



*February 2002 MPTs
and Point Sheets*

Franklin Construction Company

In re Madert

Whitford v. Newberry Middle School District



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 2002 in twenty-four jurisdictions: Alaska, Colorado, District of Columbia, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Maine, Minnesota, Mississippi, Missouri, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, South Dakota, Texas, West Virginia, Guam, and the Northern Mariana Islands.

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 2002 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 the cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page references.
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

Franklin Construction Company

Axtell, Maynard & Sandrego
Attorneys at Law
One Central Post Plaza
Boyceville, Franklin 33321
(555) 521-7108

MEMORANDUM

To: Applicant
From: Max Sandrego
Date: February 26, 2002
Subject: Franklin Construction Company

Our new client, Franklin Construction Company (FCC), a joint venturer in the New Millennium Hotel Venture (the Venture), has asked for our advice regarding a demand letter it received from its co-venturer, Millman Developers, Inc. (MDI). I met yesterday with Ralph Dirksen, chief executive officer of FCC.

Please draft an opinion letter to Mr. Dirksen for my signature advising him on the following questions:

- (1) Is FCC obligated under either of its two contractual undertakings to pay *either* MDI or the Venture any part of the money demanded in the letter from MDI?
- (2) Is FCC obligated under the statutes and case law to pay *either* MDI or the Venture any part of the money demanded in the letter from MDI?
- (3) Does FCC have any obligation to undertake efforts to recover the money from the Boyceville Redevelopment Agency?

Follow the usual office format for opinion letters: (a) a short “Factual Statement”; (b) a “Short Answer” for each issue in which you state the essence of the opinion; and (c) an “Opinion” segment in which you state your conclusions and explain your reasoning, supported by the legal authorities. Mr. Dirksen is a sophisticated businessman but he is not a lawyer, so be sure to explain things fully and in language that a layperson can understand.

EXCERPT FROM TRANSCRIPT OF INTERVIEW WITH RALPH DIRKSEN

February 25, 2002

* * * *

Dirksen: I've got this letter from Art Millman—president of a company with which my company, Franklin Construction, had a joint venture. He wants us to pay back the \$350,000 his company contributed. I'm flabbergasted. It was never represented to be a loan. I don't want to have anything to do with Millman or his company ever again.

Lawyer: Well, why don't you start from the beginning.

Dirksen: OK. Back in January of last year, we got interested in some property owned by the Boyceville Redevelopment Agency. You know, the block at Third and Market that was razed a couple years ago.

Lawyer: Yeah. I'd heard a new hotel is supposed to go in there.

Dirksen: That's right. It's a tremendously valuable property. I thought we were going to get it, but the Agency pulled the rug out from under us.

Lawyer: What happened?

Dirksen: Well, when I first heard the Agency was going to put that property on the market, I started lobbying for an exclusive right to negotiate with them. Frankly, I pulled some political strings and got the mayor to go to bat for me. Anyway, the Agency passed a resolution giving Franklin Construction the exclusive right to negotiate for six months.

Lawyer: To negotiate for what?

Dirksen: For acquisition and development of the property.

Lawyer: Oh, OK. What amount of money are we talking about?

Dirksen: Well, it was sort of a package deal. We were supposed to get the property and the development rights in return for our commitment to build a Class A hotel—685 rooms—for at least \$35,000,000.

Lawyer: How does that compare to other projects you've had?

Dirksen: By far the biggest. And that's the problem. I guess I never thought getting the financing on such a valuable property would be as tough as it was.

Lawyer: What do you mean?

Dirksen: It's the most money I've ever had to dig up. That, coupled with the fact that one

of our ongoing projects ran into trouble last year. I couldn't find any individuals or lending institutions to back us on this one. I was pretty frantic because this project is a hands-down winner. The successful bidder stands to make a ton of money.

Lawyer: Did you get the loan commitments?

Dirksen: Not exactly. I got in touch with Art Millman. He's the president of Millman Developers, a major land developer out of Allensburg. He's done some huge projects, and I thought with his clout maybe he could help me get the backing. He was enthusiastic because I'd gotten the Redevelopment Agency to give us the exclusive rights, so he offered to go into partnership with us—that is, his company and mine.

Lawyer: Was he able to get the loan commitments?

Dirksen: No, but I was able to convince the Agency that, with Millman's backing, we'd be able to wrap it up pretty soon. So the Agency OK'd my involving Millman and extended my exclusive negotiating right for 90 days. I thought that would give us plenty of time.

Lawyer: OK. Go on.

Dirksen: Millman's lawyers figured out that what we needed to do was for Franklin Construction and Millman Developers to set up a partnership or joint venture or whatever. The first thing, to give Millman a stake in the deal, was for Franklin Construction to assign all its rights to Millman. Then Millman would put up the front money.

Lawyer: Front money?

Dirksen: Yeah. To get the Agency to extend my negotiating rights, Franklin Construction had to agree to deposit with the Agency 1% of the project price—\$350,000.

Lawyer: When you say "deposit," what do you mean? Was it refundable if the deal fell through, or what?

Dirksen: Well, now that things have fallen through, the Agency is claiming the money was forfeited and we're not entitled to get it back. Anyway, part of the assignment agreement was for Millman to put up the money, and, once the Agency OK'd Millman as our partner, we'd then set up the joint venture.

Lawyer: Did that ever happen?

Dirksen: Yeah. It's all spelled out in this stack of documents, and I'll just leave them with you. Millman's attorneys drafted the Assignment Agreement and the Joint Venture

Agreement. I confess, I was pretty desperate to save the deal, so I just signed them. The long and short of it is that Millman would basically take over and run things.

Lawyer: What part would you play in the joint venture?

Dirksen: Not much, really. FCC's role was only to provide services. The deal was that I'd use my political connections to keep us in the race and maintain a relationship with city officials after the project got started. Basically, my company would stay in the joint venture to do whatever work Millman asked it to do, such as securing building permits and approvals once construction got underway, and we'd get 10% of the profits down the road.

Lawyer: Then what?

Dirksen: Well, we weren't making much progress in getting loan commitments. Other local developers began agitating at City Hall. Then, out of the blue, the Agency sends me a letter terminating our exclusive negotiating right. The next thing I know, I get Art Millman's letter telling me to go after the Agency and pay back the \$350,000. Do I have to do those things?

Lawyer: I'll need to read the documents and do some research in order to answer your question. Then I'll give you a written opinion.

* * * *

Millman Developers, Inc.
Builders for the New Millennium
Millman Towers
Suite 4200
Allensburg, Franklin 33323

February 22, 2002

Ralph P. Dirksen
Chief Executive Officer
Franklin Construction Company
12543 Wrangel Road
Boyceville, FR 33324

Re: New Millennium Hotel Venture

Dear Mr. Dirksen:

As you know, we have done everything humanly possible to satisfy the Boyceville Redevelopment Agency (“Agency”) that we are pursuing all avenues to obtain the acquisition and development funding commitments for the Third and Market Street property. Notwithstanding our efforts, the Agency has abruptly terminated the exclusive right granted to Franklin Construction Company to negotiate for acquisition of the property. This termination effectively destroys any chance that we will be able to acquire and develop the property.

Accordingly, Millman Developers, Inc., exercises its right under Section M of the New Millennium Hotel Venture Agreement to terminate the Venture. We hereby demand that Franklin Construction Company pursue the Agency to recover the \$350,000 Millman Developers advanced to Franklin Construction under our Assignment Agreement. Regardless of whether you are successful, we demand that you repay that sum.

Sincerely yours,



Arthur D. Millman
President

ASSIGNMENT AGREEMENT

This ASSIGNMENT AGREEMENT ("Agreement") is between Franklin Construction Company ("FCC"), a Franklin corporation, and Millman Developers, Inc. ("MDI"), a Franklin corporation.

R E C I T A L S

1. The Boyceville Redevelopment Agency ("Agency"), by Resolution No. 126-98, granted to FCC the exclusive right to negotiate for the acquisition and development of Redevelopment Parcel 2B at Third and Market Streets in Boyceville, Franklin (the "Property"). The Agency has, by Resolution No. 43-99, extended FCC's exclusive negotiating right until March 14, 2002.
2. FCC requires MDI's assistance in satisfying the requirements of the Agency Resolutions.

A G R E E M E N T

A. FCC transfers and assigns to MDI all right, title and interest conferred upon FCC by the Agency under the above-mentioned Resolutions, including without limitation the right of exclusive negotiation thereunder.

B. MDI accepts this assignment and agrees to transfer to FCC the sum of \$350,000 to be deposited with the Agency as required in Resolution No. 43-99.

C. MDI agrees to pay FCC \$60,000 in consideration of this assignment.

D. MDI and FCC agree to form a corporation, partnership, joint venture or other entity ("Entity"), the business purpose of which will be to acquire the Property and develop thereon a 685- room Class A hotel.

E. This Agreement is expressly conditioned on the following:

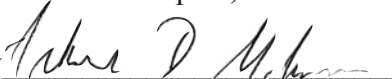
- (i) Execution by MDI and FCC of a definitive agreement regarding formation of the Entity within 30 days from the date hereof; and
- (ii) Agency acceptance of MDI as an authorized party to the acquisition and development of the Property.

In the event of the failure of either of the conditions set forth in (i) and (ii), above, this Agreement shall be null and void and FCC shall refund to MDI the \$350,000 transferred hereunder.

F. MDI shall have the right to assign all rights acquired under this Agreement to any successor in interest, including without limitation the Entity.

Date: November 30, 2001

Millman Developers, Inc.

By 
Arthur D. Millman
President

Franklin Construction Company

By 
Ralph P. Dirksen
Chief Executive Officer

BOYCEVILLE REDEVELOPMENT AGENCY
Resolution No. 43-99

WHEREAS, in Agency Resolution No. 126-98, the Boyceville Redevelopment Agency (“Agency”) granted to Franklin Construction Company (“FCC”) the exclusive right for six months to negotiate with the Agency for the acquisition and development of Redevelopment Parcel 2B (the “Property”) at Third and Market Streets in Boyceville, Franklin, on condition that the Property be acquired for the purpose of developing a Class A hotel; and

WHEREAS, the six-month exclusive negotiating period expires on December 14, 2001; and

WHEREAS, the Agency is satisfied that FCC has been attempting diligently to obtain the necessary \$35,000,000 acquisition and construction funding for development of the Property; and

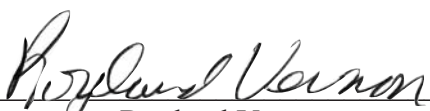
WHEREAS, the Agency has approved the involvement of Millman Developers, Inc., in FCC’s efforts to secure the financing;

NOW, THEREFORE, the Agency hereby grants to FCC an extension of the exclusive negotiating right on the following conditions:

1. Said extension shall be for 90 days, which shall begin on December 15, 2001, and expire on March 14, 2002, unless terminated sooner as provided in Paragraph 3, below.
2. Within 10 days of the date of this Resolution, FCC shall deposit \$350,000 with the Agency. This deposit is 1% of the anticipated acquisition and development costs. The Agency shall apply this deposit to the overall cost of the project.
3. If, at any time within said 90-day extension period it appears that FCC is unlikely to obtain the necessary loan commitments by the end of the 90-day period, the Agency may in its sole discretion terminate FCC’s exclusive negotiating rights and solicit other interested parties to participate in the bidding to develop the Property.

Date: November 20, 2001

Attest: This is a true and correct copy of Resolution No. 43-99 of the Board of Directors of the Boyceville Redevelopment Agency.

By 
Royland Vernon
Clerk of the Board

JOINT VENTURE AGREEMENT
OF
NEW MILLENNIUM HOTEL VENTURE

This JOINT VENTURE AGREEMENT is entered into by Millman Developers, Inc. (“MDI”), a Franklin corporation, and Franklin Construction Company (“FCC”), a Franklin corporation.

R E C I T A L S

1. Pursuant to Resolutions Nos. 126-98 and 43-99 of the Boyceville Redevelopment Agency (the “Agency”), FCC acquired the exclusive right to enter into negotiations with the Agency for the acquisition and development of Redevelopment Parcel 2B at the corner of Third and Market Streets, Boyceville, Franklin (the “Property”).

2. FCC has been unable to obtain the necessary loan commitments to satisfy the Agency and has therefore sought the assistance of MDI, which is a corporation with substantial experience in the development of commercial properties.

3. On November 20, 2001, the Agency recognized MDI as an authorized party to the negotiations for acquisition and development of the Property.

4. On November 30, 2001, FCC assigned to MDI all its right, title and interest in and to the exclusive right of negotiation under the Resolutions. A copy of the Assignment Agreement between MDI and FCC is attached as an exhibit and made a part of this Joint Venture Agreement.

5. The negotiations with the Agency contemplate the development of the Property as a 685- room Class A hotel.

6. MDI and FCC desire to undertake a joint venture to develop the Property as a hotel property and, in consideration of the foregoing and the following, hereby agree to do so.

A G R E E M E N T

A. Purpose. The joint venture shall be known as the NEW MILLENNIUM HOTEL VENTURE (the “Venture”). Its purpose is to pursue a development agreement with the Agency for the acquisition, development, construction, ownership, operation, sale, lease or other disposition of the Property as a 685-room Class A hotel at an overall cost of at least \$35,000,000, all for the production of income and profit.

