THE MPT

MULTISTATE PERFORMANCE TEST

February 2009 MPTs and Point Sheets

ncbe

February 2009 MPTs and Point Sheets

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Preface

The Multistate Performance Test (MPT) is developed by the National Conference of Bar Examiners (NCBE). This publication includes the items and point sheets from the February 2009 MPT. Each test includes two items; jurisdictions that use the MPT select either one or both items for their applicants to complete. The instructions for the test appear on page v. For more information, see the *MPT Information Booklet,* available on the NCBE website at www.ncbex.org.

The MPT point sheets describe the factual and legal points encompassed within the lawyering tasks 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 problems contemplated by the drafters. Point sheets are not official grading guides and are not intended to be "model answers." Examinees can receive a range of passing grades, including excellent grades, without covering all of the points discussed in the point sheets. User jurisdictions are free to modify the point sheets. Grading of the MPT is the exclusive responsibility of the jurisdiction using the MPT as part of its admissions process.

Description of the MPT

The MPT consists of two items, either or both of which a jurisdiction may select to include as part of its bar examination. Applicants are expected to spend 90 minutes completing each MPT item administered.

The materials for each MPT include a File and a Library. The File consists of source documents containing all the facts of the case. The specific assignment the applicant is to complete is described in a memorandum from a supervising attorney. The File might also include transcripts of interviews, depositions, hearings or trials, pleadings, correspondence, client documents, contracts, newspaper articles, medical records, police reports, or lawyer's notes. Relevant as well as irrelevant facts are included. Facts are sometimes ambiguous, incomplete, or even conflicting. As in practice, a client's or a supervising attorney's version of events may be incomplete or unreliable. Applicants are expected to recognize when facts are inconsistent or missing and are expected to identify potential sources of additional facts.

The Library may contain cases, statutes, regulations, or rules, some of which may not be relevant to the assigned lawyering task. The applicant is expected to extract from the Library the legal principles necessary to analyze the problem and perform the task. The MPT is not a test of substantive law; the Library materials provide sufficient substantive information to complete the task.

The MPT is designed to test an applicant's ability to use fundamental lawyering skills in a realistic situation. Each test evaluates an applicant's ability to complete a task that a beginning lawyer should be able to accomplish. The MPT requires applicants to (1) sort detailed factual materials and separate relevant from irrelevant facts; (2) analyze statutory, case, and administrative materials for applicable principles of law; (3) apply the relevant law to the relevant facts in a manner

likely to resolve a client's problem; (4) identify and resolve ethical dilemmas, when present; (5) communicate effectively in writing; and (6) complete a lawyering task within time constraints. These skills are tested by requiring applicants to perform one of a variety of lawyering tasks. For example, applicants might be instructed to complete any of the following: a memorandum to a supervising attorney, a letter to a client, a persuasive memorandum or brief, a statement of facts, a contract provision, a will, a counseling plan, a proposal for settlement or agreement, a discovery plan, a witness examination plan, or a closing argument.

Instructions

The back cover of each test form contains the following 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. Columbia and Olympia are also fictitious states in the Fifteenth Circuit. In Franklin, the trial court of general jurisdiction is the District Court, the intermediate appellate court is the Court of Appeal, and the highest court is the Supreme Court.

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 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 they all were new to you. You should assume that the cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page references.

5. Your response must be written in the answer book provided. If you are taking this examination on a laptop computer, your jurisdiction will provide you with specific instructions. In answering this performance test, you should concentrate on the materials in the File and Library. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.

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 the instructions regarding the task you are to complete, which are given to you in the first memorandum in the File, and on the content, thoroughness, and organization of your response.

FILE

MPT-1: *Phoenix Corporation v. Biogenesis, Inc.*

FORBES, BURDICK & WASHINGTON LLP
777 Fifth Avenue
Lakewood City, Franklin 33905

MEMORANDUM

To: Applicant

From: Ann Buckner

Date: February 24, 2009

Subject: *Phoenix Corporation v. Biogenesis, Inc.*

Yesterday, we were retained by the law firm of Amberg & Lewis LLP to consult on a motion for disqualification filed against it.

Amberg & Lewis represents Biogenesis, Inc., in a breach-of-contract action brought by Phoenix Corporation seeking $80 million in damages. The lawsuit has been winding its way through state court for almost six years. Phoenix is represented by the Collins Law Firm. There have been extensive discovery, motion practice, and several interlocutory appeals over the years, but the matter is now set for jury trial in a month and is expected to last six weeks. Two weeks ago, however, Phoenix filed a disqualification motion after Amberg & Lewis obtained one of Phoenix's attorney-client privileged documents—a letter from Phoenix's former president to one of its attorneys. Yesterday, I interviewed Carole Ravel, an Amberg & Lewis partner. During the interview, I learned some background facts; I also obtained a copy of the letter and Phoenix's brief in support of its disqualification motion.

Please prepare a memorandum evaluating the merits of Phoenix's argument for Amberg & Lewis's disqualification, bringing to bear the applicable legal authorities and the relevant facts as described to me by Ms. Ravel. Do not draft a separate statement of facts, but instead use the facts as appropriate in conducting your evaluation.

Transcript of Client Interview (February 23, 2009)

Buckner: Good to see you, Carole.

Ravel: Good to see you too, Ann. Thanks for seeing me on such short notice.

Buckner: My pleasure. What's the problem?

Ravel: The problem is a motion for disqualification. Here's the supporting brief.

Buckner: Thanks. Let me take a quick look. I'm unacquainted with the science, but the law is familiar. How can I help?

