pitched for his high school baseball team the last two seasons, Watt wanted to fulfill his youthful dream and become a pitcher for the Reds.

Watt arrived at the appointed playing field and signed in along with dozens of other young players. Don Zimmerman, the Reds' Supervisor of Scouts, gave an orientation talk in which he introduced his assistants and explained the procedures for the day. During this talk, Zimmerman asked pitchers when they had last thrown and asked all participants if they had any injuries. Injured players were not permitted to participate fully in the tryout. After the orientation, participants were timed in a 60-yard dash. Balls were then hit to infielders and outfielders at their respective positions, and they fielded them and made throws. All of this was observed by the Reds' representatives in attendance who would, on occasion, provide advice to individual players on proper techniques.

The last part of the tryout was conducted under conditions simulating an actual game. The pitchers, including Watt, each took a turn throwing to several batters. Before his turn, Watt threw a number of warmup pitches to get his arm ready. On his third pitch to a batter, he felt his arm "pop" but experienced no particular pain. He stepped off the pitcher's mound and informed the Reds' personnel, including Zimmerman, that his arm had popped. Receiving no response, Watt returned to the mound and threw another pitch.¹ He immediately experienced severe pain in his arm and quit pitching. A subsequent medical examination revealed a portion of the bone and tendons in Watt's arm had been pulled away due to the force of contraction of his tricep muscle during pitching.

¹ Whether or not the Reds' representatives responded to Watt's statement is a matter of dispute. It is undisputed, however, that Watt heard no response.

Watt initiated this action against the Reds and Zimmerman claiming negligence in permitting him to throw a fourth pitch after they knew or should have known this would cause severe injury. Defendants moved for summary judgment claiming that plaintiff's injury is one inherent in the sport of baseball, that hence they owed him no duty of care, and that the plaintiff assumed such a risk when he voluntarily participated in the tryout. The trial court granted the motion.

In *Knight v. Jewett* (1993), the Franklin Supreme Court explained that assumption of risk is of two types, primary and secondary. Secondary assumption of risk is where a defendant breaches a duty of care owed to the plaintiff but the plaintiff nevertheless knowingly encounters the risk created by the breach. Secondary assumption of risk is not a bar to recovery, but it requires the application of comparative fault principles. Primary assumption of risk occurs where a plaintiff voluntarily participates in a sporting event or activity involving certain inherent risks. For example, an errantly thrown ball in baseball or a carelessly extended elbow in basketball are considered inherent risks of those respective sports. Primary assumption of risk is a complete legal defense and bars any recovery.

Primary assumption of risk is merely another way of saying that no duty of care is owed as to risks inherent in a given sport or activity. The overriding consideration in the application of this principle is to avoid imposing a duty which might chill vigorous participation in the sport and thereby alter its fundamental nature. In *Knight*, for example, the defendant, a participant in a touch football game, knocked over the plaintiff, another participant, and then stepped on her hand and injured it. The court held the defendant owed no duty to the plaintiff under these circumstances: "In the heat of an active sporting event like baseball or football, a participant's normal energetic conduct often includes accidentally careless behavior. Even when a participant's conduct violates a rule of the game and may subject the violator to internal sanctions prescribed by the sport itself, imposition of legal liability for such conduct might well alter fundamentally the nature of the sport by deterring participants from vigorously engaging in activity that falls close to, but on the permissible side of, a prescribed rule." Thus, *Knight* stands for the proposition that negligent conduct of a participant in an active sport is an inherent part of the game.

There can be little question that an arm injury such as that suffered by Jeffrey Watt is a risk inherent in the sport of baseball. Watt was a pitcher. In baseball, the objective of a pitcher is to throw the ball with such accuracy and velocity and along such trajectories as will tend to inhibit batters from hitting it. This activity naturally causes great strain on the pitching arm. The injury Watt suffered was a direct result of the natural strain caused by the pitching motion of the arm.

Had Watt stopped after his third pitch of the simulated game, we would have no difficulty finding primary assumption of risk a bar to recovery. Up to that point, defendants did nothing more than provide an opportunity for Watt to do what he had been doing for the last two years, i.e., to pitch. Whatever injury occurred on the third pitch was an inherent risk of the pitcher's unremitting contest with the batter. However, the incident did not end with the third pitch. Defendants initially directed Watt to pitch and then permitted him to continue after he informed them his arm had "popped." It is reasonable to infer that when Watt, a 17-year-old, informed the Reds' personnel his arm had "popped," he was seeking guidance as to how to proceed. Hearing nothing to countermand the original instruction to pitch, and obviously anxious to please and impress the scouts, Watt threw another pitch, thereby causing further injury.