B. Capital Contributions to the Venture. MDI assigns to the Venture as its capital contribution all its right, title and interest to (i) the exclusive right of negotiation transferred by FCC to MDI and (ii) the \$350,000 paid by MDI as the result of the attached Assignment Agreement. FCC’s capital contribution to the Venture shall consist of its local expertise and such assistance and services as MDI may from time to time require of it during the construction phase of the project. The venturers agree that any and all rights and property hereafter acquired as a result of the negotiations with the Agency, including the Property and any financing commitments relating thereto, shall belong to the Venture.

C. Management of the Venture. The venturers agree that MDI shall be the Managing Venturer of the Venture. In its capacity as Managing Venturer, MDI shall have exclusive management and control of the Venture and shall make all decisions and be authorized to do anything and everything it deems necessary or beneficial in running the business of the Venture.

D. Sharing in Distributions and Profits. The venturers agree that they will share in distributions of the profits of the Venture (other than returns of capital), including distributions of operating cash flow, as follows:

<u>Venturer</u>	<u>Percentage of Share</u>
MDI	90%
FCC	10%

* * * *

M. Term of the Venture. The term of the Venture shall commence on the date of this Agreement and, unless sooner dissolved by agreement of the venturers, by operation of law, or by failure or impracticability of the purpose of the Venture, shall continue in existence until December 31, 2012; provided, however, that if, prior to acquisition of the Property by the Venture, the Agency terminates the exclusive right of negotiation, MDI shall have the right to declare the Venture terminated and to withdraw.

Date: December 26, 2001

Millman Developers, Inc.

By Arthur D. Millman
Arthur D. Millman
President

Franklin Construction Company

By Ralph P. Dirksen
Ralph P. Dirksen
Chief Executive Officer

BOYCEVILLE REDEVELOPMENT AGENCY
City of Boyceville
City Hall, Room 301
Boyceville, Franklin 33322

February 13, 2002

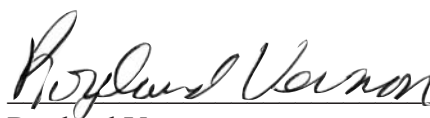
Ralph P. Dirksen
Chief Executive Officer
Franklin Construction Company
12543 Wrangel Road
Boyceville, FR 33324

Re: Redevelopment Parcel 2B
Agency Resolution No. 43-99

Dear Mr. Dirksen:

The Redevelopment Agency has determined that efforts being undertaken by Franklin Construction Company and its partner, Millman Developers, Inc., are unlikely to result in the receipt of meaningful loan commitments at any time in the near future. You are therefore notified that, pursuant to subparagraph 3 of Resolution No. 43-99, the Agency has terminated the exclusive negotiation rights granted in Agency Resolution No. 126-98 and extended in Resolution No. 43-99. All monies heretofore deposited with the Agency are deemed nonrefundable.

For the Board of Directors



Royland Vernon
Clerk of the Board

cc: Arthur D. Millman
Millman Developers, Inc.

LIBRARY

Franklin Construction Company

Franklin Business Associations Code
(Uniform Partnership Act)

§ 203. Property Acquired by Partnership

Property acquired by a partnership is property of the partnership and not of the individual partners.

§ 204. What Constitutes Partnership Property; Acquisition

* * * *

(b) Property is acquired in the name of the partnership by a transfer to either of the following:

(1) The partnership in its name.

(2) One or more partners in their capacity as partners in the partnership, if the name of the partnership is indicated in the instrument transferring title to the property.

* * * *

§ 306. Partner's Liability

(a) Except as otherwise provided in [this chapter] all partners are liable jointly and severally for all obligations of the partnership unless otherwise agreed by the claimant or provided by law.

* * * *

§ 401. Partner's Rights and Duties

* * * *

(b) Each partner is entitled to an equal share of the partnership profits and, subject to § 306 . . . , is chargeable with a share of the partnership losses in proportion to the partner's share of the profits.

(c) A partnership shall reimburse a partner for payments made and indemnify a partner for liabilities incurred by the partner in the ordinary course of the business of the partnership or for the preservation of its business or property.

(d) A partnership shall reimburse a partner for an advance to the partnership beyond the amount of capital the partner agreed to contribute.

(e) A payment or advance made by a partner that gives rise to a partnership obligation under subdivision (c) or (d) constitutes a loan to the partnership that accrues interest from the date of the payment or advance.

* * * *

§ 404. General Standards of Partner's Conduct

(a) The only fiduciary duties a partner owes to the partnership and the other partners are the duty of loyalty and the duty of care set forth in subdivisions (b) and (c).

(b) A partner's duty of loyalty to the partnership and the other partners is limited to the following:

(1) To account to the partnership and hold as trustee for it any property, profit, or benefit derived by the partner in the conduct and winding up of the partnership business or derived from a use by the partner of partnership property or information, including the appropriation of a partnership opportunity.

(2) To refrain from dealing with the partnership in the conduct or winding up of the partnership business as or on behalf of a party having an interest adverse to the partnership.

(3) To refrain from competing with the partnership in the conduct of the partnership business before the dissolution of the partnership.

(c) A partner's duty of care to the partnership and the other partners in the conduct and winding up of the partnership business is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law.

Stilwell v. Trutanich

Franklin Court of Appeal (1995)

Plaintiff, owner of a seafood company, sued defendants, the owner and the captain of a fishing vessel, for an accounting after breach of an alleged joint venture agreement. The trial court dismissed the suit on the motion of defendants, finding that there was no joint venture but, rather, that the arrangement was nothing more than a charter by plaintiff of defendants' vessel without captain or crew. Plaintiff appeals the dismissal.

A joint venture is an undertaking by two or more persons jointly to carry out a single enterprise for profit. It has been stated that a joint venture is a partnership formed for the accomplishment of a single project. Indeed, our supreme court has held that the relationships of joint venturers among themselves are governed by the partnership laws of the State of Franklin. *Mellor v. Brightman*, Franklin Supreme Court (1986).

The elements of a joint venture are: (a) a community of interest in the subject of the undertaking; (b) a sharing in profits and losses; (c) an equal right or a right in some measure to direct and control the conduct of each other and of the enterprise; and (d) a fiduciary relationship between and among the parties.

A community of interest may exist although the property forming the capital of the venture is not jointly owned by the parties and although one party has contributed money,

another property, and another skill to the enterprise. Although it is usual to provide for an equal sharing of profits and losses, the parties may agree to an unequal distribution of the profits, or they may agree that all the parties shall participate in the profits and only certain of them in the losses. In addition, the omission of a provision for the sharing of losses in a joint venture is immaterial since, in the absence of agreement, the law implies a provision that the losses are to be shared among the parties in the same proportion as the profits were to have been divided.

The parties to a joint venture can agree to have unequal control of operations. While in the absence of a special agreement one joint venturer cannot bind the others, they may by agreement grant authority to one or more of the joint venturers, which would not be implied from the relationship alone.

Interpreted in light of these rules, the complaint in this case adequately establishes the existence of a joint venture. It pleads and incorporates a written joint venture agreement to which one of the defendants was an undisclosed principal. The agreement is denominated "Joint Venture Agreement" and refers to the business relationship between the parties. It contemplates the making of a single voyage into Mexican waters to catch, transport, and sell seafood products. It designates the percentage of the net profits each party shall receive.

The complaint further alleges that the voyage referred to in the agreement was completed, that the venture suffered losses, and that said losses were borne by plaintiff, who was not reimbursed therefor. Although the agreement is silent on the manner in which the losses of the venture are to be apportioned, the law implies an obligation on the part of the joint venturers to bear losses in the same proportion as they agreed to divide the profits.

The fact that the defendants had no right to direct their joint venturer in making the voyage, procuring the seafood, and selling the products does not negate the existence of a joint venture agreement because, by written agreement, they delegated their authority.

Reversed.

Kovacik v. Reed

Franklin Supreme Court (1996)

In this suit for dissolution of a joint venture and for an accounting, defendant Reed appeals from a judgment that plaintiff Kovacik recover one-half of the losses of the venture, plus prejudgment interest, and declaring that Reed was obligated to return one-half of the amount Kovacik had invested as capital in the joint venture.

Kovacik told Reed he (Kovacik) had the opportunity to do kitchen remodeling work for a builder who was refurbishing a number of low-income dwellings. He said he had about \$10,000 to invest and that, if Reed would become his job superintendent and estimator, Kovacik would share the profits on the job with Reed on a 50-50 basis. Reed agreed and commenced the work on various projects. As the work proceeded, it became clear that it was unprofitable, and the builder for whom the work was being done fell seriously in arrears. At the end of the project, the Kovacik/Reed venture had suffered significant losses.

Reed's only contribution to the venture was his own labor. Kovacik provided all the venture's financing. The parties had never discussed apportionment of any losses that might accrue to the venture and, despite periodic requests by Kovacik that Reed "put up some money to get us out of the red," Reed had consistently refused to contribute any money.

Kovacik also claimed that, by failing to file

mechanic's liens against the properties, Reed had breached a fiduciary duty of care as a joint venturer to preserve Kovacik's claims for the delinquent amounts, thereby eroding Kovacik's capital investment.

The trial court concluded as a matter of law that, as joint venturers, Kovacik and Reed were bound to share the losses in the same proportion as they had agreed to share the profits; that Kovacik was therefore entitled to recover from Reed one-half of the losses; and that Reed, having breached his duty of care to Kovacik, was liable to Kovacik for one-half of the amount advanced by Kovacik to the venture.

It is the general rule that in the absence of an agreement to the contrary the law presumes that partners or joint venturers intended to participate equally in the profits and losses of the common enterprise. This is true irrespective of any inequality in their contributions to the venture.

In cases in which the above stated general rule has been applied, each of the parties contributed capital consisting of either money or land or other tangible property, or else was to receive compensation for services rendered to the common undertaking, which was to be paid before computation of the profits or losses. Where, however, as in the present case, one partner or joint venturer contributes the money capital as against the other's skill and labor, all the cases hold

that neither party is liable to the other for contribution for any loss sustained. Thus, upon loss of the money, the party who contributed it is not entitled to recover any part of it from the party who contributed only services.

The rationale is that where one party contributes money and the other contributes services, then in the event of a loss each would lose his own capital—the one his money and the other his labor. Another view of it would be that the parties, by their agreement to share equally in the profits, agreed that the value of their respective contributions of money and labor were equal. Accordingly, upon incurring the loss of both money and labor, the parties have shared equally in the loss.

We also find as a matter of law that Reed's failure, if any, to file mechanic's liens did not rise to the level of gross negligence or reckless misconduct such as would constitute a breach of a partner's duty of care. It appears that, as between the parties, Kovacik was charged with the management of the enterprise. If anything, it is the duty of the managing venturer to take action against debtors of the venture to preserve and recover assets of the joint venture. Moreover, in the absence of an agreement to do so, there is no obligation on the part of one joint venturer to protect the other from loss of investment, to take steps to assist the other to recover the investment, or to reimburse him personally for advances made in the conduct of the joint business.

Indeed, if the parties here were successful in recovering what the delinquent builder owed them, Kovacik would not have a superior claim to the entire amount. The money so recovered would belong to the joint venture. It would go into the coffers of the joint venture to be used first to pay the debts and obligations of the joint venture; then, if there were a resultant profit, 50% of the profit would be paid to Reed; and only the balance would go to Kovacik toward recoupment of his investment.

We reverse and remand for entry of judgment in accordance herewith.

FILE

In re Madert

Justin, Lindsay & Oh
Attorneys at Law
47 Montgomery Avenue
Oakton, Franklin 33311

Memorandum

To: Applicant
From: Sarah Lindsay
Re: Allie and Bruce Madert
Date: February 26, 2002

Our clients, Allie and Bruce Madert, are having a problem with their next-door neighbors, Adrian and Evelyn Doyle. The Doyles are trying to start a rock band. They are constantly practicing alone or with an ever-changing group of other musicians in a shed they converted into a music studio behind their house. The Maderts have repeatedly asked the Doyles to restrain themselves in a variety of ways, but to no avail. When the Maderts mentioned that they might even be forced to take legal action, Adrian Doyle told them to contact his lawyer, George Austin.

In fact, the Maderts are reluctant to file a lawsuit. Before they go that far, they want us to write a letter to George Austin to see if we can convince the Doyles that, unless they make changes to reduce the intrusiveness of their playing to acceptable levels, the Maderts will sue for an injunction and damages.

Draft a letter for my signature to George Austin. The letter should briefly explain the dispute, emphasize the key facts, and use legal authority to argue persuasively that the noise produced by the Doyles' music constitutes a nuisance to our clients and that, if the Maderts sue, a court will likely issue an injunction and award significant damages. Be sure to include in the letter a statement of what relief the Maderts could expect to obtain and constructive suggestions of what steps the Doyles can take to abate the noise so that it is no longer a nuisance.

Austin is a stickler for legal analysis, but a very reasonable and competent lawyer. He is likely to be receptive to solutions that will avoid litigation for his clients if he is persuaded that his clients' case is weak, so don't hesitate to lay out our case to him.