Ravel: To be candid, we've made a few mistakes, and I thought it would be prudent to consult with someone like you with substantial experience in representing lawyers in professional liability and ethics matters.

Buckner: Tell me what happened.

Ravel: Sure. Six years ago, Phoenix Corporation sued Biogenesis for breach of contract in state court, seeking about $80 million in damages. Phoenix is a medical research company; the Collins Law Firm represents it. Our client Biogenesis is one of the largest biotechnology companies in the world. Phoenix claims that Biogenesis breached a contract they entered into in 1978. There's a lot about this case that's enormously complicated and technical—all that science that you said you're unacquainted with—but the dispute is fairly simple. Under the agreement, Phoenix granted a license to Biogenesis to use a process that Phoenix invented for genetically engineering human proteins. In exchange, Biogenesis was obliged to pay Phoenix royalties on sales of certain categories of pharmaceuticals that were made using the licensed engineering process. Here is the dispute: While Biogenesis has taken the position that its royalty obligation is limited to the categories of pharmaceuticals specified, Phoenix claims that it extends to other categories of pharmaceuticals as well. If the jury agrees with Biogenesis, it owes nothing more. If the jury agrees with Phoenix, Biogenesis owes about $80 million beyond what it has already paid in royalties.

Buckner: That's how the brief sums it up, too.

Ravel: Right. The factual background and procedural history set out in the brief are accurate—but of course we disagree with Phoenix's argument about Biogenesis's royalty obligation.

Buckner: Fine. But what about this Phoenix letter that's allegedly protected by the attorney-client privilege?

Ravel: Here it is, a letter to Peter Horvitz, a Collins partner, from Gordon Schetina, who was then Phoenix's president.

Buckner: Thanks. It certainly looks privileged.

Ravel: It is. I can't deny it. But it's important. Let me go back to the 1978 agreement. Discovery in Phoenix's breach-of-contract action has established to our satisfaction that, by their conduct from 1978 to 1998, Biogenesis and Phoenix revealed that they understood that Biogenesis's royalty obligation was limited to the categories of pharmaceuticals specified in the agreement. During that period, Biogenesis made a lot of money and paid Phoenix a great deal in royalties. It was only in 1998 that Phoenix began to claim that Biogenesis's royalty obligation extended to other categories of pharmaceuticals—when it saw how much more in royalties it could obtain and became greedy to get them.

Buckner: And the Schetina letter . . .

Ravel: And the Schetina letter amounts to an admission by Phoenix that Biogenesis was correct in its understanding of its limited royalty obligation.

Buckner: So how did you get it?

Ravel: Phoenix's lawyers assume that the Schetina letter was disclosed to us inadvertently during discovery, but they're wrong. The letter arrived on February 2, 2009, by itself, in an envelope with the Collins Law Firm's return address. My assistant opened the envelope and discovered the letter all by itself, with a note reading "From a 'friend' at the Collins Law Firm."

Buckner: Do you know who the "friend" was?

Ravel: No. But it's not hard to guess. Collins is in the process of laying off staff in an effort to increase profits. The letter was obviously sent by a disgruntled employee.

Buckner: That makes sense. But what happened next?

Ravel: When the letter arrived, my team and I were in full trial-preparation mode. Of course, I recognized that the letter appeared privileged on its face; it's a classic confidential communication from a client to an attorney. In our eyes, the letter was a smoking gun. It made our case and we wanted to use it.

Buckner: So what happened?

Ravel: We were pretty sure that we were within the ethical rules. But that same day, two of the associates on my team went out for lunch. As they were discussing the impact of the Schetina letter in what turned out to be too much detail, a man at a neighboring table asked whether they knew who he was. They said no, and the man said he was Peter Horvitz and stormed out. Horvitz called me within minutes, and he was furious. He demanded return of the letter and I refused. A few days later, he filed the disqualification motion.

Buckner: I see. And precisely what is it you'd like us to do for you?

Ravel: Ann, I'd like you to evaluate the merits of Phoenix's argument that we should be disqualified. Trial is only a month away, and Biogenesis would have to incur tremendous costs if it were forced to substitute new attorneys if we were disqualified. And let's be candid, we've been charged with a violation of an ethical obligation and might face some exposure as a consequence.

Buckner: I understand, Carole. Let me do some research, and I'll get back to you.

Ravel: Thanks so much.

PHOENIX CORPORATION

1500 Rosa Road
Lakewood City, Franklin 33905

January 2, 1998

CONFIDENTIAL

Peter Horvitz, Esq.
Collins Law Firm
9700 Laurel Boulevard
Lakewood City, Franklin 33905

Dear Peter:

I am writing with some questions I'd like you to consider before our meeting next Tuesday so that I can get your legal advice on a matter I think is important. I have always understood our agreement with Biogenesis to require it to pay royalties on specified categories of pharmaceuticals. I learned recently how much money Biogenesis is making from other categories of pharmaceuticals. Why can't we get a share of that? Can't we interpret the agreement to require Biogenesis to pay royalties on other categories, not only the specified ones? Let me know your thoughts when we meet.