In *Galardi v. Seahorse Riding Club* (1995), an experienced rider was injured when she fell from a horse during training. She sued her instructor and the owner of the stables for negligence claiming they caused her to jump over fences which were unreasonably and unnecessarily high and improperly designed, located, and spaced. We reversed summary judgment for the defendants. While recognizing the risk of injury from a fall cannot be eliminated and in fact creates the challenge which defines the sport, i.e., is an inherent part of the sport, we concluded these defendants owed a duty to avoid an unreasonable risk of injury to plaintiff and to take care that the jumping array was not beyond the capability of horse and rider. Like the defendant in *Galardi*, defendants here were not co-participants in the sport or activity but were instead in control of it.² Defendants decided what would be done and when. They controlled the simulated game in the sense of determining who would play what positions, including pitcher, and for how long. They supplied necessary equipment,

² Defendants' argument that they were participants in the tryout because both player and observer are integral parts of a tryout is in error. Under the reasoning of *Knight*, participants are limited to those actively engaged in the game or other activity.

such as bats and batting helmets, and took it upon themselves to restrict the participation of players with injuries. They also gave a limited amount of instruction on techniques. Under these circumstances, defendants owed a duty to plaintiff and the other participants not to increase the risks inherent in the game of baseball. Thus, for example, they owed a duty not to supply faulty equipment such as batting helmets or catching gear.

Various policy considerations support imposition of a duty here. It requires no depth of analysis to recognize that, when one injures himself, further use of the injured member will likely exacerbate the condition. This is especially pertinent where, as here, the further use is in connection with a tryout for a professional sports team. It cannot be lost on defendants that the tryouts they conduct are the only opportunity for many boys and young men to demonstrate they have the potential to play major league baseball, and perhaps to command the astronomical salaries and enjoy the universal celebrity that are identified with the sport. Under such circumstances, it is likely a participant will attempt to push his body beyond its capabilities.

While we attach no moral blame to defendants' conduct, it is nevertheless true the tryout was conducted for their benefit. Defendants' objective was to discover talented players who could improve the Reds' future prospects. Imposition of a duty to protect participants from aggravating an existing injury would help to prevent future harm. At the same time, such a duty would not unduly burden either defendants or injured players. Neither is served by permitting a player to participate in a tryout where such participation is necessarily constricted by an injury. For the foregoing reasons, summary judgment was improperly granted.

THE MPT

MULTISTATE PERFORMANCE TEST

In re Hayworth and Wexler

February 1997, Test 2



Preface

The National Conference of Bar Examiners inaugurated the Multistate Performance Test (MPT) in 1997. This publication is a reprint of one of the first two MPTs, which are administered in February 1997 in four states: Georgia, Hawaii, Iowa, and Missouri.

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In re Hayworth and Wexler

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FILE

Levine, Clifford & Sampliner
Attorneys at Law
3216 Galewood Road
Oakland, Franklin 33337
(434) 731-9413

TO: Applicant
FROM: Ellen Levine
DATE: February 25, 1997
SUBJECT: Premarital Agreement for Hank Hayworth and Wendy Wexler

Hank Hayworth is a long-time client of mine who has asked me to prepare a premarital agreement that he and Wendy Wexler, the woman he intends to marry, can sign. His goal is to keep his assets and those of his wife separate. Both of them have previously been married and divorced.

Hank is a 45-year-old real estate developer who specializes in buying distressed residential property which he refurbishes and resells. When I was in law school at the University of Mackinac he was working on his MBA, and we played intramural volleyball together. I have represented him in a number of matters dealing with his business over the course of ten years. I also represented him in his divorce.

Hank and Wendy began dating after she bought one of the houses he had remodeled. She bought the house after she separated from her first husband but prior to her divorce. Hank introduced her to me, and I represented her in a personal injury case that was settled two years ago. At the conclusion of the matter, I sent her a settlement check for \$2,250 along with our standard termination letter telling her that our representation of her was concluded and that, unless or until she retained me to work on any other matter, I was no longer her lawyer.

Wendy, who is 41, also went to the University of Mackinac, where she studied nursing. I did not know her there. She has both a B.S. and M.S. degree in nursing and has enjoyed a successful career as a hospital nurse. She has worked since college, with the exception of time she took off for maternity leave. She has one child, age 11. Five years ago she was promoted to the position of Director of Nursing Education at Oakland General Hospital.

Hank says that Wendy does not want to get her own lawyer to advise her regarding the premarital agreement. After I began drafting the agreement, I became concerned about the consequences of Wendy's being unrepresented in this matter and did some research into it. I have attached a partial first draft of the provisions I wrote to conform to Hank's wishes. I have also attached a case I found from our Supreme Court and some provisions from the Franklin Rules of Professional Conduct (which are identical in substance to the ABA Model Rules of Professional Conduct).