**Transcript of Recorded Interview with
Allie and Bruce Madert
February 25, 2002**

Attorney: Allie, Bruce, how good to see you. What brings you to see me in this setting?

Allie: I can hardly believe it—a problem with our new next-door neighbors. Well, not so new. They moved in about a year ago. Our old neighbor, Cecil, was always friendly, but our lives didn't overlap much. When Adrian and Evelyn Doyle moved in, our neighbors suddenly became a big problem.

Attorney: What kind of problem?

Allie: Let me go back to the beginning. Cecil was a painter, and he spent most of his time in an old shed behind the house, which he used as a studio. When the Doyles bought the house, the first thing they did was get a permit to remodel the shed and bring in contractors to make it fancier—they put in a skylight, made the windows larger, and made other improvements. At first we thought they were trying to create an accessory apartment, which would have been illegal without a zoning variance. They said they were creating a music studio. Adrian plays the bass guitar and Evelyn the drums. They had lived in an apartment before and were excited to have a place where they could just “let go” with their music. I told Evelyn that I was disturbed by noise—especially the bass guitar—and that the shed didn't seem like it would contain the sound. Bruce thought I was being kind of rude when I told her about hating the sound of the bass coming through the floor in my college dorm. She assured me that they were looking into ways to absorb the noise. As the renovations went along, I asked specifically about all the glass they were adding—I thought it would exacerbate the problem. Again, Evelyn said they were “dealing with it.”

Bruce: I did think Allie was being a little paranoid, but then, during the renovations, they started to practice their instruments in their house late into the night. At midnight you could hear the same six notes on the bass, over and over, not to mention the sharp sounds of the drums.

Allie: I couldn't decide if the practicing or the playing was worse. Other people would go over to the Doyles and they would all play. I don't know how they ever got any jobs, but apparently they did. Sometimes we'd see them loading up their old Chevy with all their equipment and they would say they were headed off to a “gig.”

Attorney: Did you ever let them know that the noise was bothering you?

Allie: Lots. Once after they had been practicing during a weekday evening, I saw Adrian

and told him that it was distracting to the kids when they were doing their homework. He said it would be better when the studio was finished and that they would try to keep the noise down. It never seemed any better to me.

Bruce: Another time, Evelyn came over about five on a Saturday afternoon to say they were having people over that evening and that she hoped it didn't bother us. I felt funny saying that I hoped they didn't go too late. At 2 a.m., when I finally fell asleep, they were still going strong.

Allie: After one particularly awful Friday night after the studio was finished when they had at least six other musicians there, we put a letter in their mailbox that said we were considering legal action. I brought a copy for you.

Attorney: Did you get a response?

Bruce: A vague one. Adrian said that they'd had a "really intense" night and that it was unlikely to happen again. He said that if we had legal problems to contact his lawyer, George Austin. It was so strange. Adrian showed no anger or embarrassment.

Attorney: So then what happened?

Allie: Things only got worse. They keep practicing till all hours and having people over to play—anywhere from two to eight of them. If there was any difference in the sound after the studio was completed, it was louder. It was certainly more frequent.

Bruce: And I never saw any sound insulating material when they were doing the construction. I've looked in the window and can see that the walls are just drywall. They have shades on the windows, but they don't seem specially designed for acoustical qualities. The noise is especially terrible in warm weather. I like to keep the windows open rather than run the air-conditioning. But then I feel like the band is in the living room.

Attorney: Before I find out what you would like to have happen, I'd like to know more about the neighborhood. Tell me about the Windsor section of town where you live.

Allie: We love Windsor. When we looked for a house to buy 16 years ago, we looked only there. The area has a strong sense of community, commitment to diversity and acceptance of all sorts of artistic types. A lot of people are ecologically minded. We have our own special recycling programs where we separate our garbage into five categories. You can't cut down a tree on your own property without a special permit. Some of the commuters who try to use our neighborhood to avoid busy streets don't like our speed bumps, but the bumps keep our children safe and keep away the motorcycles and trucks, with their noise and dirty exhaust.

Bruce: Like Allie says, we have a lot of artistic types in the neighborhood. That's part of what attracted us. We have our own jazz and folk festivals and a local weekly

music series outside the library in the summer. One neighborhood group puts on a yearly Shakespeare play using all child actors and another has a neighborhood dance recital. We hold an art festival for local artists in our commercial district. We could go on, but you get the idea.

Allie: It's ironic that a couple of musicians are causing our trouble. We've had all sorts living around us over the years, and they've always been careful about not disturbing anyone. There are artists' cooperatives and community centers close by where people can go if they want to play loudly or with a group or late at night. They don't charge very much.

Bruce: I think the difference is that the Doyles are recently married, middle-aged teenagers who are trying to experience a carefree, vaguely rebellious youth they never had. Our kids think they're just pathetic. During the day, they're both computer programmers. At night, they have dreams of starting a rock band.

Attorney: How do you fit into the Windsor community?

Bruce: Over the years, we've restored our Victorian, which is in the historic district. Most of the houses have large backyards, but the side yards are only 12 feet wide.

Attorney: Now let me find out what you would want—other than for the Doyles to move.

Allie: You're right. I'd throw them a good-bye party, and they could play. But given the work and money they've put into the studio and, by the way, the house, too, I don't see any celebration in my future.

Bruce: Also, they're not mean people. They're just kind of ridiculous and out-of-it so they do some pretty inconsiderate things. If we can keep from suing them, I'd prefer that option, but we're prepared to spend some money on this if we have to. Also, we don't know if the law is on our side.

Allie: I'd be happy enough if they kept the noise from reaching our house—the whole year. So I guess they'd have to change the times they play and practice. And, I bet there are alterations they could make to the studio to muffle the noise a lot.

Bruce: But probably they can't do everything they're now doing out of their studio.

Attorney: Let me tell you how I'm thinking about proceeding, and you can see if that makes sense to you or if you have other ideas. I think the law is quite favorable in your direction. The law provides a variety of remedies, that is, things we can ask for, both in terms of getting money and getting the Doyles to change. Before spending money on an investigation and hiring a battery of experts, we might be able to convince the Doyles, through their lawyer, to make the necessary changes.

Allie: I don't know if a lawyer can get through to them, but it seems worth a try. I'm not particularly interested in getting money from the Doyles, as long as the noise stops. But I wouldn't mind threatening—it might get their attention.

Bruce: I agree. Out of curiosity, could we get a court to order them to stop playing their music completely?

Attorney: Probably, but I'll have to do the research. The legal argument about the scope of the problems they face will have to be strong and convincing. I'll draft something and send it to you to see what you think before I send it to Austin.

Bruce: Sounds great. We'll wait to hear from you.

209 Westland Road
Oakton, Franklin 33329
December 7, 2001

Adrian and Evelyn Doyle
211 Westland Road
Oakton, Franklin 33329

Dear Adrian and Evelyn,

We are writing to you out of our frustration and unhappiness about the problem created for us by the noise level of your music. We know that you both love music, as we do. We also appreciate your enthusiasm for it. However, you do not seem to understand that the noise level interferes with the lives of our family. Your party last night was only the most recent and egregious example of the way your playing is out of hand. You and your friends continued to play very loudly until after 3:00 a.m. For all we know, you continued even later, but we finally got to sleep a little after 3:00. Laurie fell asleep by midnight, but she had a recital this morning at 8:30 so was much more tired than was good for her. Noah, who fell asleep about 12:30 a.m., had to get up at 7:00 a.m. for his basketball game. We all need our sleep, even on weekends. Although you might not have to wake up on weekend mornings, many of us do, and these late hours spoil what are important times for us.

We are asking you to please stop playing in a way that we can hear. It is intolerable that your music interferes with the regular activities of our lives. If the noise does not stop, we may have to take legal action. We hope that we can work together to solve this problem.

Very truly yours,

Allie and Bruce Madert

Allie and Bruce Madert

Noise Pollution and Control

University of Franklin Department of Ecological Studies

1998

INTRODUCTION

One of the drawbacks of our advanced technology is that we have produced the loudest noises known to humans. The realization that noise is a pollutant has been very slow in coming. Noise is invisible. Defining its impact on people and the environment is more difficult than with other environmental pollutants such as those that affect air or water. In addition, some people just plain like to make noise because of its association with power. It is a common misconception that you can adjust to noise by ignoring it or getting used to it. The ear never closes and is continually responding to sound, even during sleep. Noise can

- cause permanent hearing damage;
- contribute to the development or aggravation of heart and circulatory diseases;
- affect the quantity and quality of sleep;
- interfere with conversation and social interaction;
- disrupt the educational process and hinder the development of language skills in children;
- transform our initial annoyance into more extreme emotional responses and behavior; and
- endanger life and limb by obscuring shouts for help or masking warning signals, thereby delaying or preventing rescue attempts.

Home should be a place for rest and quiet after the labor and cares of each day. Excessive noise in the community deprives most people of access to such a retreat. Community noise problems are varied and include everything from barking dogs to traffic noise.

SUGGESTED OPERATIONAL RESTRICTIONS FOR COMMUNITY NOISE REDUCTION

Nuisance Laws: Prohibit loud or raucous behavior, disturbing the peace, and/or making unnecessary noise. This approach may be difficult to enforce, except in controlling noise from animals, radios, televisions, and musical instruments, and this approach needs to be employed in conjunction with another approach such as property-line noise limits.

Property-Line Noise Limits: Effective in controlling noise from stationary sources. Place a decibel level limit on noise at the boundary of the receiving or (less commonly) of the emanating property. Most often the noise limits are stated in terms of the character of the receiving land use (e.g., residential, commercial, etc.), and the time of day.

Source-Distance Noise Limit: Restricts operation of a device that creates a noise disturbance within a specified distance from the source. May be imposed to control noise from radios, televisions, stereos, motor boats, refuse collection vehicles, and recreational vehicles.

Time Limitations: Effective in controlling both stationary and mobile noise sources. Specify hours during which noise is prohibited.

Area Limitations: Specify areas such as noise sensitive zones and places of public entertainment where noise is controlled.

Use Controls: Restrict the operation of the noise sources such as motor vehicle horns, motor vehicles and cycles, and places of public entertainment.

SUGGESTED NOISE CONTROL TECHNIQUES

Use of Buffers: Setbacks can be provided in the form of open space, frontage roads, recreational areas, garages, etc., between the noise source and the receiver. The objective is to achieve attenuation of noise with distance.

Use of Barriers: This includes walls, berms, or other structures intended to provide extra attenuation by blocking noise from the source.

Unit Design: Placement of relatively sensitive rooms or fixtures away from the noise source is cost-effective. Garages, bathrooms, and storage areas can serve as internal noise barriers for bedrooms and living rooms.

Building Orientation: Using one building to shield another can reduce noise control costs. Placing yards or patios inside the “L” or “U” of buildings can reduce outdoor noise exposures if these face away from the noise source.

Noise Attenuation by Building Facades: The most obvious example of this technique is the reduction of window area on noise-impacted facades. Practices such as the use of double or staggered-stud walls, acoustical glass (with low air-infiltration window frames), resilient channels, etc., are effective in reducing interior noise levels. Weather stripping and caulking of wall penetrations are essential.

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In re Madert

Meadowbrook Swimming Club v. Albert

Franklin Supreme Court (1938)

This appeal is from a decree for an injunction against the continuance of a noise nuisance. Several years ago Meadowbrook Swimming Club built an amusement park, including a large swimming pool, in the narrow valley of Jones Falls. High hills, which rise on both sides of the valley, have become popular sites for expensive residences. In 1935 Meadowbrook added an outdoor dance floor, with a “shell” platform for the musicians’ stand. The club opened the dance floor to the public, engaged modern jazz orchestras to play dance music from nine to twelve, six nights per week, and used amplifiers to enhance the volume of sound.

Immediately, a number of residents, whose houses were located on the hills some 200 feet or more above the dance floor, complained in writing to Meadowbrook. The club made sundry efforts to minimize the alleged nuisance. The club abandoned the amplifiers, limited dancing to four nights a week, sought expert advice, and undertook acoustic experiments. Nevertheless, the blare of the brasses, the beating of the drums, and the thumping of the bass were, and are, so penetrating and loud that witnesses who live on the sides of the hills, who are doubtless normally constituted and of exceptional integrity and intelligence, are unable to sleep, to study, or otherwise lead normal lives in their own homes for four evenings a week during the summer.

Though not a nuisance *per se*, where a trade or business as carried on interferes with the reasonable and comfortable enjoyment by another of his property, a wrong is done to a neighboring owner for which an action lies at law or equity. It makes no difference that the business was lawful and conducted in the most approved method. The question is whether the nuisance complained of will or does produce unreasonable physical discomfort to persons of ordinary sensibilities, tastes, and habits. However, not every inconvenience will call forth the restraining power of a court. The injury must diminish materially the value of the property as a dwelling and seriously interfere with the ordinary comfort and enjoyment of it.