Very truly yours,

Gordon Schetina
President

IN THE DISTRICT COURT OF THE STATE OF FRANKLIN
FOR THE COUNTY OF LANCASTER

PHOENIX CORPORATION, Plaintiff, v. BIOGENESIS, INC., Defendant.	**No. Civ. 041033** **PLAINTIFF'S BRIEF IN SUPPORT OF MOTION TO DISQUALIFY COUNSEL FOR DEFENDANT**

I. Introduction

The rule governing this motion is plain: A trial court may—and, indeed, must—disqualify an attorney who has violated an ethical obligation by his or her handling of an opposing party's attorney-client privileged material and has thereby threatened that party with incurable prejudice. Just as plain is the result that the rule compels here: Defendant's attorneys obtained one of plaintiff's attorney-client privileged documents evidently by inadvertent disclosure. In violation of their ethical obligation, they chose to examine the document, failed to notify plaintiff's attorneys, and then refused to return the document at the latter's demand. By acting as they did, they have threatened plaintiff with incurable prejudice. Since this Court cannot otherwise prevent this prejudice, it must disqualify them to guarantee plaintiff a fair trial.

II. Factual Background and Procedural History

In 1977, Phoenix Corporation, a medical research company, invented a process for genetically engineering human proteins—a process essential to the development of entirely new categories of pharmaceuticals capable of managing or curing the most serious conditions and diseases afflicting human beings, including diabetes and cancer.

In 1978, Phoenix entered into an agreement with Biogenesis, Inc., one of the pioneers in the field of biotechnology: Phoenix licensed its invention to Biogenesis, and Biogenesis obligated itself to pay Phoenix royalties on its sales of various categories of pharmaceuticals.

Between 1979 and 1997, Biogenesis produced dozens of pharmaceuticals and generated billions of dollars in revenue as a result of their sale. To be sure, Biogenesis paid Phoenix substantial royalties—but, as it turns out, far less than it was obligated to.

In 1998, Phoenix learned that Biogenesis had not been paying royalties on its sales of all the categories of pharmaceuticals in question, but only categories specified in the 1978 agreement. For the first time, Biogenesis stated its position that the agreement so limited its obligation. Phoenix rejected any such limitation.

Between 1999 and 2002, Phoenix attempted to resolve its dispute with Biogenesis. Each and every one of its efforts, however, proved unsuccessful.

In 2003, Phoenix brought this action against Biogenesis for breach of the 1978 agreement, seeking $80 million in damages for royalties Biogenesis owed but failed to pay. Between 2003 and 2009, Phoenix and Biogenesis have been engaged in extensive discovery and motion practice and in several interlocutory appeals as they have prepared for a jury trial, set to begin on March 30, 2009, and expected to last six weeks.

On February 2, 2009, Phoenix learned, fortuitously, that Biogenesis's attorneys, Amberg & Lewis LLP, had obtained a document evidently through inadvertent disclosure by Phoenix's attorneys, the Collins Law Firm, in the course of discovery. On its face, the document showed itself to be protected by the attorney-client privilege, reflecting a confidential communication from Phoenix, by its then president Gordon Schetina, to one of its attorneys, Peter Horvitz, seeking legal advice, and clearly the document was not intended for the Amberg firm. Nevertheless, the Amberg firm failed to notify Collins about its receipt of the Schetina letter. As soon as it learned what had transpired, Collins instructed the Amberg firm to return the letter, but the Amberg firm refused.

III. Argument

A. This Court Should Disqualify Amberg & Lewis from Representing Biogenesis Because It Has Violated an Ethical Obligation Threatening Phoenix with Incurable Prejudice in Its Handling of Phoenix's Attorney-Client Privileged Document.

The law applicable to Phoenix's motion to disqualify Amberg & Lewis from representing Biogenesis in this action is clear.

A trial court may, in the exercise of its inherent power, disqualify an attorney in the interests of justice. *Indigo v. Luna Motors Corp.* (Fr. Ct. App. 1998). The court may—and, indeed, must—disqualify an attorney who has violated an ethical obligation by his or her handling of an opposing party's attorney-client privileged material and has thereby threatened that party with incurable prejudice. *Id.* Although the party represented by the disqualified attorney may be said to enjoy an "important right" to representation by an attorney of its own choosing, any such "right" "must yield to ethical considerations that affect the fundamental principles of our judicial process." *Id*. As the court said, "The paramount concern, however, must be to preserve public trust in the scrupulous administration of justice and the integrity of the bar." *Id*.

As will be demonstrated, the law compels the disqualification of Amberg & Lewis.

1. Phoenix's Document Is Protected by the Attorney-Client Privilege.

To begin with, the Schetina letter is protected by the attorney-client privilege. Under Franklin Evidence Code § 954, the "client . . . has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and attorney. . . ." On its face, the Schetina letter reflects a confidential communication from Phoenix's then president, Schetina, to one of its attorneys, Horvitz, seeking legal advice.

2. Amberg & Lewis Has Violated an Ethical Obligation.

Next, Amberg & Lewis has violated an ethical obligation by handling the Schetina letter as it did. In the face of the inadvertent disclosure of attorney-client privileged material, such as evidently occurred in this case, the ethical obligation is plain under Franklin Rule of Professional Conduct 4.4: "An attorney who receives a document relating to the representation of the attorney's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender."

Because on its face the Schetina letter reflects a confidential communication from Phoenix's then president, Schetina, to its attorney, Horvitz, seeking legal advice, and is therefore protected by the attorney-client privilege, Amberg & Lewis should surely have known that the letter was not intended for it. The Amberg firm was at the very least obligated to notify Collins that it had received the letter. It should also have refrained from examining the letter, and should have abided by our instructions. On each point, the Amberg firm acted to the contrary, choosing to examine the letter, failing to notify Collins, and then refusing to return it at Collins's demand.