Since I've represented Hank for so long, I've concluded I cannot undertake the joint representation of Hank and Wendy or serve as an intermediary in this case. I have attached the Professional Conduct rule and comment on intermediaries so you can see the basis of my conclusion. Please do not spend time discussing this point.

I need to meet with Hank to discuss representing him in this matter. To help me prepare for my meeting, please write me a memorandum that discusses what advice I should give Hank about the following:

1. How do Wendy's rights and interests affect the enforceability of the agreement as it is now drafted?
2. What particular problems does Wendy's being unrepresented present for Hank and me, and how should we resolve those problems?

Be sure to state the reasons and to cite the authorities for your conclusions.

Levine, Clifford & Sampliner
Attorneys at Law
3216 Galewood Road
Oakland, Franklin 33337
(434) 731-9413

TO: File
FROM: Ellen Levine
DATE: February 21, 1997
SUBJECT: Interview with Hank Hayworth

Client wants me to draft a premarital agreement for execution prior to his marriage to Wendy Wexler. Wedding scheduled for two weeks from now. Remains very unhappy about property settlement in previous divorce, although he does not blame me. Says he worked hard for the 15 years of that marriage and resented having to give his first wife the house plus more than \$200,000, half of their assets. Does not want to make the same mistake again and will marry again only if he can be sure that he can protect assets in case of divorce.

Hank wants an agreement that all of the property and assets he now owns, any increase in their value, as well as all he later acquires, will remain his separate property both during the marriage and in the event of divorce. He wants Wendy to have the same right. He says that they will acquire some things jointly, for example their residence, and that each will pay an equal share of their living expenses from his or her separate earnings. However, he wants her to agree that anything they don't explicitly buy or own jointly will remain separate property and that each will control his or her own income. He also wants her to waive any right she has to alimony or to his separate property at the time of property distribution in case of divorce, although he is not seeking a waiver of child support should they have any children.

Under Franklin law, absent such an agreement, Wendy would be entitled to an equitable share of all property acquired during the marriage, including the increases in the value of the property brought into the marriage. She might also be entitled to alimony or maintenance because of the disparity in their incomes.

Hank brought me a financial statement that shows he has a net worth of more than \$1.5 million and last year had income in the amount of \$275,000. He says that Wendy's assets consist mainly of the equity in her house of approximately \$50,000, a vested pension worth approximately \$125,000, and a small savings account with less than \$500 in it. They each own a car and household goods.

He says that he has discussed most of the proposed agreement with Wendy and she is willing to go along. He has not yet told her about the waiver of alimony and property distribution but intends to do so before presenting her with the document. He has encouraged her to consult her brother, who is an attorney. She has declined to do so because she either feels uncomfortable discussing her financial situation with a family member or is embarrassed by the fact that Hank is insisting that they enter into a premarital agreement. Hank has offered to pay for the cost of a consultation with another lawyer, but Wendy has declined. She has agreed, he says, that I should draft the agreement and she will sign it.

Wendy's job as Director of Nursing Education is an administrative one and she deals with contracts, grants, budgets, and other business matters. Her income is \$63,000 per year.

I agreed to prepare a draft of the premarital agreement and to review it with him. Told him we will need to attach his financial statement and a complete schedule of disclosures to the agreement; gave him a sample so that he can prepare for our next meeting.

PARTIAL FIRST DRAFT
Premarital Agreement
between
Hank Hayworth and Wendy Wexler

* * * *

1. All of the separate property of Hank Hayworth, including, but not limited to, the real property described in Schedule A, which is attached, and the personal property described in Schedule B, which is attached, shall, after the contemplated marriage, remain the separate property of Hank Hayworth, free and clear of any interest on the part of Wendy Wexler or any creditor or other person claiming any interest through Wendy Wexler. Wendy Wexler disclaims any interest in and to the separate property of Hank Hayworth, both now and after the contemplated marriage.

2. The parties agree that any accumulations of income or property that might be construed under the laws of any state as the acquisition of marital property shall for all purposes of this Agreement and their marriage be the separate property of the party responsible for such acquisition.

3. Each party agrees that, in the event of termination of the marriage by any means other than death, each shall retain his or her separate property and shall make no claim against the other for maintenance, alimony, or any other type of financial settlement, except as hereinafter specifically provided:

* * * *

LIBRARY

In the Matter of the Marriage of Robert T. Watson and Jane A. Watson

Supreme Court of Franklin (1986)

Petitioner Robert Watson challenges a decision voiding his premarital agreement with respondent Jane Watson. We affirm.