Noise alone may create a nuisance and be the subject of injunction. In *Lloyd v. Parsons*, Franklin Court of Appeal (1934), a person who kept on his premises so great a number of domestic animals, fowl, and hogs that their noise deprived the complainant neighbor of the reasonable use and comfortable enjoyment of his adjacent dwelling was properly enjoined from keeping the animals. Any habitual noise, whether produced by domestic animals or by skilled musicians, which is so loud, continuous, insistent, not inherent to the character of the neighborhood and unusual therein, that normal people are so seriously incommoded that they cannot sleep, study, read, converse, or concentrate until it stops, is unreasonable.

The decree in this case permanently enjoined Meadowbrook from “the playing of loud music, or the creation of other similar noises” upon its property “in such manner that the noise is transmitted onto the properties of the plaintiffs, so as to deprive them and the members of their families of the reasonable use and comfortable enjoyment” of their respective homes. Meadowbrook argues on appeal that the decree has the effect of an unqualified prohibition against the playing of jazz or other loud music. But such a purpose is not indicated by the decree.

A change of the conditions under which the loud jazz music is played might prevent the disturbance. For example, the club’s president suggested that the construction of a roof to cover the open-air dance floor and connect it with the top of the shell might obviate the cause of complaint. The decree leaves Meadowbrook free to adopt any effective method of so reducing the volume of sound transmitted to the homes of the plaintiffs that they will no longer be disturbed.

The form of the decree is not objectionable as insufficiently definite for it specifies the purpose and extent of the restriction that it imposes, while leaving the defendant at liberty to devise and apply promptly an efficient plan for the abatement of the prohibited nuisance.

Decree affirmed, with costs awarded to plaintiffs.

Gorman v. Sabo

Franklin Court of Appeal (1956)

The jury returned a verdict of \$3,500 against Mr. and Mrs. Gorman in a suit by their neighbors, Mr. and Mrs. Sabo, based on the willful and malicious beaming into the Sabo home of loud blaring of the Gorman radio. The Gormans appealed.

The jury found the following facts. Mr. and Mrs. Sabo and their four children moved in next door to the Gormans, who also had children. Trouble arose among the children, producing ill feeling on the part of Mrs. Gorman against the Sabo family.

Mrs. Gorman deliberately harassed the Sabo family with the aim of making them move. She turned up the radio to an excessive volume, beaming it directly from a west window of the Gorman house into the east side of the Sabo house. The window was kept open even in cold weather. This continued for hours each day over a period of several years. Mrs. Gorman also ordered her children to beat with sticks and stones on metal furniture and cans at strategic times.

Mrs. Gorman's efforts to get rid of the Sabo family were known to the neighbors, many having seen the radio and heard its noise. Mrs. Gorman told various neighbors that she intended to make the Sabos move, that she would make life miserable for Mrs. Sabo, and that she hoped Mr. Sabo would be struck down.

As a result of the noise, life became miserable for Mr. and Mrs. Sabo. Their children could not take their naps. It was necessary to move them from their rooms on the side of the house facing the Gormans. On innumerable occasions it was impossible to carry on a conversation in the Sabo home. Mrs. Sabo suffered from an actual illness because of the constant noise. Mr. Sabo became irritable and nervous.

If noise causes physical discomfort and annoyance to those of ordinary sensibilities, tastes and habits, and seriously interferes with the ordinary comfort and enjoyment of their homes and thus diminishes the value of the use of their property, it constitutes a private nuisance, entitling those offended against to damages. Where there is a non-trespassory invasion of rights in real property occupied as a home, consisting of a private nuisance, the measure of damages is the diminution in the value of the use of the property as a home. The elements in the loss of the value of the use include the ordinary use and enjoyment of the home and also sickness or ill health of those in the home caused by the nuisance. A plaintiff is not limited to the recovery of the diminished rental value but may be compensated for any actual inconvenience and physical discomfort that materially affected the comfortable and healthful enjoyment and occupancy of the home.

Damages for illness, pain and discomfort, and annoyance caused by a nuisance are recoverable in addition to, and separate from, damages for diminution in the value of the use or the value of the property. The Sabos produced sufficient evidence of the ill effects suffered by them to entitle them to substantial damages.

Once the right to compensatory or at least nominal damages has been established, punitive damages may also be awarded. The testimony also clearly supports a finding of willfulness and malice on the part of Mrs. Gorman sufficient to justify punitive damages.

Judgment affirmed, with costs awarded to plaintiffs.

Arundel Fish & Game Club v. Carlucci

Franklin Court of Appeal (2000)

This case concerns noise resulting from gunfire on the premises of the rifle and pistol firing range of the Arundel Fish & Game Club (the Club), which was established in the early 1950s. The issue is whether that noise constituted a common law private nuisance to resident owners of properties adjoining the Club. The District Court concluded that it did and issued an injunction requiring the Club to design and implement a noise abatement system. This appeal ensued.

When the Club purchased its property, there was relatively little residential development in the area. The real estate surrounding the Club's premises is now predominantly residential.

At trial, the owners of the adjoining residential properties described the noise emanating from the Club's activities. Michael Darrow testified that in 1987 he completed the home that he shares with his family. His house is located approximately 800 feet from the Club's land. Darrow related that the gunfire from the Club occurred from 9 a.m. until 9 p.m. seven days a week. He could hear the gun club's activities from any place in his house, including the shower with the water running. He testified that he and his family could not use their yard on the weekends. The noise prevents sleeping, reading, watching television or any other activity that requires concentration.

Five other residents similarly testified to the interference that the noise caused with enjoyment of their residences. The residents related their efforts to persuade the Club to modify its activities. Their complaints to the police also had not resulted in any relief.

The Club first argues that, since it is not subject to the noise restrictions imposed by regulations adopted by the Franklin Department of the Environment, its activities cannot be enjoined as a private nuisance. Under Title 3 of the Franklin Environment Code, which concerns Noise Control, Franklin Environment Code § 3-101 *et seq.*, the Department of the Environment has been charged with promulgating regulations that limit noise. Significantly, the legislature has exempted shooting sports clubs from the reach of noise regulations.

The regulations adopted by the Department of the Environment to control noise pollution are codified in the Franklin Code of Regulations (FCR) at 26-01 through 26-59.¹ The maximum permissible noise levels for commercial enterprises operating on residential land, measured at its boundary, are set forth at FCR 26-23(a):

The maximum allowable noise level for a commercial enterprise in a

¹ Note that these regulations apply only to commercial and industrial enterprises.

residential zone shall not exceed 65 decibels in the daytime hours nor 55 decibels in the nighttime hours.²

Even though the Club qualifies for an exemption from the regulations of the Franklin Department of the Environment, the exemption does not bar residents from seeking equitable relief from a nuisance created by appellant.

In order to provide quantifiable guidelines for the operation of the gun club, the court will use some standards provided by the regulations promulgated by the Franklin Department of the Environment simply for the advisory benefit they provide. In this case, the measurements of the noise levels at the residents' property lines taken by experts retained by the residents varied between 72 and 89 decibels. All are significantly above the levels permitted by the Department of the Environment for commercial enterprises in residential zones. These guidelines can help a court inform its judgment about whether noise levels are unreasonable and can have deleterious effects on those subjected to them and what those levels should be.

² Terms used in the regulations are defined at Franklin Code of Regulations (FCR) 26-02:

* * *

b. 'Daytime hours' means 7 a.m. to 10 p.m., local time.

c. 'Nighttime hours' means 10 p.m. to 7 a.m., local time.

* * *

Nuisance is usually placed into three classifications: first, those that are nuisances *per se* or by statute; second, those that prejudice public health or comfort such as slaughterhouses, livery stables, etc.; third, those that in their nature are not nuisances, but may become so by reason of their locality, surroundings, or the manner in which they may be maintained.

The gun club is a nuisance that falls into the third category. There is ample evidence to justify the court's conclusion that the gunfire on the Club's premises constituted a private nuisance to its residential neighbors.³

The Club also relies on the Restatement (Second) of Torts § 822.⁴ The Club argues that liability for private nuisance should apply only when the interference is intentional and unreasonable or caused by negligent, reckless, or abnormally dangerous conduct. We agree.

In this case, however, the gun club's activities do violate the standard enunciated in the

³ The fact that most of the residents purchased their properties and built their homes on residentially zoned property after the Club had been established did not bar those residents from seeking relief from the nuisance.

⁴ The Restatement (Second) of Torts § 822 provides:

One is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is either
(a) intentional and unreasonable, or
(b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.

Restatement and are intentional, as we have defined that term:

An intentional invasion of another's interest in the use and enjoyment of land need not be inspired by ill will or malice. An actor who knowingly causes an invasion of this interest in the pursuit of a laudable enterprise without any desire to cause harm also commits an intentional invasion. It is the knowledge that the actor has at the time he or she acts or fails to act that determines whether the invasion resulting from his conduct is intentional or unintentional. When an actor is put on notice concerning the harm of certain activities and continues to engage in them with knowledge of the harm, the actor is liable for creation of a nuisance. *Lawrence v. Simms*, Franklin Supreme Court (1995).

Finally, the gun club argues that the injunction issued by the court was overbroad. We again disagree. The court ordered that within six months the Club design and implement a noise abatement system for all of its facilities so as to reduce the noise to not more than 65 decibels during the daytime and 55 decibels during the nighttime. It further provided that the sound would be measured by devices at locations on the residents' properties from the sides of the residents' houses that faced

the Club's premises. It further ordered that during a six-month period the operation of the Club's firing ranges be limited to certain hours calculated to reduce the likelihood of interference with the use and enjoyment of the residents' properties.

Both experts who evaluated the noise emanating from the Club testified that there are effective noise abatement procedures that could be employed by the Club to reduce the noise levels that the residents were enduring on their properties. We perceive no abuse of the court's discretion in so framing the injunction.

Affirmed, with costs awarded to plaintiffs.

FILE

Whitford v. Newberry
Middle School District

**The Gogh Law Offices
647 Aiden Place
Newberry, Franklin 33616**

MEMORANDUM

TO: Applicant
FROM: Sandy Gogh
RE: *Whitford v. Newberry Middle School District*
DATE: February 28, 2002

I was very pleased with the way you handled the evidentiary phase of the motion for preliminary injunction in *Annie Whitford v. Newberry Middle School District*. You will be making the closing argument tomorrow afternoon. Before then, I'd like you to write out your closing argument to prepare for your presentation in court and let me review it.

The court has instructed you to focus your argument on the likelihood of Annie's success on the merits, which you know is a prerequisite for issuance of a preliminary injunction. The judge has already found irreparable injury, so there is no need for you to argue that point.

The closing argument should revolve around the facts that you brought out at the hearing. The School District refused to allow Annie to try out for her school's boys-only volleyball team. Since the District receives federal financial assistance, this refusal violated Annie's rights under Title IX of the Education Amendments of 1972. The refusal deprived her of an equal opportunity, based on gender, to participate in interscholastic athletics.

In the argument, you should tell a persuasive story about why Annie should prevail, highlight the salient facts of that story, and show how the evidence supports the factors that are enumerated in the statute, regulations, and case law. It is also important that you preempt the District's position by showing how the District's evidence fails to support its case and, in fact, supports Annie's. The structure of the argument—i.e., an introduction, main argument, and conclusion—is important. It should be persuasive, organized, well-reasoned, and compelling. You should end it with a clear statement of the relief you are seeking.

1 UNITED STATES DISTRICT COURT
2 CENTRAL DISTRICT OF FRANKLIN
3

4 Annie Whitford, a minor, by
5 her best friends and natural
6 guardians Pearl Whitford and George
7 Whitford,

8 Plaintiff

Case Number 02-CV-1068

9 v.

10 Newberry Middle School District,
11 Defendant
12

13
14 TRANSCRIPT OF HEARING ON PLAINTIFF'S
15 MOTION FOR PRELIMINARY INJUNCTION

16 February 27, 2002
17

18 THE COURT: Okay counsel, let's begin. You may proceed.

19 APPLICANT: In this case, plaintiff Annie Whitford is a 12-year-old student in the seventh
20 grade at Newberry Middle School. She seeks an order requiring the Newberry Middle
21 School District to let her try out for the interscholastic volleyball team at Newberry
22 Middle School. Newberry Middle School is covered by Title IX of the Education
23 Amendments of 1972, which prohibits gender discrimination in school athletic pro-
24 grams. Annie wanted to try out for her school's all-male volleyball team and was
25 informed by the coach that she could not because a District rule prohibits females from
26 playing with or against male students in contact sports.

27 THE COURT: Is that policy in writing?

28 APPLICANT: It's attached to my motion, Your Honor. Let me read it into the record: "Boys
29 and girls shall not be permitted to participate in interscholastic athletic games as mixed
30 teams, nor shall boys' teams and girls' teams participate against each other in inter-
31 scholastic athletic contests when the sports involved are contact sports or sports in
32 which the purpose or major activity involves physical contact, including football, base-
33 ball, basketball, volleyball, wrestling, and ice hockey."