Even if it should turn out that Amberg & Lewis obtained the Schetina letter as a result of unauthorized disclosure as opposed to inadvertent disclosure, the outcome would be the same. In *Mead v. Conley Machinery Co.* (Fr. Ct. App. 1999) the Court of Appeal imposed an ethical obligation similar to that of Rule 4.4 to govern cases of unauthorized disclosure. It follows that the misconduct of the Amberg firm, as described above, would amount to an ethical violation if the letter's disclosure were unauthorized and not inadvertent.

3. Amberg & Lewis Has Threatened Phoenix with Incurable Prejudice.

Finally, by its unethical actions, Amberg & Lewis has threatened Phoenix with incurable prejudice. The Schetina letter could well prejudice the jury in the midst of a long and complex trial, especially if it were cleverly exploited by Biogenesis. Whether or not any *direct* harm could be prevented by the exclusion of the letter from evidence—which Phoenix intends to seek in the coming days—the *indirect* harm that might arise from its use in trial preparation cannot be dealt with so simply: The bell has been rung, and can hardly be unrung, except by disqualification of Amberg & Lewis—an action that is necessary in order to guarantee Phoenix a fair trial.

Even if it should turn out that Amberg & Lewis obtained the Schetina letter by *unauthorized* disclosure as opposed to *inadvertent* disclosure, the result would not change. It is true that in *Mead v. Conley Machinery Co.*, the Court of Appeal suggested in a footnote that, in cases of unauthorized disclosure, the "threat of 'incurable prejudice'. . . is neither a necessary nor a sufficient condition for disqualification." But that suggestion is mere dictum, inasmuch as *Mead* did not involve the threat of *any* prejudice, incurable or otherwise.

IV. Conclusion

For the reasons stated above, this Court should grant Phoenix's motion and disqualify Amberg & Lewis from representing Biogenesis in this action.

Respectfully submitted,

Kimberly Block

Date: February 9, 2009

Kimberly Block
COLLINS LAW FIRM LLP
Attorneys for Plaintiff Phoenix Corporation

LIBRARY

MPT-1: *Phoenix Corporation v. Biogenesis, Inc.*

RULE 4.4 OF THE FRANKLIN RULES OF PROFESSIONAL CONDUCT

Rule 4.4. Inadvertent disclosure of attorney-client document

An attorney who receives a document relating to the representation of the attorney's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

HISTORY

Adopted by the Franklin Supreme Court, effective July 1, 2002.

COMMENT

[1] Rule 4.4, which was adopted by the Franklin Supreme Court in 2002 in response to *Indigo v. Luna Motors Corp.* (Fr. Ct. App. 1998), recognizes that attorneys sometimes receive documents that were mistakenly sent or produced by opposing parties or their attorneys. If an attorney knows or reasonably should know that such a document was sent inadvertently, then this rule requires the attorney, whether or not the document is protected by the attorney-client privilege, to promptly notify the sender in order to permit that person to take protective measures.

[2] Rule 4.4 provides that if an attorney receives a document the attorney should know was sent inadvertently, he or she must promptly notify the sender, but need do no more. *Indigo v. Luna Motors Corp.*, which predated this rule, concluded that the receiving attorney not only had to notify the sender (as this rule would later require), albeit only as to a document protected by the attorney-client privilege, but also had to resist the temptation to examine the document, and had to await the sender's instructions about what to do. In so concluding, *Indigo v. Luna Motors Corp.* conflicted with this rule and, ultimately, with the intent of the Franklin Supreme Court in adopting it.

[3] Rule 4.4 does not address an attorney's receipt of a document sent without authorization, as was the case in *Mead v. Conley Machinery Co*. (Fr. Ct. App. 1999). Neither does any other rule.

Mead v. Conley Machinery Co., which also predated this rule, concluded that the receiving attorney should review the document—there, an attorney-client privileged document—only to the extent necessary to determine how to proceed, notify the opposing attorney, and either abide by the opposing attorney's instructions or refrain from using the document until a court disposed of the matter. The Franklin Supreme Court, however, has declined to adopt a rule imposing any ethical obligation in cases of unauthorized disclosure.

Indigo v. Luna Motors Corp.
Franklin Court of Appeal (1998)

The issue in this permissible interlocutory appeal is whether the trial court abused its discretion by disqualifying plaintiff's attorney for improper use of attorney-client privileged documents disclosed to her inadvertently. We hold that it did not. Accordingly, we affirm.

I

Plaintiff Ferdinand Indigo sued Luna Motors Corporation for damages after he sustained serious injuries when his Luna sport utility vehicle rolled over as he was driving.

In the course of routine document production, Luna's attorney's paralegal inadvertently gave Joyce Corrigan, Indigo's attorney, a document drafted by Luna's attorney and memorializing a conference between the attorney and a high-ranking Luna executive, Raymond Fogel, stamped "attorney-client privileged," in which they discussed the strengths and weaknesses of Luna's technical evidence. As soon as Corrigan received the document, which is referred to as the "technical evidence document," she examined it closely; as a result, she knew that it had been given to her inadvertently. Notwithstanding her knowledge, she failed to notify Luna's attorney. She subsequently used the document for impeachment purposes during Fogel's deposition, eliciting damaging admissions. Luna's attorney objected to Corrigan's use of the document, accused her of invading the attorney-client privilege, and demanded the document's return, but Corrigan refused.

In response, Luna filed a motion to disqualify Corrigan. After a hearing, the trial court granted the motion. The court determined that the technical evidence document was protected by the attorney-client privilege, that Corrigan violated her ethical obligation by handling it as she did, and that disqualification was the appropriate remedy. Indigo appealed.