Jane Watson, then Jane Dilts, worked for Robert Watson as a secretary during the 1969 legislative session when he was a member of the Franklin State Senate. She subsequently filed for divorce from her first husband in July 1969.

In the early part of 1970, Robert and Jane became engaged to marry. During this same period, around February, Robert began discussing his desire for a premarital agreement with Jane. He told her he wanted to protect the interests of his three sons by his previous marriage. Robert did not communicate to Jane his specific intent to make certain everything obtained in the future would be separate and go to his sons.

In early March 1970, Robert asked his attorney to prepare a premarital agreement for the upcoming marriage; the attorney testified he was representing Robert in this transaction but that he had never informed Jane of that fact. Shortly after, in the week before their marriage, the couple met with the attorney on two occasions to discuss premarital agreements. The first meeting on March 17, 1970 (four days before the wedding), was to discuss the nature of the premarital agreement, the need for it, the effect of it, and the property involved. The attorney and the couple reviewed, paragraph by paragraph, a sample premarital agreement. The attorney then drafted a premarital agreement that provided all income and earnings derived from Robert's separate property would remain separate, as would any increases in value to that property. The attorney gave the parties separate copies of the agreement, including itemized lists of property, to read through before meeting with the attorney again.

On the eve of the wedding, the couple met to execute the premarital agreement. The attorney had never advised Jane to seek independent counsel but did say to both parties, "If you want somebody else to look at this, fine." In addition, paragraph 15 of the agreement stated (just above the couple's

signatures): "This agreement is being signed only after having been read completely by each party, and after each has had an opportunity to seek advice and counsel of his or her own choosing."

After being advised of the nature and value of the other's property, each party signed the premarital agreement. Robert testified that if Jane had objected to signing the agreement on the eve of the wedding, the wedding would have been delayed until an unobjectionable agreement could have been prepared.

At the time of the agreement, Robert owned stock and real estate worth about \$330,000. Jane, on the other hand, owned only her personal effects. In June 1983, Robert petitioned for dissolution of the couple's marriage. He requested the court divide their property in accordance with the premarital agreement. His net worth, as of the trial date, was approximately \$830,000. Jane challenged the validity of the premarital agreement.

We have long recognized the right of the members of a prospective marriage to contract between them regarding their property. If fair and fairly made, we have held premarital agreements between competent parties to be valid and binding.

During the past 30 years, we have developed a two-pronged analysis for evaluating the validity of a premarital agreement. Under the first prong, the court must decide whether the agreement provides a fair and reasonable provision for the party not seeking enforcement of the agreement. If the court makes this finding, then the analysis ends and the agreement may be validated. If the agreement is not fair, the court must invoke the second prong and decide: (A) whether full disclosure has been made by the parties of the amount, character, and value of the property involved, and (B) whether the agreement was entered into intelligently and voluntarily on independent advice and with full knowledge by both spouses of their rights.

Here, the premarital agreement was grossly disproportionate in favor of petitioner. In fact, after over 13 years of marriage, the agreement would serve to deny respondent any of her common law and statutory rights for a just and equitable distribution of property and prevent her from making any

claim against or seeking any rights in Robert's separate property. Since the agreement fails the test of fairness, we turn to the second prong of our analysis.

We find that part A of the second prong of the premarital agreement test was satisfied. The record reveals that Robert disclosed to Jane the nature and extent of his assets. Jane, in turn, communicated how limited were her resources. Thus, the parties made full disclosure of the amount, character, and value of the property involved in the premarital agreement.

In part B of the second prong of the premarital agreement test, the circumstances surrounding and the procedure followed in the execution of the agreement are the crucial factors. The bargaining positions of the parties, sophistication of the parties, presence of independent advice, understanding of the legal consequences and rights, and timing of the agreement juxtaposed with the wedding date are some of the factors involved in the circumstances surrounding the document signing. The status of the relationship between the two parties entering into the agreement requires procedural fairness to allow both parties the knowledge and sufficient opportunity to act voluntarily and intelligently.

The question of whether enforcement of the agreement is dependent upon each party's being represented by independent counsel can be considered only on a case-by-case basis. For example, in *In re Marriage of Knoll* (Oregon Supreme Court, 1983), the wife challenged the validity of the premarital agreement. The court found the agreement valid, judged in light of the circumstances in the case and the wife's range of experience. Important facts in the court's decision were: (1) the wife was advised of the necessity of a premarital agreement at least nine months before the wedding and knew and understood the purpose of the agreement; (2) she had been given a copy of the agreement at least seven months before the wedding; (3) she was advised on numerous occasions by her husband's attorney to seek independent counsel; and (4) she had an excellent understanding of her husband's assets, because she handled the bookkeeping and payroll for her husband's businesses and was in charge of ten of his business checking accounts. The court decided that the failure to provide the wife with a detailed explanation of the agreement and her failure to follow advice and seek independent counsel were offset by her advance knowledge of the agreement, her receiving subsequent advice to seek independent counsel, and her extensive understanding of her husband's assets. These circumstances put her in a fair position to sign the agreement freely and intelligently.