34 THE COURT: Mr. Perdue, is this a fair summary of the problem?

35 PERDUE (Counsel for School District): Yes, Your Honor.

36 THE COURT: Call your first witness, counsel.

1 THE PLAINTIFF, Annie Whitford, WAS SWORN AND IDENTIFIED.

2 APPLICANT: Good morning, Annie. I am going to ask you a few questions, okay?

3 WHITFORD: Okay.

4 Q: When did you start playing volleyball?

5 A: When I was about seven years old, in the second grade.

6 Q: Have you been playing ever since?

7 A: Yes, constantly. I've played on teams through the YMCA, the Parks and Recreation
8 Department, and the U. S. Volleyball League Juniors Club. I've gone to volleyball camps
9 for the last five summers.

10 Q: Were there boys on these teams?

11 A: Yes, they were all co-ed.

12 Q: I notice you're wearing a T-shirt today that has something to do with volleyball.

13 A: Yeah, it's my lucky T-shirt. It's the one I got as a special award when my team won the
14 silver medal at the National Junior Olympics this year in New Orleans. I play the position
15 of middle blocker, so the T-shirt says, "Annie Whitford, Middle Blocker, Attacker of the
16 Unwary, She Yields to No One."

17 Q: Have you received other awards?

18 A: Yes, I've gotten awards when my teams have won tournaments, and also as the team's
19 Most Valuable Player.

20 Q: Do you know the win-loss statistics of your teams?

21 A: Counting it all up, the teams I've played on have won 97 matches and lost only seven.
22 We've taken at least 20 titles.

23 Q: Annie, what does volleyball mean to you?

24 A: Volleyball is my life. I play it every day. If I'm not practicing or playing on teams, I'm
25 working on my serves, passes, and spikes against the wall of the gym or behind the school.
26 My goal is to get a scholarship to a college with a great women's volleyball team, like the
27 University of Franklin or Stanford. My parents sure couldn't afford those schools other-
28 wise. Maybe I'll even play in the Olympics one day. In fact, even before that, I've got a
29 real good chance of getting a volleyball scholarship to Prescott next year. It's, like, the top
30 prep school in the state and has got a great volleyball program.

31 Q: When did you first attend Newberry Middle School?

1 A: Just this year when my family moved here from out of state.

2 Q: Why do you want to play on the boys' volleyball team?

3 A: For one, seventh grade is the first chance you get to play interscholastic volleyball. Also,
4 it's not like there is even a girls' team for me to try out for. Even if there were, I've played
5 with boys on all of my past teams and I've watched the Newberry Middle School volley-
6 ball team play. I think that playing with the boys will give me the competition I need to
7 develop my skills.

8 Q: Annie, suppose the judge decided you should be able to try out, but she waited six months
9 before she made that decision. Would that be okay?

10 A: Well, I don't want to be impolite, but, like, what would be the point? The season starts in
11 two weeks and only lasts three months. I mean, Prescott scouts and even some colleges
12 wouldn't be able to see me play.

13 APPLICANT: I have nothing further for this witness.

14 THE COURT: Cross-examination?

15 PERDUE: Yes. Thank you, Your Honor.

16 Q: Annie, have you ever been hurt playing volleyball?

17 A: Well, just twice. In a tournament game last year, I was hit in the face by a ball. I got a
18 bruised eye and a bloody nose.

19 Q: Was that ball hit by a boy?

20 A: Yeah.

21 Q: Any other injuries?

22 A: At last summer's volleyball camp, a boy on the other team bumped me at the net and
23 caused me to come down off balance. I came down on my right ankle and sprained it.

24 Q: So, your injury was caused by coming into physical contact with a boy, isn't that right?

25 A: Yeah, but he did it intentionally and he got called for a foul because you're not supposed
26 to do that. But you really try hard not to do stuff like that because your team could get
27 penalized.

28 Q: And, lots of times, when you're scrambling to get the ball, you and your teammates col-
29 lide, isn't that true?

30 A: Not lots of times, but sometimes.

31 Q: Thank you, Annie. Nothing further, Your Honor.

1 THE COURT: Next?

2 APPLICANT: The plaintiff calls Karin Wallenstein.

3 THE WITNESS, Karin Wallenstein, WAS SWORN AND IDENTIFIED.

4 APPLICANT: Ms. Wallenstein, in what positions are you employed at Newberry Middle School?

5 WALLENSTEIN: I am the Director of Physical Education and the volleyball coach.

6 Q: Were you previously employed in school athletics?

7 A: Yes, after graduating from college, I taught physical education courses for seventh and
8 eighth graders for about six years. After that, I was at different times an assistant coach
9 for the women’s volleyball teams at Franklin Community College and Franklin State.

10 Q: Do you also play volleyball?

11 A: I play on the “Bruisers” adult co-ed team through the U.S. Volleyball League. I’ve played
12 since high school.

13 Q: How many interscholastic sports teams are there at Newberry Middle School?

14 A: There are 10.

15 Q: What are they?

16 A: There are six boys’ teams—football, basketball, baseball, ice hockey, volleyball, and
17 wrestling. There are four girls’ teams—cross-country, basketball, swimming, and tennis.

18 Q: Are there any co-ed interscholastic teams?

19 A: No.

20 Q: Is there a budget for interscholastic athletics at Newberry?

21 A: Yes, it pays for things like coaches’ salaries, facilities upkeep, equipment and uniform pur-
22 chases, athlete transportation, and publicity.

23 Q: What percentage of the athletic budget is spent on the boys’ teams?

24 A: I’d say approximately 70%.

25 Q: Did you allow Annie Whitford to try out for the school volleyball team?

26 A: Ultimately, no.

27 Q: Why?

28 A: This is a little embarrassing. Being new to Newberry, I didn’t even know that the District
29 had a rule barring girls from the volleyball team. I had seen Annie play during P. E. class
30 and she is by far the best player we have in the school—boy or girl. I told her I hoped she
31 would try out.

1 Q: Did any other female students ask to try out?

2 A: No, but not for lack of interest.

3 Q: What do you mean?

4 A: Unlike me, they knew the rule. Before tryouts I asked some of the girls who played well
5 in class if they were going to try out. They told me it was no use, that, although some of
6 them love to play volleyball, they had given up a long time ago trying to get the school to
7 start a girls' team, or to allow a co-ed team. Once I found out about the rule barring girls,
8 I had to tell Annie she couldn't try out for the team.

9 Q: How much, if any, physical contact takes place between players during a game of volleyball?

10 A: We follow U. S. Volleyball League rules, which say volleyball is a non-contact sport. The
11 main activity of the game is hitting the ball back and forth over the net and trying to land
12 the ball in the opponent's court without its being returned successfully. Intentional or
13 threatened physical contact between players can cause the player who acts intentionally or
14 threatens another—and her team—to be penalized, including expulsion from the match.

15 Q: Thank you, Coach Wallenstein.

16 THE COURT: Cross-examination?

17 PERDUE: Thank you, Your Honor. Ms. Wallenstein, isn't it true that volleyball players wear pro-
18 tective padding when they play?

19 WALLENSTEIN: Most players wear kneepads, and I have seen a few players wear elbow pads.

20 Q: In a game of volleyball, the six members of one team play on one side of the net and the
21 six members of the opposing team play on the other side, correct?

22 A: Yes, that's correct.

23 Q: And, in the course of running for the ball, team members collide with each other, don't they?

24 A: Not normally, if each player covers her area, but it can happen occasionally.

25 Q: And sometimes a player in the front line collides at the net with a player from the other
26 team, right?

27 A: Sometimes.

28 Q: For example, when trying to spike a ball over the net, a player jumps up to hit the ball, right?

29 A: Yes.

30 Q: And that player raises her arm over her head and attempts to slap the ball hard over the net.

31 A: Yes.

1 Q: And in trying to make that play, she may physically strike a player on the other team who
2 may be trying to block or pass the ball, right?

3 A: In my experience, rarely.

4 Q: Well, isn't it considered a very good play when a player spikes a ball hard over the net?

5 A: Yes.

6 Q: And a hard, fast hit over the net that the other team can't respond to is even called a "kill,"
7 right?

8 A: Yes, but certainly not with the aim of "killing" anyone.

9 Q: In the course of your impressive career as a college coach, how many injuries to players
10 have you observed as a result of physical contact between players?

11 A: Some.

12 Q: Because a good player is going to use all her power, speed, and strength to get that vol-
13 leyball over the net, right?

14 A: Come on, Mr. Perdue, we are talking about 12-year-old boys and girls.

15 Q: Ms. Wallenstein, please answer my question.

16 A: I guess so.

17 PERDUE: I have no further questions of this witness.

18 THE COURT: Redirect?

19 APPLICANT: Briefly, Your Honor. Ms. Wallenstein, do volleyball rules require players to wear
20 knee or elbow pads?

21 WALLENSTEIN: No.

22 Q: How about mouth protectors or shin guards?

23 A: Neither.

24 Q: Do the rules prohibit players from wearing jewelry?

25 A: The rules don't but good sense does.

26 APPLICANT: Nothing further, Your Honor, and the plaintiff rests.

27 THE COURT: Mr. Perdue?

28 PERDUE: Your Honor, the District calls its only witness, Grace Huang.

29 THE WITNESS, Grace Huang, WAS SWORN AND IDENTIFIED.

30 PERDUE: Ms. Huang, you have been the Superintendent of the Newberry Middle School District
31 for 10 years?

1 HUANG: Correct.

2 Q: What, if any, responsibility do you have over the interscholastic athletic programs at the
3 schools in your District?

4 A: I decide the budget allocations, approve the types and number of interscholastic teams
5 and, with help of counsel, monitor compliance with the law.

6 Q: Were you responsible for the issuance of the rule at issue in this case?

7 A: Yes.

8 Q: What are the reasons for this rule?

9 A: I read Title IX to prohibit co-ed interscholastic teams in contact sports and the District has
10 concluded that volleyball is a contact sport.

11 Q: Your Honor, I have nothing further for this witness.

12 THE COURT: Cross-examination?

13 APPLICANT: Thank you, Your Honor. Ms. Huang, you have no firsthand experience in school
14 athletics, do you?

15 HUANG: No, not really.

16 Q: You have never taught seventh grade students, have you?

17 A: My previous teaching experience was with high school students.

18 Q: Am I correct that only seventh and eighth grade students may participate in interscholas-
19 tic athletic activities in the Newberry Middle School District?

20 A: Yes, that is correct.

21 Q: How many students are there in the seventh and eighth grades at Newberry Middle School?

22 A: Approximately 1,000.

23 Q: How many of the 1,000 students are female?

24 A: About 600.

25 Q: That would make about 400 of the students male?

26 A: Yes.

27 Q: Of the 600 female students, approximately how many participate in interscholastic athletics?

28 A: About 100 among the four girls' teams.

29 Q: And, of the 400 male students, how many play on interscholastic sports teams?

30 A: About 200.

31 Q: In the past, female students at Newberry Middle School have requested the formation of

1 a girls' interscholastic volleyball team, am I right?

2 A: I vaguely recall some parents sending me a letter to that effect.

3 Q: And their request was denied?

4 A: That's true.

5 Q: There are talented volleyball players among the female students at Newberry Middle
6 School, aren't there?

7 A: I don't really know.

8 Q: I assume you have thought through the reasons why you denied the request for an inter-
9 scholastic girls' volleyball team?

10 A: Yes, I have.

11 Q: Well, are some of those reasons that you have limited facilities, and that it would be hard
12 to schedule practice and game times if you had both girls' and boys' teams?

13 A: Yes.

14 Q: You might have to hire another coach, and even if you didn't, you'd have to pay Ms.
15 Wallenstein more to take on the extra work?

16 A: Yes.

17 Q: You would have to increase your lockers and other facilities to accommodate visiting
18 teams. Is that right?

19 A: Yes.

20 Q: This all would cost a great deal of money, wouldn't it?

21 A: We only have so much money to spend on the athletic programs at each school.

22 Q: I have nothing further for this witness.

23 THE COURT: Mr. Perdue, any redirect?

24 PERDUE: No, the District rests.

25 THE COURT: Thank you, counsel. I see it's getting late, so let's reconvene tomorrow afternoon
26 for argument. We will get you a transcript with our new simultaneous transcription equip-
27 ment. Before we adjourn, however, let me say I think it's pretty clear Annie has established
28 that waiting for a trial doesn't do her any good. If her legal theory is right, she will suffer
29 irreparable harm. You have adequately briefed the issue whether the Title IX regulations
30 comport with constitutional equal protection standards so do not argue that point again. I
31 want you to focus your arguments on the likelihood of plaintiff's success on the merits.

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Whitford v. Newberry
Middle School District

Title IX of the Education Amendments of 1972

20 United States Code § 1681

- (a) No person in the United States shall, on the basis of gender, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

34 Code of Federal Regulations § 106.41. Athletics.

- (a) General. No person shall, on the basis of gender, be excluded from participation in, be denied the benefits of, be treated differently from another person, or otherwise be discriminated against in any interscholastic athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.
- (b) Separate teams. Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams in a particular sport for members of each gender where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one gender but operates or sponsors no such team for members of the other gender, and athletic opportunities for members of that gender have previously been limited, members of the excluded gender must be allowed to try out for the team offered unless the sport involved is a contact sport. For the purposes of this paragraph, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball, and other sports the purpose or major activity of which involves bodily contact.
- (c) Equal opportunity. A recipient that operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both genders. In determining whether equal opportunities are available, the following factors will be considered:
 - (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both genders;
 - (2) Provision of equipment and supplies;

- (3) Scheduling of games and practice time;
- (4) Travel and per diem allowance;
- (5) Opportunity to receive coaching and academic tutoring;
- (6) Assignment and compensation of coaches and tutors;
- (7) Provision of locker rooms, practice and competitive facilities;
- (8) Provision of medical and training facilities and services;
- (9) Provision of housing and dining facilities and services; and
- (10) Publicity.