II

It has long been settled in Franklin that a trial court may, in the exercise of its inherent power, disqualify an attorney in the interests of justice. *See*, *e.g.*, *In re Klein* (Fr. Ct. App. 1947). Ultimately, disqualification involves a conflict between a client's right to an attorney of his or her choice and the need to maintain ethical standards of professional responsibility. The paramount concern, however, must be to preserve public trust in the scrupulous administration of justice and the integrity of the bar. The important right to an attorney of one's choice must yield to ethical considerations that affect the fundamental principles of our judicial process.

Appellate courts review a trial court's ruling on disqualification for abuse of discretion. A court abuses its discretion when it acts arbitrarily or without reason. As will appear, we discern no arbitrary or unreasonable action here.

A

Indigo's first claim is that the trial court erred in determining that Corrigan violated

an ethical obligation by handling the technical evidence document as she did.

From the Franklin Rules of Professional Conduct and related case law, we derive the following, albeit implicit, standard: An attorney who receives materials that on their face appear to be subject to the attorney-client privilege, under circumstances in which it is clear they were not intended for the receiving attorney, should refrain from examining the materials, notify the sending attorney, and await the instructions of the attorney who sent them.

Under this standard, Corrigan plainly violated an ethical obligation. She received the technical evidence document; the document appeared on its face to be subject to the attorney-client privilege, as it was stamped "attorney-client privileged"; the circumstances were clear that the document was not intended for her; nevertheless, she examined the document, failed to notify Luna's attorney, and refused to return it at the latter's demand.

B

Indigo's second claim is that the trial court erred in determining that disqualification of Corrigan was the appropriate remedy in light of her violation of her ethical obligation.

The trial court predicated Corrigan's disqualification on the threat of incurable prejudice to Luna. Such a threat has long been recognized as a sufficient basis for disqualification. *See*, *e.g.*, *In re Klein.* We find it more than sufficient here. Corrigan used the technical evidence document during the deposition of Luna executive Fogel, eliciting damaging admissions. Even if Corrigan were prohibited from using the document at trial, she could not effectively be prevented from capitalizing on its contents in preparing for trial and perhaps obtaining evidence of similar force and effect.

III

The trial court concluded that disqualification was necessary to ensure a fair trial. It did not abuse its discretion in doing so.

Affirmed.

Mead v. Conley Machinery Co.
Franklin Court of Appeal (1999)

The issue in this permissible interlocutory appeal is whether the trial court abused its discretion by disqualifying plaintiff's attorney on the ground that the attorney improperly used attorney-client privileged documents disclosed to him without authorization. *Cf. Indigo v. Luna Motors Corp.* (Fr. Ct. App. 1998) (inadvertent disclosure). We hold that it did and reverse.

I

Dolores Mead, a former financial consultant for Conley Machinery Company, sued Conley for breach of contract. Without authorization, she obtained attorney-client privileged documents belonging to Conley and gave them to her attorney, William Masterson, who used them in deposing Conley's president over Conley's objection.

Conley immediately moved to disqualify Masterson. After an evidentiary hearing, the trial court granted the motion. Mead appealed.

II

In determining whether the trial court abused its discretion by disqualifying Masterson, we ask whether it acted arbitrarily or without reason. *Indigo*.

III

At the threshold, Mead argues that the trial court had no authority to disqualify Masterson because he did not violate any specific rule among the Franklin Rules of Professional Conduct. It is true that Masterson did not violate any specific rule—but it is *not* true that the court was without authority to disqualify him. With or without a violation of a specific rule, a court may, in the exercise of its inherent power, disqualify an attorney in the interests of justice, including where necessary to guarantee a fair trial. *Indigo.*

IV

Without doubt, there are situations in which an attorney who has been privy to his or her adversary's privileged documents without authorization must be disqualified, even though the attorney was not involved in obtaining the documents. By protecting attorney-client communications, the attorney-client privilege encourages parties to fully develop cases for trial, increasing the chances of an informed and correct resolution.

To safeguard the attorney-client privilege and the litigation process itself, we believe that the following standard must govern: An attorney who receives, on an unauthorized basis, materials of an adverse party that he or she knows to be attorney-client privileged should, upon recognizing the privileged nature of the materials, either refrain from reviewing such materials or review them only to the extent required to determine how to proceed; he or she should notify the adversary's attorney that he or she has such materials and should either follow instructions from the adversary's attorney with respect to the disposition of the materials or refrain from using the materials until a definitive resolution of the proper disposition of the materials is obtained from a court.

Violation of this standard, however, amounts to only one of the facts and circumstances that a trial court must consider in deciding whether to order disqualification. The court must also consider all of the other relevant facts and circumstances to determine whether the interests of justice require disqualification. Specifically, in the exercise of its discretion, a trial court should consider these factors: (1) the attorney's actual or constructive knowledge of the material's attorney-client privileged status; (2) the promptness with which the attorney notified the opposing side that he or she had received such material; (3) the extent to which the attorney reviewed the material; (4) the significance of the material, i.e., the extent to which its disclosure may prejudice the party moving for disqualification, and the extent to which its return or other measure may prevent or cure that prejudice; (5) the extent to which the party moving for disqualification may be at fault for the unauthorized disclosure; and (6) the extent to which the party opposing disqualification would suffer prejudice from the disqualification of his or her attorney.[1]

Some of these factors weigh in favor of Masterson's disqualification. For example, Masterson should have known after the most cursory review that the documents in question were protected by the attorney-client privilege. Nevertheless, he did not notify Conley upon receiving them. Also, it appears that he thoroughly reviewed them, as he directly referenced specific portions in his response to Conley's disqualification motion. Finally, Conley was not at fault, since Mead copied them covertly.