Parties to a premarital agreement do not deal at arm's length with one another. Their relationship is one of mutual trust and confidence. They must exercise the highest degree of good faith, candor, and sincerity in all matters bearing on the proposed agreement. The beneficial aspects of a premarital agreement must be obtained without abuse, and, in particular, without any overreaching on the part of the spouse initiating the agreement.

Here, the agreement is void for several reasons (all involving the circumstances leading up to the execution of the agreement): (1) the attorney never advised Jane that he was representing only Robert; (2) the attorney never advised Jane that the practical effect of the agreement was to eliminate any rights she might have in the accumulation of property; (3) the disparity between the parties in business experience and assets mandated a more vigorous urging by the attorney that Jane seek independent advice; and (4) the timing of the agreement negated any inclination respondent may have had to secure independent advice. Jane had an extremely short period of time in which to consider the premarital agreement; she received no specific verbal encouragement to seek independent advice; and from the record it is not apparent she had even a minimal understanding of the legal consequences of the rights she was signing away. We find the circumstances surrounding her signing of the agreement did not afford her with sufficient opportunity to sign the agreement intelligently and voluntarily.

There is no absolute requirement of independent counsel. If the agreement had been fair and reasonable, and had there been no showing of fraud or overreaching, there would be no such requirement. Here the agreement was patently unreasonable. Independent counsel was required. A clear and important distinction certainly exists between saying that in particular circumstances a transaction could not be supported in the absence of independent advice, and saying that a general rule of equity exists which makes independent advice indispensable to the validity of transactions between persons occupying a fiduciary relationship.

Where it is plainly shown that a transaction was fair and free from objectionable influence, and especially where the person supposed to have been at a disadvantage is shown to have been of

strong and independent mind and in a position to form an intelligent judgment, a requirement that, in addition, he or she must have had independent advice would seem to be arbitrary and unnecessary.

Although we strongly urge both parties to seek advice from independent counsel before signing a premarital agreement, we hold that it is not an indispensable prerequisite where it is otherwise shown that the agreement makes fair and reasonable provision for the party against whom enforcement is sought or that full disclosure was made and that each party entered into the premarital agreement intelligently and voluntarily. The absence of independent counsel is a factor to consider in deciding whether there has been full disclosure and intelligent and voluntary waiver of statutory and common law rights.

In light of the circumstances in the present case, we find respondent Jane Watson did not intelligently and voluntarily sign the premarital agreement and affirm the decision voiding the agreement.

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, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations to any proceeding concerning the lawyer's representation of the client.

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.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Comment to Rule 1.7

Loyalty to a Client. Loyalty is an essential element in the lawyer's relationship with a client.

An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined.

* * * *

As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client's consent. Paragraph (a) expresses that general rule. Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated. Paragraph (a) applies only when the representation of one client would be directly adverse to the other.

Loyalty to a client is also impaired when a lawyer cannot consider, recommend, or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict, in effect, forecloses alternatives that would otherwise be available to the client.

* * * *

Consultation and Consent. A client may consent to representation notwithstanding a conflict. However, as indicated in paragraph (a)(1) with respect to representation directly adverse to a client, and paragraph (b)(1) with respect to material limitations on representation of a client, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When more than one client is involved, the question of conflict must be resolved as to each client.

* * * *

Interest of Person Paying for a Lawyer's Service. A lawyer may be paid from a source other than the client if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client.

* * * *

Other Conflict Situations. Conflicts of interest in contexts other than litigation sometimes may be difficult to assess. Relevant factors in determining whether there is potential for adverse effect include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will arise, and the likely prejudice to the client from the conflict, if it does arise. The question is often one of proximity and degree.

For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them.

* * * *

RULE 1.8 CONFLICT OF INTEREST: PROHIBITED TRANSACTIONS

* * * *

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

- (1) the client consents after consultation;
- (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
- (3) information relating to representation of a client is protected as required by Rule 1.6.

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 to Rule 1.9

After termination of a client-lawyer relationship, a lawyer may not represent another client except in conformity with this Rule. The principles in Rule 1.7 determine whether the interests of the present and former client are adverse. Thus, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client.