Unequal aggregate expenditures for members of each gender or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams may be considered in assessing equality of athletic opportunity for members of each gender.

Metcalf v. Homer School District

United States Court of Appeal for the Fifteenth Circuit (1998)

Ryan Metcalf, a male student at Homer High School in Homer, Franklin, alleges that he is unlawfully precluded on the basis of his gender from playing interscholastic field hockey because he is not allowed to compete for a place on the only field hockey team at his school, which is the girls' team. The district court ruled in favor of Ryan, under Title IX of the Education Amendments of 1972.

The District argues that its policy prohibiting boys from being members of the girls' field hockey team falls within both of the exceptions set forth in 34 C.F.R. § 106.41 (b) concerning the obligations placed upon a recipient when it sponsors a team for members of only one gender and not the other gender. When the sport is a contact sport, the recipient can provide a team for only one gender. When the sport is a non-contact sport, the recipient must provide an opportunity for the excluded gender to try out for the team only when "athletic opportunities for members of that gender have previously been limited." *Id.*

The contact sport exception is the broadest exception under Title IX. Whether field hockey is a contact sport depends on whether it is a sport "the purpose or major activity of which involves bodily contact." *Id.* An expert testifying on plaintiff's behalf stated that "field hockey is technically, and according to the international rules that govern the game, a non-contact sport. Almost all bodily contact or threatened bodily contact between

players is a violation or foul. Any physical contact is incidental."

The District offered its own expert, who explained that the major activities of the sport of field hockey involve running up and down the field attempting to score a goal or prevent the other team from doing so. She stated that these activities "inevitably produce and involve bodily contact." She concluded that field hockey is a contact sport because bodily contact regularly occurs throughout the course of any competitive field hockey game.

Both parties agreed that the "purpose" of field hockey, unlike wrestling, boxing or football, does not involve bodily contact. The district court held that "no major activity of field hockey involves bodily contact and it is, therefore, not a contact sport." We disagree.

The district court's inquiry as to the major activity suggests that bodily contact can be deemed a "major activity" of a sport only if it is sanctioned activity. While the fact that the rules penalize bodily contact is an important factor in determining whether the *purpose* of field hockey involves bodily contact, the regulation does not allow the inquiry to end there. It requires a further inquiry into whether the *major activity* of field hockey involves bodily contact.

In making this determination, we consider it

significant that the rules require mouth protectors and shin guards, prohibit spiked shoes, and prohibit the wearing of jewelry. Such a level of protective rules suggests that bodily contact does in fact occur frequently. Further, even if bodily contact is incidental to the game, it may be an inevitable and frequent occurrence in the game. In sum, both the level of protective rules as well as the inevitability and frequency of bodily contact in the actual game must be analyzed to determine whether the major activities of a sport involve bodily contact.

Applying these factors, we find that field hockey is a contact sport under 34 C.F.R. § 106.41(b), and reverse. Because Ryan's Title IX claim is disposed of by our finding that field hockey is a contact sport, it is not necessary to inquire into whether the athletic opportunities of males at Homer High have previously been limited.

Milley v. Arlington School District

United States Court of Appeal for the Fifteenth Circuit (2000)

Tommi-Jo Milley is an extraordinarily gifted female baseball pitcher. Since “T.J.” was seven years old, she has pitched in organized baseball teams in programs run by the Arlington Park District and the Arlington Little League. She has also participated in the U. S. Baseball Association Batter-Up and Elks Club competitions. During this period the teams T.J. played on have won 95% of their games. She has received numerous awards recognizing her abilities. In all of these programs, T.J. played with boys.

In the fall of 1999, T.J., now 11, enrolled in sixth grade at Arlington Junior High School in Des Plaines, Franklin. She was then presented with her first opportunity to play interscholastic baseball. There is only one baseball team at Arlington and that is a boys’ baseball team. Defendant in this case, the Arlington School District, denied T.J. permission to try out for the boys’ baseball team. T.J. and her parents filed this action, seeking injunctive relief requiring defendants to permit her to try out for the boys’ team. The district court’s grant of summary judgment for the plaintiff is now before us on appeal.

Plaintiff challenges her exclusion from the tryouts under Title IX of the Education Amendments of 1972 and the regulations thereunder. 34 C.F.R. § 106.41 subsection (b) requires a recipient of federal funds who sponsors a team in a particular sport only for

members of one gender to allow members of the excluded gender to try out for the team if the sport is a non-contact sport and athletic opportunities for members of the excluded gender have previously been limited. The parties stipulate that baseball is not a contact sport. They agree that the sole question on appeal is whether “athletic opportunities . . . have previously been limited” for girls at Arlington.

In interpreting this language, the district court considered the absence of a girls’ or a co-ed baseball team at Arlington and held that the District was in violation of Title IX because opportunities for girls in baseball have previously been limited. The court interpreted the regulation’s inquiry as sports-specific. We disagree.

The phrase “have previously been limited” must be understood in the context of the entire athletic program. If the district court’s construction were adopted, there could never be a situation in a non-contact sport in which a team was limited to a single gender without a corresponding team for the other gender because, by definition, the opportunities in that particular sport would be limited for the excluded gender. It would mean that girls would always be able to argue that they had previously limited athletic opportunities just because certain sports have traditionally been considered boys’ sports, such as baseball.

Our view is consistent with subsection (c) of the regulation, which enumerates ten factors that will be considered in determining whether interscholastic programs provide equal athletic opportunity. That subsection further provides, “Unequal aggregate expenditures for members of each gender or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams may be considered in assessing equality of athletic opportunity for members of each gender.” Thus, it is clear that the obligation of an educational institution in complying with the requirements of Title IX cannot be measured only by comparing types of teams available to each gender, but instead must turn on whether disparities of a substantial and unjustified nature exist in the benefits, treatment, services, or opportunities afforded male and female athletes in the institution’s sports program as a whole.

The district court’s grant of summary judgment for the plaintiff is reversed.

POINT SHEET

Franklin Construction Company

Franklin Construction Company
DRAFTERS' POINT SHEET

In this performance test item, the applicant's firm represents Franklin Construction Company (FCC), one of two corporate parties in a failed joint venture. The applicant is asked to write an opinion letter to FCC explaining whether it is required to pay back the money the other joint venturer contributed as capital or to take action to recover the other joint venturer's capital contribution.

FCC obtained a valuable exclusive right to negotiate with the local Redevelopment Agency (the Agency) for the acquisition and development of a parcel of land. The project called for the development of a large, class A hotel involving the ultimate expenditure of \$35 million. The six-month exclusive negotiation period was about to expire, and FCC had not yet secured the necessary loan commitments. FCC enlisted the aid of Millman Developers, Inc. (MDI), a large developer who FCC believed could facilitate the loan arrangements, and convinced the Agency to grant a 90-day extension of the exclusive negotiation right.

The extension was granted on the condition that FCC deposit with the Agency \$350,000—1% of the project price. MDI advanced the money in consideration of a written assignment by FCC of the exclusive negotiation right to MDI. FCC and MDI then formed a joint venture called the New Millennium Hotel Venture (the Venture) evidenced by a written agreement. MDI's capital contribution to the Venture consisted of the exclusive negotiation right and the \$350,000 that had been deposited with the Agency. FCC's contribution consisted of its "local expertise" and future services, such as securing building permits and approvals during the construction phase. The Joint Venture Agreement specified that MDI would receive 90% of the profits and FCC, 10%. It was silent on how the losses would be shared.

FCC and MDI were not making satisfactory progress toward securing the necessary loan commitments, so the Agency, as it had the right to do, revoked the exclusive negotiation right. The Agency has not returned the \$350,000, claiming it was a nonrefundable deposit. Pursuant to an escape clause in the Joint Venture Agreement, MDI served notice on FCC that it was terminating the agreement and, in addition, has demanded that FCC take action against the Agency to recover the \$350,000 and pay back that sum.

FCC seeks the advice of the applicant's firm on what its obligations are.

The following discussion covers all the points the drafters intended to raise in the

problem. Applicants need not cover them all to receive passing or even excellent grades. The grading decisions are within the discretion of the graders in the user jurisdictions.

I. Overview. The assignment here is to write an opinion letter. The format is suggested in the memo from the partner, and the applicant is instructed to use the relevant authorities, explain his or her reasoning, and write the letter in language that a non-lawyer can understand. Graders should take into account how well applicants follow these instructions.

The problem breaks down into three major parts:

- Whether FCC has any contractual obligation to pay the money to either MDI or the Venture.
- Whether the statutes or case law impose any obligation on FCC to pay the money to either MDI or the Venture.
- Whether FCC has any obligation to undertake efforts to recover the money from the Redevelopment Agency.

No particular order of discussion is required, but the applicant is expected to present a well-organized letter. The analysis proceeds as follows:

II. Whether FCC has any contractual obligation to refund the money. The applicant is expected to analyze the Assignment Agreement and the Joint Venture Agreement, both of which are in the File, and to conclude that neither of those contracts requires FCC to refund the \$350,000.

- The Assignment Agreement. It is under this agreement that the money was advanced to FCC. The advance of \$350,000 was expressly conditioned on the occurrence of two things:

- The execution by FCC and MDI within 30 days of a definitive agreement leading to the formation of an “entity” through which they would carry out the acquisition and development of the property.
 - This event occurred 26 days later when they entered into the Joint Venture Agreement.
- Agency acceptance of MDI as a party entitled to engage in the acquisition and development of the property.
 - This event had occurred 10 days earlier when the Agency, in Resolution No. 43-99, “approved the involvement of Millman Developers, Inc., in FCC’s efforts to secure the financing.”
 - Although this language does not specifically say that MDI

is an “authorized party to the acquisition and development of the Property,” it is clear enough and was obviously construed by the parties as being the equivalent.

- Both conditions were fulfilled. Accordingly, there was no obligation under the Assignment Agreement to refund the money.
- The Joint Venture Agreement. There is no real question about whether the arrangement between MDI and FCC is a joint venture. It clearly fits within the rules articulated in *Stilwell v. Trutanich*.

The only mention of the \$350,000 in the capital contribution section of the Joint Venture Agreement is that “MDI assigns to the Venture. . . all its right, title and interest to. . . the \$350,000 paid by MDI as the result of the attached Assignment Agreement.”

- By this language, MDI is clearly making a capital contribution of whatever rights it had in the money.
- There is no express mention in the agreement about any obligation to refund the money to MDI or to the Venture on the occurrence of any event, and there appears to be nothing that gives rise to an implied obligation.
 - The closest the agreement comes is in Section M, where it provides for termination of the Venture in the event of a revocation of the exclusive negotiation right. But it would be a stretch to infer from that language an obligation on the part of FCC to refund the money.

III. Whether the law imposes any obligation on FCC to refund the money either to the Venture or to MDI. The letter from MDI demands that FCC “repay that sum.” It is intentionally vague as to whether MDI is demanding that the money be refunded to it or to the Venture. The memo from the partner instructs the applicant to explain whether there is an obligation to pay the money to “*either* MDI or the Venture.” This is a clue to the applicants that they should discuss the demand from both angles.

- Applicable statutory law: The applicants should acknowledge somewhere in their answers that, as indicated in *Stilwell v. Trutanich*, “the relationships of joint venturers among themselves are governed by the partnership laws of the State of Franklin” and that the applicable statutory law is the Uniform Partnership Act found in the Franklin Business Associations Code.

- Obligation to pay MDI. In the Joint Venture Agreement, MDI assigned its “right, title and interest in the \$350,000” to the Venture as a capital contribution. That transfer made all rights in the money the property of the Venture.
 - Sections 203 and 204 of the Franklin Business Associations Code make it clear that property acquired by the partnership is partnership property. Therefore, the rights in the \$350,000, whatever they may be, belong to the Venture.
 - Even if there were a “payback” of the \$350,000, or any part of it, the repayment would have to be for the benefit of the Venture, and, under Franklin Business Associations Code § 404, MDI would have a fiduciary duty to hold it for the benefit of the Venture.
 - Accordingly, FCC has no obligation to pay the money to MDI because MDI has no present rights in it.
 - Franklin Business Associations Code §§ 401(c) and (d) are distractors.
 - Those subsections deal with the obligation of the *partnership* to reimburse a partner who makes *payments* on behalf of or *advances* to the partnership over and above the partner’s capital contribution. The \$350,000 was a capital contribution. Thus, these subsections do not apply.
- Obligation to pay the Venture. If FCC did have an obligation to pay any of the money, it would be, as indicated above, an obligation to the Venture. To determine whether there is any such obligation and, if so, the extent of it, one must look to the agreement between the parties. And where, as here, the partnership/joint venture agreement is silent as to sharing of the losses, the issue is how does the law allocate the losses?
 - The general rule is stated in Franklin Business Associations Code § 401(b) and in *Stilwell v. Trutanich*: Partners or venturers are chargeable with a share of the losses in proportion to their respective shares of the profits. “[T]he law implies an obligation on the part of the joint venturers to bear losses in the same proportion as they agreed to divide the profits.”