Other factors, however, weigh against Masterson's disqualification. The information in the documents in question would not significantly prejudice Conley, reflecting little more than a paraphrase of a handful of Mead's allegations. The court may exclude the documents from evidence and thereby prevent any prejudice to Conley—all without disqualifying Masterson. Exclusion would prevent ringing for the jury any bell that could not be unrung. To be sure, it would not erase the documents from Masterson's mind, but any harm arising from their presence in Masterson's memory would be minimal and, indeed, speculative. In contrast, Mead would suffer serious hardship if Masterson were disqualified at this time, after he has determined trial strategy, worked extensively on trial preparation, and readied the matter for trial. In these circumstances, disqualification may confer an enormous, and unmerited, strategic advantage upon Conley.

In conclusion, because the factors against Masterson's disqualification substantially outweigh those in its favor, the trial court abused its discretion in disqualifying him.

Reversed.

[1] In *Indigo v. Luna Motors Corp.*, we recently considered the issue of disqualification in the context of *inadvertent* disclosure of a document protected by the attorney-client privilege as opposed to *unauthorized* disclosure. The analysis set out in the text above renders explicit what was implicit in *Indigo*, and is generally applicable to disqualification for inadvertent disclosure as well as unauthorized disclosure. Although we found the threat of "incurable prejudice" decisive in *Indigo*, it is neither a necessary nor a sufficient condition for disqualification.

FILE

MPT-2: *Ronald v. Department of Motor Vehicles*

LAW OFFICES OF MARVIN ANDERS
1100 Larchmont Avenue
Hawkins Falls, Franklin 33311

M E M O R A N D U M

To: Applicant
From: Marvin Anders
Date: February 24, 2009
Subject: Ronald v. Department of Motor Vehicles

Our client, Barbara Ronald, was arrested and charged with driving a motor vehicle with a prohibited blood-alcohol concentration. A blood test taken after her arrest indicates that she had a blood-alcohol concentration of 0.08 percent. Pursuant to § 353 of the Franklin Vehicle Code, the "Administrative Per Se" Law, the Franklin Department of Motor Vehicles (DMV) suspended her driver's license even though she has not yet had a criminal trial for driving with a prohibited blood-alcohol concentration.

Section 353 permits a driver whose license has been suspended to request an administrative hearing to vacate the suspension. The evidentiary portion of Ms. Ronald's hearing was yesterday. We must submit written argument to the administrative law judge on the issues we raised by the close of business today. Because this is an administrative proceeding—not a criminal prosecution for driving with a prohibited blood-alcohol concentration—the rules are different, particularly the rules of evidence. For example, the DMV may introduce hearsay evidence that would be inadmissible in court. Also, under § 353, the DMV need prove that Ms. Ronald was driving with a prohibited blood-alcohol concentration only by a preponderance of the evidence.

Please draft a persuasive memorandum for the administrative law judge arguing that:

1. The police officer did not have reasonable suspicion to stop Ms. Ronald;
2. The administrative law judge cannot rely solely on the blood test report to find that Ms. Ronald was driving with a prohibited blood-alcohol concentration; and
3. In light of all the evidence, the DMV has not met its burden of proving by a preponderance of the evidence that Ms. Ronald was driving with a prohibited blood-alcohol concentration.

Do not write a separate statement of facts. However, be sure to use the law and the facts to make the strongest case possible on each issue, anticipating and addressing the arguments that the DMV may be able to make in its favor.

Transcript of February 23, 2009, Administrative Hearing

Administrative Law Judge (ALJ): We're here for the hearing on the one-year suspension of Barbara Ronald's driver's license pursuant to Franklin Vehicle Code § 353. Attorney Jennifer Newman appears on behalf of the DMV, Marvin Anders on behalf of Ms. Ronald. Ms. Newman, you've got the burden; you go first.

Newman: Thank you. The DMV requests that the clerk mark as Exhibit 1 a Hawkins Falls Police Department Incident Report, by Officer Barry Thompson, regarding the incident involving Ms. Ronald on December 19, 2008. The DMV also requests that the Hawkins Falls Police Department Crime Laboratory § 353 Blood Alcohol Test, dated December 29, which is the document that triggered Ms. Ronald's driver's license suspension on January 9, be marked and admitted as Exhibit 2.

ALJ: Any objections to the admission of the police report and crime lab test results?

Anders: We don't object to admitting the police report. However, since the officer is here, I'll call him as a hostile witness and examine him on some details. We do dispute that he had reasonable suspicion to stop Ms. Ronald. We're also challenging the sufficiency of the § 353 test results as inadmissible hearsay, and we'll argue that they are not enough to support a finding that Ms. Ronald was driving with a blood-alcohol level of at least 0.08 percent.

ALJ: Ms. Newman?

Newman: It's the DMV's position that you should, at a minimum, consider the § 353 test results as evidence and that they are, in fact, enough to meet our burden, and that Officer Thompson did have reasonable suspicion to stop Ms. Ronald.

ALJ: The police report is admitted. Since this is an administrative hearing, I'll receive the § 353 test results, and you can argue their impact in a written memorandum.

Newman: With that, the DMV rests.

Anders: Your Honor, Ms. Ronald wants to testify briefly, and I'd like to call her.

[Witness takes the stand and is sworn and identified.]

Anders: Ms. Ronald, can you tell us what happened on the night of the incident?