* * * *

RULE 2.2 INTERMEDIARY

(a) A lawyer may act as intermediary between clients if:

* * * *

(3) the lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.

* * * *

Comment to Rule 2.2

* * * *

Since the lawyer is required to be impartial between commonly represented clients, intermediation is improper when that impartiality cannot be maintained. For example, a lawyer who has represented one of the clients for a long period and in a variety of matters might have difficulty being impartial between that client and one to whom the lawyer has only recently been introduced.

* * * *

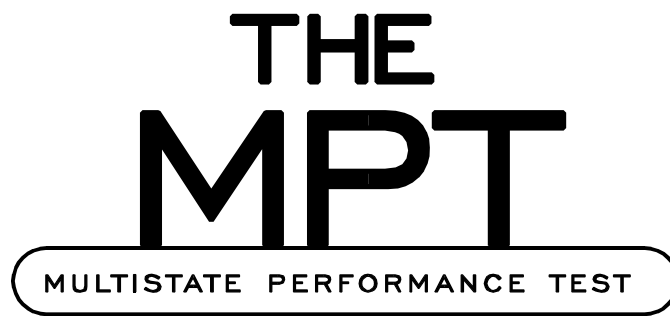
RULE 4.3 DEALING WITH UNREPRESENTED PERSON

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

Comment to Rule 4.3

An unrepresented person, particularly one not experienced in dealing with legal matters, might

assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. During the course of a lawyer's representation of a client, the lawyer should not give advice to an unrepresented person other than the advice to obtain counsel. However, as long as the lawyer makes clear that he or she is not acting on behalf of the unrepresented person or taking steps to advance the interests of the unrepresented person, the lawyer may provide accurate statements of the law.



1997 Point Sheets

*Alexander v. BTI and Bell
In re Hayworth and Wexler*



The MPT point sheets describe the factual and legal points encompassed within the lawyering task to be completed by the applicants. They outline all 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 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.

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Alexander v. BTI and Bell
DRAFTERS' POINT SHEET

The task given to the applicant is to draft a persuasive brief in support of defendants' motion for summary judgment in a personal injury case. The applicant must persuade the court that the doctrine of primary assumption of the risk bars plaintiff's recovery.

At the threshold, the brief must conform to the office memorandum that tells the applicant what the brief is supposed to look like: (1) it must contain a statement of facts (which means that the applicant must extract from the file the undisputed facts and set them forth concisely in a way that favors the defendants' position); (2) the headings must apply the facts to the principle of law being contended for; and (3) the text must argue logically and persuasively.

The case turns on whether BTI and Bell owed plaintiff a duty of care under the circumstances. If not, the doctrine of primary assumption of the risk completely bars plaintiff's recovery. If, on the other hand, they did owe plaintiff a duty of care, the doctrine of secondary assumption of the risk will operate only to limit plaintiff's recovery on notions of comparative negligence.

The outcome sought by the drafters is this: Under the case law, co-participants in a sporting event do not owe a duty of care to each other to guard against risks inherent in the game. The facts make it clear (at least, clear enough to permit a strong argument) that the instructional (i.e., coach/student) phase of the encounter between Bell and the plaintiff was over and that they had embarked upon the competitive, real tennis match phase (i.e., as co-participants) at the time plaintiff was struck in the eye with the ball. Accordingly, defendants owed plaintiff no duty of care and, thus, the doctrine of primary assumption of the risk is a total bar to plaintiff's claim.

The cases in the library make the point quite clearly, and the applicants should have no trouble picking this up. In fact, they should not miss this point because they are specifically told in the file memo from Mr. Calomen that it is the theory of the case "that neither BTI nor Bell owed Alexander a duty of care." The difficulty they will experience is in distinguishing the facts in the cases from the facts given to them in the file and reaching the conclusion that Alexander and Bell were co-participants rather than coach and student.

The key points the applicants should make, in the statement of facts, where appropriate, or woven into the argument, are:

- The doctrine of primary assumption of the risk bars recovery in these circumstances

only if the parties were co-participants in a sporting event. The case to cite for the proposition is *Knight v. Jewett*, which is cited internally in *Galardi* and *Watt*.