- If that rule prevailed here, FCC would be liable to the Venture for \$35,000, (10% of \$350,000) because, under the agreement, FCC was allocated 10% of the profits.
- However, § 401(b) incorporates § 306(a), which specifically states that “all partners are liable . . . for all obligations of the partnership unless otherwise . . . *provided by law.*”
 - The rule stated in *Kovacik v. Reed* provides otherwise: “Where . . . one partner or joint venturer contributes the money capital as against the other’s skill or labor, all the cases hold that neither party is liable to the other . . . for any loss sustained. . . . The rationale is that where one party contributes money and the other contributes services, then in the event of a loss each would lose his own capital—the one his money and the other his labor.”
 - In the present case, FCC contributed only “its local expertise and such assistance and services as MDI may from time to time require of it during the construction phase of the project.”
 - Having contributed only its services, FCC is not liable for any of the lost capital and, therefore, has no obligation to refund any of the \$350,000 to the Venture.

IV. Whether FCC has any obligation to undertake efforts to recover the money from the Redevelopment Agency. Section 404 of the Franklin Business Associations Code spells out the fiduciary duties among partners or, as in this case, joint venturers. There is nothing in § 404 that imposes any duty on FCC to pursue the Redevelopment Agency. The fiduciary duty of care requires only that a partner/venturer refrain from “engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law.” There is nothing here to implicate FCC in such conduct.

- Under the Joint Venture Agreement, MDI is the managing partner and, if any party has the obligation to go after the Agency, it would be MDI.
- But, FCC, which is not a managing partner of the joint venture, has no such obligation.

- As the court held in *Kovacik v. Reed*, “If anything, it is the duty of the managing venturer to take action against debtors of the venture to preserve and recover assets of the joint venture. Moreover, in the absence of an agreement to do so, there is no obligation on the part of one joint venturer to protect the other from loss of investment, [or] to take steps to assist the other to recover the investment.”

POINT SHEET

In re Madert

In re Madert
DRAFTERS' POINT SHEET

Allie and Bruce Madert have met with the supervising partner at the firm to complain about their neighbors, Adrian and Evelyn Doyle. The Doyles, who moved next door about a year ago, are part-time musicians trying to start a rock band; he plays the bass guitar, and she plays the drums. They practice their extremely loud rock music at all hours of the night and on weekends, sometimes just the two of them and at other times with an ever-changing group of other musicians. They practiced in the house for a time until they finished remodeling a shed behind their house, which they made into a studio.

The side yard between the Maderts' home and the Doyles' is only 12 feet wide. When the Doyles and their musician friends are practicing, the music is so loud that the Maderts and their children have trouble sleeping. The children are distracted while trying to do their homework and their sleep time is reduced to the point where their lack of sleep adversely affects their extracurricular activities.

The Maderts have repeatedly complained to the Doyles to no avail. They even went so far as to give the Doyles a letter threatening litigation if the Doyles didn't do something to reduce the noise. The Doyles responded by blithely referring the Maderts to their lawyer. The problem continues.

The Maderts prefer to try to settle the matter short of litigation but are prepared to sue if they need to. The supervising partner suggests writing a letter to the Doyles' lawyer to see if that will help solve the problem.

The task for the applicants is to draft a letter to the Doyles' lawyer to see if, through him, the Doyles can be persuaded to abate the nuisance.

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

I. Overview. The work product of the applicants should be in the form of a letter and should be written in language that one would expect to be in a letter from one lawyer to another. Quotations from and citations to the cases and other authorities would be in order. Better applicants will recognize that the letter is an initial effort to conciliate the dispute and will avoid a

belligerent approach.

The supervising partner's instructions tell the applicants that the letter should:

- be persuasive (as opposed to objective);
- emphasize the key facts;
- use the legal authorities (i.e., cases);
- point out that, if the Maderts sue, a court will likely issue an injunction and award damages;
- state what relief the Maderts expect; and
- include constructive suggestions for steps that the Doyles could take to abate the noise and avoid litigation.

Thus, graders should be looking for all of those points to be covered in the letter. The File materials—a transcript of an interview with the Maderts, the letter from the Maderts to the Doyles, and a report on noise pollution and control—provide the factual support. The three Franklin court cases in the Library furnish the legal authority.

II. Factual Recitation. Some applicants may choose to include all the facts at the beginning of the letter in a sort of “statement of the facts” and others may opt instead to weave them into the argument later on in the letter. Either approach is acceptable. The important thing is that the introductory part of the letter should sufficiently inform the reader of the essence of the dispute.

The Background. The letter should recite the nature of the dispute and how it got started, including the following facts:

- Adrian and Evelyn Doyle moved next door to the Maderts about a year ago;
- The Doyles are aspiring musicians who are trying to start a rock band; Adrian plays the bass guitar, and Evelyn plays the drums;
- They practice their music either alone or with other band members on weeknights and weekends;
- At first, they practiced in their house and more recently in a shed they converted into a studio at the rear of the house;
- The music is loud and raucous and is very disturbing to the Madert family; and
- The noise has gotten louder and more frequent since the Doyles began practicing in the shed, which appears to have been renovated without insulating materials.

The Effect on the Maderts. The applicants' letters should describe how the noise affects the Maderts:

- It is not uncommon on weeknights for the Doyles to practice with their instruments late into the night—frequently as late as midnight;
- The repetitive beat of the bass guitar and drums permeates the Maderts' home and keeps the Maderts from sleeping;
- The problem is exacerbated when the Doyles' musician friends join them on weekends and the loud music of the entire band goes on until 2 or 3 o'clock in the morning;
- The Madert children, 9 and 13 years old, are unable to focus on their homework because the noise is so loud;
- The entire Madert family is unable to get to sleep until very late;
- The Maderts' 13-year-old daughter plays the violin and, on at least one occasion, was unable to get enough sleep on the night before an 8:30 a.m. recital because of a loud Friday night session at the Doyles';
- On the same occasion, the Maderts' 9-year-old son wasn't able to get to sleep until after midnight and had to get up at 7 a.m. for a Saturday morning basketball game;
- On that same occasion, Bruce and Allie Madert weren't able to get to sleep until 3 a.m.;
- Thus, the noise is interfering significantly with the regular activities of the Maderts' lives.

Notice to the Doyles that the Noise Was Intolerable. The letters should also include a history of the Maderts' complaints and the Doyles' responses:

- Early on, Allie Madert told Evelyn Doyle that the noise that emanated from the Doyle house when they were practicing disturbed her;
 - Evelyn Doyle's response was that the Doyles were looking for ways to dampen the sound in the renovation of the shed at the rear of their house;
- The design of the renovation added a lot of glass to the shed, which Allie Madert observed would exacerbate the problem when the Doyles began practicing in the shed;
 - Evelyn Doyle simply said they were "dealing with it";

- Once, Allie Madert complained to Adrian Doyle that the noise was distracting the children when they were doing their homework;
 - His response was that it would be better once the shed was done and that they (the Doyles) would try to keep the noise down;
- After a particularly loud and late Friday night, the Maderts put a letter of complaint in the Doyles' mailbox, suggesting that they might be forced to bring legal action;
 - The response from Adrian Doyle was "see my lawyer."
- All efforts to conciliate the dispute have failed. The Doyles, while they say the right things, are unrepentant and appear intent on continuing, as they have.

The Windsor Neighborhood. The applicants' letters should describe the character of the neighborhood.

- The Windsor neighborhood is residential and the homes have large backyards;
- But the homes are fairly close together—the side yards are only 12 feet wide;
- The residents include all sorts of artistic and ecologically minded types;
- The neighbors sponsor a wide variety of musical and theatrical productions;
- The productions are usually held in the commercial district or at the artists' cooperatives and community centers that are available for the purpose of accommodating such affairs; and
- The neighbors have installed speed bumps in the streets to discourage motorcycles and noisy trucks from using them.

III. Application of the Facts (Argument). In this part of the letter the applicants should apply the facts to the authorities and argue persuasively that

- the activities of the Doyles constitute a private nuisance; and
- if the Maderts sue, the court would likely issue an injunction granting them the relief they seek and award them significant damages.

The Doyles' Activities Constitute a Nuisance. The *Meadowbrook* and *Gorman* cases supply the foundation of the argument that noise can be a private nuisance:

- In *Meadowbrook*, the court held that any activity ("trade or business"), even though it might be lawful and carried on in a reasonable method, can be a nuisance if it "interferes with the reasonable and comfortable enjoyment by another of his property."

- The *Meadowbrook* court also said that “noise alone may be a nuisance.”
- *Gorman* says that noise constitutes a private nuisance if it “causes physical discomfort and annoyance to those of ordinary sensibilities, tastes and habits and seriously interferes with the ordinary comfort and enjoyment of their homes.”
- And the *Arundel Fish & Game Club* case adopts the Restatement rule and defines “intentional” broadly enough to encompass the Doyles’ conduct.
 - The court rejected the notion that, to be considered intentional, the conduct would have to be inspired by ill will or malice. Conduct is “intentional” if it continues after the actor has been put on notice of the harm.
- There can be no doubt in this case that the loud music played by the Doyles at night interferes substantially with the Maderts’ use and enjoyment of their property and is therefore a private nuisance.
 - The music is loud and persistent.
 - The Maderts can’t sleep at night when the Doyles and their fellow musicians are playing.
 - The Madert children are having trouble focusing on their homework.
 - The noise is interfering with the ability of the Madert children to engage in ordinary extracurricular activities (soccer, violin recitals, and basketball) because they aren’t able to get enough sleep on nights before they engage in those activities.
 - Implicit in the facts is the underlying tension and aggravation accompanying the circumstances;
 - As stated in a report by the University of Franklin’s Department of Ecological Studies, “Home should be a place for rest and quiet after the labor and cares of each day.”
 - The apprehension of anticipating the next raucous jam session renders rest and quiet impossible.
- The character of the neighborhood is also a consideration in determining whether the activity constitutes a nuisance.
 - In *Meadowbrook*, the court stated, “Any habitual noise, [even if] produced by . . . skilled musicians, which is so loud, continuous, insistent, not

inherent to the character of the neighborhood and unusual therein, that normal people are so seriously incommoded that they cannot sleep, study, read, converse, or concentrate until it stops, is unreasonable.”

- This describes perfectly the situation in this case—the Doyles’ activity is not suited to the neighborhood.
 - It is a residential area where people are entitled to peace and quiet in their homes.
 - The houses are close together (12-foot side yards).
 - Although many of the residents are artistic, musical types, they carry out those pursuits either in the commercial areas of town or in the cooperatives and community centers that are available for those purposes.
 - The neighbors go to lengths to preserve the quiet, even going so far as to install speed bumps in the streets to discourage motorcycle and truck traffic.

If the Maderts Were to Sue, the Court Would Likely Issue an Injunction Granting Them the Relief They Seek and Award Damages. At this point, the applicants should describe the relief the Maderts want and argue that a court would likely grant it and award damages:

Injunction.

- It is not absolutely clear from the facts exactly what the Maderts want by way of relief.
 - Allie Madert says, “I’d be happy enough if they kept the noise from reaching our house—the whole year. So I guess they’d have to change the times they play and practice. And I bet there are alterations they could make to the studio to muffle the noise a lot.”
 - This suggests a number of things:
 - That the Maderts want a complete abatement so that the noise does not enter their home;
 - That they want the Doyles to play and practice only at certain hours when it would not interfere with the Maderts; and
 - That they want sound-muffling alterations made to the studio.

- The case law supports a combination of all three things, so it would not be inappropriate for the Maderts to demand initially a complete abatement and, in the final analysis, to suggest something short of that as a means of resolving the dispute without litigation.
- According to *Meadowbrook*, the court could simply issue a broad injunction preventing the Doyles from “the playing of loud music . . . in such [a] manner that the noise is transmitted onto the propert[y] of the plaintiffs, so as to deprive them . . . of the reasonable use and comfortable enjoyment of their . . . home[.]”
 - The burden would then be on the Doyles to “adopt any effective method of so reducing the volume of sound transmitted to the [Madert home] that [the Maderts] will no longer be disturbed.”
- Likewise, the court in *Arundel Fish & Game* affirmed a very broadly worded injunction giving the Club six months to “design and implement a noise abatement system . . . so as to reduce the noise [to acceptable levels]” and, further, limiting their activities during those six months “to certain hours calculated to reduce the likelihood of interference with the use and enjoyment of the residents’ properties.”
 - The court also found that injunctive relief could be granted even though the Club was specifically exempt from the Franklin environmental regulations.
- The relevance of these holdings to the Madert/Doyle situation is this:
 - The absence of any laws or regulations specifically preventing the Doyles from playing loud music would not deter the court from issuing an injunction (See *Arundel Fish & Game*, where the fact that the Club was exempted from regulations that apply only in commercial areas did not deter the court.);
 - The likely injunction would be very broad, simply ordering the Doyles to implement an effective abatement, putting on them the entire burden of figuring out how to do it;
 - The Doyles would be given a time limit within which to implement the abatement and, in the meantime, they could be enjoined from creating any noise that disturbs the Maderts; and
 - Thus, the very real risk to the Doyles is that the court could enjoin them

completely and permanently unless they come up with a fail-safe method of abatement.