Ronald: Yes. I went to the Lexington Club for a late supper. I had worked 18 hours at the Palace Hotel, where I'm the manager, dealing with a host of problems that came

out of nowhere. I had to go somewhere to unwind, and I was hungry. I had a salad and a piece of grilled fish and some white wine—no more than two glasses, just as I told the officer. I wasn't under the influence of anything. I was just drained. I left the Lexington Club after midnight. As I was driving down Highway 13, I saw a car following me so closely that I couldn't see it in my side mirrors. I became frightened, and I guess I must have begun to weave in my lane as I paid more attention to the car in my rearview mirror than to the road ahead. I was actually relieved when I saw the police lights. I immediately pulled over to the shoulder. I told the officer about the wine because I had nothing to hide. I was just very, very tired.

Anders: How do you think you did on the field sobriety tests that Officer Thompson had you perform—the coordination and balancing tests?

Ronald: Well, the officer told me I did not perform well. I myself think I did quite well, particularly since I'd been working for 18 hours. I was also wearing high heels, my arthritis was acting up, and traffic was whizzing by the side of the road where the officer had me perform the tests.

Anders: Thank you, Ms. Ronald. Your witness.

Newman: Ms. Ronald, how can you be sure you weren't under the influence of alcohol?

Ronald: I've worked in the hospitality business all my life. I've seen many people under the influence of alcohol. I know how they act. I simply wasn't acting that way.

* * * *

Anders: I'd like to call Officer Barry Thompson as a hostile witness. [Officer enters the room, takes the stand, and is sworn and identified.] Officer, do you remember your arrest of Ms. Ronald?

Thompson: Yes, I do.

Anders: After you first noticed her car, you followed her closely for nearly a mile. True?

Thompson: I wasn't tailgating her, but yes, I wanted to observe her carefully.

Anders: You had your high-beam headlights on?

Thompson: Yes. Again, to get a good look.

Anders: She wasn't going over the speed limit, was she?

Thompson: I don't recall.

Anders: If she had been, you would have mentioned it in your report?

Thompson: I probably would have.

Anders: You said that her vehicle was weaving back and forth in its lane, correct?

Thompson: Yes.

Anders: But not until after you started following her?

Thompson: I saw her weaving and it was 1:00 a.m., the time bars were closing.

Anders: Did Ms. Ronald's vehicle ever travel out of her traffic lane?

Thompson: I didn't see her cross into another lane, but she wasn't driving straight, either.

Anders: You stopped her car on U.S. Highway 13, a major truck route, is that right?

Thompson: Yes.

Anders: Wasn't it quite busy that night?

Thompson: I suppose so. It usually is.

Anders: After you stopped her, you had her step onto the shoulder close to Highway 13?

Thompson: Yes.

Anders: She was wearing fairly high heels, wasn't she?

Thompson: Yes.

Anders: Did you allow her to take her shoes off?

Thompson: She never asked to take her shoes off.

Anders: You asked her to stand on one foot?

Thompson: Yes.

Anders: And to walk a straight line while right next to Highway 13, the truck route?

Thompson: On the shoulder, off the highway.

Anders: Okay, Officer. Let me ask: you didn't smell alcohol on her breath, did you?

Thompson: I don't recall.

Anders: I have nothing further.

Newman: I have no questions.

Anders: We rest. [Witness steps down.]

ALJ: I've got another hearing scheduled. Written arguments are due by the close of business tomorrow.

HAWKINS FALLS POLICE DEPARTMENT INCIDENT REPORT # 48012

Incident Date: December 19, 2008 **Arrest Time:** 1:15 a.m. **Incident Type:** Driving with blood-alcohol level of 0.08 percent or more (Fr. Veh. Code § 352) **Personal Injuries:** None
Incident Location: U.S. Highway 13 at Bellaire Blvd. **Conditions:** Dark, clear, dry
Suspect: Barbara Ronald, white female, weight 145 lbs, height 5′9″, d.o.b. 9/15/1951, age 57
Suspect's Identification: Franklin driver's license, #W23152
Suspect's Address: 110 Merrill Crest Drive, Hawkins Falls, FR 33309
Motor Vehicle: License Plate: Franklin JSP-256 **Make/Model/Year:** Jaguar XJS V12 1992

Detailed Description of the Incident: This officer first observed suspect's vehicle pulling out from the Lexington Club parking lot at 1:00 a.m. at U.S. Highway 13 and Montview Way. The vehicle began to travel south on U.S. Highway 13; followed suspect in patrol car and observed her vehicle weaving back and forth in her lane. There was no debris or other material in the roadway that could explain such weaving. I activated the patrol car's overhead emergency lights, and suspect pulled over to the right shoulder near the corner of U.S. Highway 13 and Bellaire Boulevard about 1.4 miles from the Lexington Club; approached driver's window to ask for identification; as suspect handed over her driver's license, her eyes appeared bloodshot and watery; she said that she had been weaving back and forth because she had been scared by my headlights and was trying to see who was following her; on questioning, she admitted to having consumed two glasses of white wine.

I asked suspect to exit her vehicle and observed that her gait was unsteady. Based on these observations, I asked suspect to perform a series of field sobriety tests. When asked to walk a straight line and then stand on one foot, suspect performed poorly, lost her balance, and was distracted. As a result of her poor performance on the field sobriety tests, objective symptoms of intoxication, and poor driving, I formed the opinion that she had been driving with a blood-alcohol level of at least 0.08 percent, and placed her under arrest at 1:15 a.m.