- The fine legal point to be derived is that, as between co-participants, no duty of care ever arises, so there is no need to engage in an analysis of whether there has been a breach of a duty. (Again, a big hint to this effect is given to the applicants in the instructional memo from Mr. Calomen when he says that the theory he wants to put forth is "that neither BTI nor Bell owed Alexander a duty of care.")
- The relationship of Alexander and Bell started out as a coach/student relationship, but at the point Alexander asked to practice under real game conditions, she and Bell became co-participants. The excerpts from the depositions make it an undisputed fact that the "usual" practice is that an actual match is preceded by warm-ups such as they were engaged in at the time the ball struck Alexander. Thus, the argument goes, the warm-up was part of a competitive match, not a continuation of the coach/student training.
- One of the risks inherent in any tennis match, which Alexander as a thoroughly experienced player must have understood, is that one of the co-participants might be struck and injured by a ball hit by the other. Also, it is an inherent risk in any sporting match that one of the active participants will be negligent, but, unless the negligent actor acted recklessly or intentionally to increase the risk, no liability attaches. (*Galardi* and *Watt*.) The fact that something on the sideline "distracted" Alexander makes it clear that Bell did nothing to increase the risk.
- Although the applicants have to cite *Galardi* and *Watt*, the holdings in those cases are distinguishable (and the applicants should affirmatively distinguish them) on the basis that, as distinct from the present case, the parties there stood in the coach/student relationship.
- BTI's liability, or freedom therefrom, is derivative, i.e., it depends on the doctrine of *respondeat superior*. If Bell has no liability, neither has BTI.

There are many refinements and finer points that applicants might pick up from the facts and the cases, but any applicant who discusses the foregoing reasonably well deserves to pass handily.

In re Hayworth and Wexler
DRAFTERS' POINT SHEET

This performance test deals with the subject of professional responsibility. The setting is one in which a long-time client of the office (Hank Hayworth) asks the responsible partner to draft a premarital agreement to be signed by the client and his prospective wife (Wendy Wexler). Coincidentally, Wendy was once a client of the office in an unrelated personal injury matter. The partner has concluded that, because of the firm's long-standing relationship with Hank, she cannot serve as "intermediary" in the transaction.

Hank is insisting on a very one-sided agreement. Wendy is reluctant to consult another attorney. The partner is concerned that, because of controlling case law and the Rules of Professional Conduct (which are included in the materials given to the applicant), she may have some obligation to advise Hank as to the effect of Wendy's interests on the agreement and to advise Hank of the effect of Wendy's refusal to get independent advice.

The applicant is asked to write a memo telling the partner what advice she should give Hank (1) on the effect of Wendy's interests on the enforceability of the agreement and (2) about problems arising because of Wendy's being unrepresented and how to resolve the problems.

The applicants should recognize the "two-pronged" approach of the *Watson* case, i.e., (1) that the premarital agreement must be facially fair, and (2) if not, it must have been entered into "intelligently and voluntarily" with full knowledge by both parties of the nature and extent of the property and an understanding of their rights.

With that as the premise, the applicants should cover the following points:

1. Effect of Wendy's rights and interests:

- Under *Watson*, Wendy has the right to a fair agreement, or, at the very least, a knowing and intelligent waiver after full disclosure and advice of independent counsel, factors clearly not present here.
- In order to ensure enforceability of the agreement, Wendy's interests must be taken into account, either by ensuring that the agreement itself gives her a fair division of the property or that she knowingly waives her rights.
- Wendy would ordinarily be entitled to an equitable share of the property acquired during marriage, a share of the increase in value of the property brought into the marriage, and alimony.

- The agreement as it is now (partly) drafted is all one-sided; it deals principally with Hank's property and only tangentially refers to Wendy's; it gives Wendy no benefit of property acquired or of whatever growth in the value of the assets may occur during the marriage; and it cuts her off from any share of Hank's income during the marriage and from alimony upon divorce.
- When Hank's current assets are contrasted with Wendy's, it is clear that Hank has and will retain the lion's share.
- The wedding is scheduled to take place in two weeks, and this raises the question whether there is enough time for Wendy to digest and fully understand the impact of the agreement Hank wants her to sign.
- Hank must be made to understand that this is not an arms-length transaction between business persons but it is rather a transaction that gives rise to a fiduciary relationship in which full disclosure is essential and overreaching is prohibited.
- Under the current state of the law, Wendy's rights and interests cannot be ignored. The distinction that applicants should be able to draw is that the partner's obligation to advise Hank about Wendy's interests arises not because of any undertaking to represent Wendy but, because of her obligation to advise Hank of the risks that the agreement may end up not being enforceable under the circumstances.
- The whole object, from Hank's perspective, is to be sure that the agreement is ultimately enforceable in case of a later divorce.

2. Problems arising because of Wendy's being unrepresented and how to resolve

the problems: This segment of the answer invokes both a discussion of the decision in the *Watson* case and the Rules of Professional Conduct, weaving in the facts given in the file. Not all the Rules contained in the file are relevant to the issues in the case; part of the job for the applicants is to sort through the Rules and determine which ones are important.