Damages.

- The Doyles are also exposed to the risk of significant compensatory damages and perhaps even punitive damages.
 - *Meadowbrook and Gorman* both support a claim for damages.
 - *Meadowbrook* holds that, under the circumstances, “an action lies at law or equity.”
 - Under *Gorman*, damages may be recovered for “the diminution in the value of the use of the property as a home . . . for any actual inconvenience and physical discomfort . . . [and] for illness, pain and discomfort, and annoyance caused by a nuisance.”
 - There is no question that the Maderts have suffered such injuries and that they could produce “sufficient evidence of the ill effects suffered by them to entitle them to substantial damages.” *Gorman*.
- There is even a possibility that the court would award punitive damages.
 - In *Gorman*, the court agreed that the evidence that the defendants had acted willfully and maliciously was sufficient to justify punitive damages.
 - In the present case, there is similar evidence:
 - The Doyles simply ignored repeated complaints by the Maderts that the noise was having serious effects on their lives;
 - Adrian Doyle’s response when the Maderts finally put it in writing was, “See my lawyer.”
 - Notwithstanding the frequent complaints, the Doyles persisted in their disruptive activities.
 - Although it may be problematic under the facts, applicants should argue that a finder of fact could conclude that the Doyles acted willfully and maliciously.

IV. **Constructive Suggestions for Abatement.** This part of the letter should carry a

conciliatory tone. It should suggest that, although the Maderts will file suit if they have to, they would prefer to resolve the matter short of litigation. There are any number of combinations the applicants could come up with for means of abatement. Below are some things suggested in the materials, including the University of Franklin article on noise pollution and control.

- The Doyles could practice and play at one of the artists' cooperatives or community centers in town. This option would not be expensive and is what all the other musical groups do.
- Although it might not completely abate the noise, the Doyles could agree to install insulation materials and acoustical glass in the studio at the back of their house that would vastly reduce the amount of noise that escapes.
- Until such modifications are made, they could agree either to stop practicing and playing altogether or to do so only at one of the community locations.
- After the modifications are made, they could agree that they will practice and play *only* in the studio (not in the house) and that they will limit their hours of play and practice to times when the noise will not disturb the Maderts.
- They could agree to build some sort of protective buffer around the studio which, in combination with the insulation and acoustical glass, would further dampen the noise.
- They could agree to outer noise limits that practicing and playing would produce. They could install noise measuring devices on their property and on the Maderts' property. The devices would be monitored and, if the noise exceeded the agreed-upon levels, further abatement steps would be taken.
- Applicants might also suggest that the Maderts are open to ideas from the Doyles. Finally, the applicants should probably set a reasonable deadline for a response from the Doyles.

POINT SHEET

Whitford v. Newberry
Middle School District

Whitford v. Newberry Middle School District
DRAFTERS' POINT SHEET

In this performance test, applicants are asked to write out their closing argument to prepare for their presentation to the court after a hearing on a motion for a preliminary injunction. Under a Newberry Middle School District rule, Annie Whitford, a seventh grader, has been prohibited from trying out for her school's boys-only interscholastic volleyball team. There is no separate girls' or co-ed volleyball team. Annie's federal complaint alleges that the School District rule violates Title IX of the Education Amendments of 1972 and related regulations because the rule deprives her of an equal opportunity to participate in extracurricular athletics. She seeks an order requiring the school district to allow her to try out for the volleyball team.

Applicants are provided a File, which contains a memorandum from the senior partner and the transcript from the hearing on the motion for preliminary injunction conducted by the applicant. The Library contains the relevant portions of Title IX, the regulations, and two decisions of the United States Court of Appeals for the Fifteenth Circuit.

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

I. Format.

The memorandum directs applicants to write out their closing argument to the court. Applicants must show how the evidence satisfies the requirements for a preliminary injunction enumerated in the law, and how the District's evidence fails to support its case and actually supports Annie's case. Applicants are instructed to tell a persuasive story about why Annie should prevail, to highlight the salient facts, and to otherwise develop a persuasive, organized, well-reasoned, and compelling presentation that concludes with a clear statement of the relief Annie is seeking. In order to have applicants focus on the likelihood of Annie's success on the merits, they are told not to argue that Annie will suffer irreparable harm; the judge has already determined that Annie would suffer irreparable harm. They are also told not to concern themselves with equal protection considerations that are inherent in the problem.

II. Content.

- The closing argument should start with introductory fact-based remarks that set a framework sympathetic to Annie. It should contain some or all of the following:

- Annie Whitford is a seventh-grade student at Newberry Middle School.
- Annie is a very talented volleyball player who has played for five years on various successful co-ed teams; she has received several awards, and aspires to volleyball scholarships and competitive play in college and in the Olympics.
- The District has a rule that prohibits boys and girls from participating in interscholastic athletic games as mixed teams or against each other as single gender teams. The rule lists volleyball as a contact sport.
- Annie was prohibited from trying out for her school's volleyball team, which is a boys-only team and the only school volleyball team.
- The District rule violates Title IX, and Annie seeks an order requiring the District to let her try out for the Newberry volleyball team.
- Applicants should next provide an overview of the law that reflects their understanding of the statutory, regulatory, and case law. This portion should synthesize and not simply quote the law. It should make the following points:
 - Title IX prohibits gender discrimination in any educational program, of which the interscholastic volleyball program at Newberry Middle School is one.
 - Title IX's regulations allow a school to have single gender teams where selection is based on competitive skill or the activity is a contact sport. However, where a school operates a boys-only team but not a girls-only team in a sport, *and* athletic opportunities for the girls have previously been limited, the girls must be permitted to try out for the team unless the sport is a contact sport.

NOTE: An applicant who cites the first sentence of 34 § CFR 106.41(b) as applicable to this case would be wrong. It reads, "[A] recipient may operate or sponsor separate teams in a particular sport for members of each gender where selection for such teams is based upon competitive skill or the activity is a contact sport." This section is only applicable where a recipient educational institution operates or sponsors teams for *each* gender in a particular sport. Here, the record reflects that the school does not have a separate team for each gender.

- The next portion of the closing argument should grapple with *whether volleyball is a contact sport*. Discussing this issue first will reflect applicants’ recognition that, if volleyball is a contact sport, Annie’s claim will fail because 34 CFR § 106.41(b) permits one-gender-only teams when the sport is a contact sport. Applicants should both lay out the law concerning the denomination of a sport as a “contact sport” and argue how the evidence supports Annie’s position and diminishes the District’s case, as follows:
 - The applicable regulation defines a contact sport as one “the purpose or major activity of which involves bodily contact.”
 - The applicable regulation enumerates examples of contact sports—boxing, wrestling, rugby, ice hockey, football, and basketball—but volleyball is not among the enumerated contact sports.
 - The failure of the regulation to enumerate volleyball as a contact sport focuses the inquiry on whether “the purpose or major activity of” volleyball “involves bodily contact.”
 - The first prong of the inquiry is whether the *purpose* of volleyball involves bodily contact. This discussion involves league rules and the generally accepted goal of the game. Neither the District nor Annie introduced evidence during the hearing that the purpose of the sport involves bodily contact. Under *Metcalfe*, the fact that the rules penalize bodily contact is an important factor in determining whether the purpose of a sport involves bodily contact. The following evidence supports the proposition that the purpose of volleyball does not involve bodily contact:
 - U. S. Volleyball League rules state that volleyball is a non-contact sport and that bodily contact between opposing players will result in a penalty. The purpose of the sport is to try to land the ball in the opponent’s court without its being returned successfully. Intentional or threatened physical contact between players can result in a penalty against a player and also against his or her team. (See Wallenstein testimony.)

- The boy who intentionally injured Annie during an incident at a summer co-ed volleyball camp was penalized. (See Whitford testimony.)
- The District representative, Grace Huang, gave no testimony as to the purpose of the game of volleyball. She simply testified, without substantiation, that the District had concluded that volleyball is a contact sport.
- The coach's testimony should be deemed persuasive because of her years of experience coaching middle school and college volleyball and because neither the testimony of the District's witness nor the cross-examination of the coach contradicted the coach's testimony.
- The second prong of the inquiry is whether the *major activity* of volleyball involves bodily contact. The criteria to determine whether the major activity of a sport involves bodily contact are contained in *Metcalf*.
 - A high number of *protective rules* for a sport suggests that bodily contact occurs frequently. *Metcalf*.
 - The absence of protective rules in volleyball supports the argument that bodily contact is infrequent and therefore not a major activity of the sport.
 - Even if bodily contact is incidental to the game, an analysis of the *inevitability* and *frequency* of bodily contact in the actual game determines whether the major activity of a sport involves bodily contact.
 - Although players wear knee pads when they play volleyball and common sense would dictate that players not wear jewelry, league rules do not require players to wear any protective equipment, including knee pads, elbow pads, mouth protectors, or shin guards, nor do they prohibit the wearing of jewelry during a game. (See Wallenstein testimony.) No District evidence contradicted the coach's testimony.
 - Annie has suffered only two injuries in all the years she has played volleyball. (See Whitford testimony.)

- Collisions between teammates when they are scrambling for the ball are infrequent. (See Whitford and Wallenstein testimony.)
 - In the course of trying to spike a ball over the net, a player may physically strike a player on the other team, but such an incident is rare. (See Wallenstein testimony.)
 - Even though Wallenstein testified that a good volleyball player should use all her power, speed, and strength to get the volleyball over the net, the District did not introduce any evidence that such effort makes bodily contact inevitable or frequent.
- After concluding that volleyball is not a contact sport, the applicant must argue that under the applicable regulation, Annie should be allowed to join the boys-only team because *there is no girls-only or co-ed team and the athletic opportunities for girls at Newberry Middle School have previously been limited.*
 - It is undisputed that there is neither a girls-only nor a co-ed volleyball team.
 - In arguing that athletic opportunities for girls at Newberry have previously been limited, applicants should point out that, under *Milley*, such an inquiry is not sports-specific: “[T]he obligation of an educational institution in complying with the requirements of Title IX in [interscholastic athletics] cannot be measured only by comparing types of teams available to each gender, but instead must turn on whether disparities of a substantial and unjustified nature exist in the benefits, treatment, services, or opportunities afforded male and female athletes in the institution’s sports program as a whole.”

NOTE: An applicant who argues that the absence of a girls-only volleyball team proves that athletic opportunities for girls at Newberry were previously limited demonstrates a misunderstanding of the law as expressed in *Milley*.

- *Milley* is consistent with the applicable regulation, 34 CFR § 106.41(c), “Equal Opportunity,” which enumerates a set of factors to consider in determining whether equal athletic opportunities are available.
- Applicants should then apply the relevant factors under 34 CFR § 106.41(c) to the facts of Annie’s case to prove that athletic opportunities for female students at Newberry were previously limited.
- The factors that are relevant to Annie’s case are:
 - Factor 1: Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both genders.
 - Factor 2: Provision of equipment and supplies.
 - Factor 4: Travel and per diem allowance.
 - Factor 5: Opportunity to receive coaching and academic tutoring.
 - Factor 6: Assignment and compensation of coaches and tutors.
 - Factor 10: Publicity.
- Application of these factors to the following evidence supports the conclusion that female Newberry students were denied equal athletic opportunities:
 - Girls and their parents had previously tried to get Newberry to start a girls’ interscholastic volleyball team, but the District denied the requests for monetary and logistical reasons (e.g., difficulty in scheduling practice and games times, need to spend more money on coaching and expanded facilities). (See Wallenstein and Huang testimony.)
- In looking at Newberry’s athletic program as a whole, there is disproportionate support for male athletics.
 - Of 1,000 students in the seventh and eighth grades at Newberry, approximately 600 are female and 400 are male.
 - There are 10 interscholastic sports teams, none of which is co-ed.
 - Approximately 100 girls play on the four all-girls teams (cross-country, basketball, swimming, and tennis) and approximately 200 boys play on the six all-boys teams (football, basketball, baseball,

ice hockey, volleyball, and wrestling). (See Huang and Wallenstein testimony.)

- The athletic budget pays for coaches' salaries, facilities upkeep, equipment and uniform purchases, athlete transportation, and publicity. Seventy percent of the athletic budget is spent on the boys' teams. (See Wallenstein testimony.)
- Applicants should end the argument by summarizing briefly:
 - The evidence supports the conclusion that the District's refusal to let Annie try out for the school volleyball team violates Title IX:
 - Volleyball is not a contact sport because it is not enumerated in the regulation and neither the purpose nor major activity of volleyball involves bodily contact.
 - Newberry does not have a co-ed or girls-only volleyball team, and athletic opportunities for female students have previously been limited.
 - The court should therefore issue an order requiring the District to allow Annie to try out for Newberry's interscholastic volleyball team.
 - Applicants who argue that Annie should actually be placed on the team have missed the point.

NOTES