- The *Watson* court's "two-pronged" approach confers on Wendy the right to a contract that contains (1) facial fairness and, if that is lacking, (2) full disclosure, intelligent and voluntary waiver with full knowledge of the rights being waived.
- The *Watson* case does not decree that a premarital agreement is per se unenforceable if the party who subsequently challenges it was not represented by independent counsel, but it severely proscribes the circumstances under which an agreement

entered into without benefit of counsel will be upheld:

- The division of the property must be fair on its face. Here that is not so. As drafted, it is all one-sided; from what we know about the property, Hank's interests are vastly disproportionate to Wendy's; Wendy is giving up all rights to claim any future interest in Hank's property.
- This is a radical departure from the law of Franklin, which ordinarily requires equitable division of marital property.
- Thus, a court in which a challenge is brought will move to the second "prong" and consider whether the agreement was "intelligently and voluntarily" made by Wendy. The inquiries on this issue are whether Wendy had enough time to examine and digest the agreement and whether she had the sophistication to appreciate it. At this point, whether she consulted independent counsel becomes an important factor.
 - The wedding is only two weeks away, and Hank is insisting that the agreement be signed before the wedding.
 - Hank has not yet told Wendy about the waiver of alimony and property distribution.
 - The fact that Wendy doesn't want to consult an attorney because she is "embarrassed" about the fact that Hank is seeking a premarital agreement is an indication that her decision may be less than fully voluntary.
 - Although Wendy is well educated and has had business experience in her capacity as Director of Nursing Education, it seems clear that Hank has had superior business experience; whether they are on equal footing on this score is open to debate. It seems clear that Wendy is far more sophisticated than was Ms. Watson in the *Watson* case, but somewhat less so than was the wife in the *In re Knoll* case cited in *Watson*.
 - The fact that schedules containing what is apparently a full disclosure of Hank's property will be attached to the agreement is helpful in establishing that Wendy will have had a full understanding of the nature and extent of the property; but there is nothing to indicate that she fully understands the extent of what she is giving up, and the fact that Hank hasn't yet told her diminishes the likelihood that Wendy will have had time to fully appreciate the waivers.

- The prudent advice to Hank would be that the indicia that Wendy will be entering into this agreement "intelligently and voluntarily" are not clearly present.
- Notwithstanding that the partner has decided not to represent Wendy and that Wendy has decided not to consult independent counsel, the holding in *Watson* and the Rules of Professional Conduct probably require the partner to take affirmative steps to ensure that Wendy is aware of the correct state of affairs.
 - The partner should advise Hank that she (the partner) must inform Wendy, preferably in writing, that (a) the partner does not represent her in this matter but rather represents only Hank's interests, (b) she would have the right to share in Hank's property and to receive alimony upon divorce, but under the agreement as drafted she will be waiving all such rights, (c) she should get the advice of an independent attorney, and (d) Hank has agreed to pay the fees of an independent attorney to advise her on whether she should enter into the premarital agreement.
 - This should invoke discussion of a number of the Rules of Professional Conduct - e.g.:
 - To ensure that Wendy is not misled by the partner's role, the letter should make it clear that the partner's interests are aligned with Hank's and not Wendy's. (Rule 4.3.)
 - The partner must refrain from giving Wendy legal advice. The partner's communication to Wendy about her rights absent the agreement and the effect of the waiver of alimony and property division provisions of the draft agreement are not legal advice, but rather fall into the category of providing "accurate statements of the law" allowed by the comments to Rule 4.3 re Dealing with Unrepresented Person.
 - The partner should also make demonstrable efforts to urge Wendy to obtain the advice of independent counsel. *See, Watson* and comments to Rule 4.3.

- The partner should inform Wendy that, although it is all right for Hank to pay the fees of an independent attorney, it will be necessary for Wendy to consent and be sure the payment by Hank won't compromise that attorney's independence. (Comment to Rule 1.7 re Interest of Person Paying for a Lawyer's Service.)
- If Hank refuses to acquiesce in the partner's advice to inform Wendy, as indicated above, the partner might have to refuse to undertake the representation of Hank. That is to say, if the partner does have an ethical obligation to inform Wendy of her rights and Hank refuses to consent, the comments to Rule 1.7 suggest that this presents a conflict of interest. ("Loyalty to a client is also impaired when a lawyer cannot consider, recommend, or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests.")
- There is lurking in the problem the issue whether there is a conflict of interest arising from the fact that the partner had previously represented Wendy in a personal injury action. (C.f., Rule 1.7.) Probably not, for several reasons: the matter has been closed; it was not a "related" matter; and the partner had sent Wendy what is probably an effective termination letter.