I transported her to headquarters; she consented to a blood test. I then transported her to Mercy Hospital for the blood draw. We arrived at 2:05 a.m. and waited until a blood sample could be drawn by a technician at 2:50 a.m. I booked the blood sample into the evidence locker under HFPD No. 48012.

Reporting Police Officer: Barry Thompson, Badge No. 4693
Report Date/Time: December 19, 2008, 8:29 a.m.

EXHIBIT 1

HAWKINS FALLS POLICE DEPARTMENT

CRIME LABORATORY

VEHICLE CODE § 353 BLOOD ALCOHOL TEST RESULTS

This is to certify under penalty of perjury under the law of the State of Franklin that on December 21, 2008, I tested a sample of the blood of Barbara Ronald, entered as HFPD No. 48012, on the HemoAssay-Seven Chemical Testing Instrument. I attest that my analysis of the Ronald sample reflected a blood-alcohol concentration of 0.08 percent.

Daniel Gans signed by Charlotte Swain

Daniel Gans
Forensic Alcohol Analyst
(Fr. Bur. of Inv. Cert. #802)

Charlotte Swain

Charlotte Swain
Senior Laboratory Technician

I certify that this is a true and accurate copy of forensic alcohol test results performed at the Crime Laboratory of the Hawkins Falls Police Department, pursuant to F.C.R. § 121.

Tony Bellagio

Tony Bellagio
Records Custodian
Dated: December 29, 2008

EXHIBIT 2

LIBRARY

MPT-2: *Ronald v. Department of Motor Vehicles*

FRANKLIN VEHICLE CODE

§ 352 Driving with a prohibited blood-alcohol percentage

It is unlawful for any person who has 0.08 percent or more of alcohol in his or her blood to operate a motor vehicle.

§ 353 Administrative suspension of license by Department of Motor Vehicles for prohibited blood-alcohol level on chemical testing

(a) Upon receipt by the Department of Motor Vehicles of a laboratory test report from any law enforcement agency attesting that a forensic alcohol analysis performed by chemical testing determined that a person's blood had 0.08 percent or more of alcohol while he or she was operating a motor vehicle, the Department of Motor Vehicles shall immediately suspend the license of such person to operate a motor vehicle for a period of one year.

(b) Any person may request an administrative hearing before an administrative law judge on the suspension of his or her license under this section. At the administrative hearing, the Department of Motor Vehicles shall bear the burden of proving by a preponderance of the evidence that the person operated a motor vehicle when the person had 0.08 percent or more of alcohol in his or her blood.

(c) Any party aggrieved by a decision of an administrative law judge may petition the district court in the county where the offense allegedly occurred for review of the administrative law judge's decision.

FRANKLIN CODE OF REGULATIONS

§ 121 Forensic blood-alcohol testing

Forensic blood-alcohol testing may be performed only by a forensic alcohol analyst who has been trained in accordance with the requirements of the Franklin Bureau of Investigation. A forensic blood-alcohol analysis signed by such a forensic alcohol analyst and certified as authentic by a records custodian for the laboratory in which the analysis was performed may be admitted in any administrative suspension hearing without further foundation.

FRANKLIN ADMINISTRATIVE PROCEDURE ACT

§ 115 Hearsay evidence; admissible at administrative hearing

Hearsay evidence shall be admissible at an administrative hearing. If hearsay evidence would be admissible in a judicial proceeding under an exception to the hearsay rule under the Franklin Evidence Code, it shall be sufficient in itself to support a finding. If hearsay evidence would not be admissible in a judicial proceeding under an exception to the hearsay rule under the Franklin Evidence Code, it may nonetheless be used for the purpose of supplementing or explaining other evidence.

FRANKLIN EVIDENCE CODE

§ 1278 Hearsay definition

Hearsay is a statement, other than one made by the declarant while testifying at a judicial proceeding, offered in evidence to prove the truth of the matter asserted.

§ 1279 Hearsay rule

Hearsay is not admissible except as provided by this Code.

§ 1280 Hearsay rule: public-records exception

Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered in any judicial proceeding to prove the act, condition, or event, if (a) the writing was made by and within the scope of duty of a public employee, (b) the writing was made at or near the time of the act, condition, or event, and (c) the sources of information and method and time of preparation were such as to indicate its trustworthiness.

Pratt v. Department of Motor Vehicles
Franklin Court of Appeal (2006)

The Department of Motor Vehicles (DMV) seeks review of a district court decision vacating the suspension of Jason Pratt's driver's license for the offense of driving a motor vehicle with a prohibited blood-alcohol concentration (PBAC). The DMV asserts that the court erred in concluding that Pratt's deviations within one lane of travel, with nothing more, failed to provide the police officer with reasonable suspicion to justify an investigative stop of the vehicle.

On February 2, 2004, Plymouth police sergeant Tom Kellogg was on patrol on Mill Street. There is no line or marking delineating the traffic lane from the parking lane on this street. The parking lane is bounded by the curb. Sergeant Kellogg testified that, at approximately 9:30 p.m., he was traveling southbound on Mill Street and observed Pratt's car traveling northbound, but that the car was "canted" such that it was driving at least partially in the unmarked parking lane.

After Pratt's car passed, Sergeant Kellogg turned around and began following it. He observed the car traveling in an "S-type" pattern—a smooth motion toward the right part of the parking lane and back toward the centerline. He stated that Pratt's car moved approximately 10 feet from right to left within the northbound lane, coming within one foot of the centerline and to within six to eight feet of the curb. Pratt's car repeated the S-pattern several times over two blocks. The movement was neither erratic nor jerky, and Pratt's car did not come close to hitting any other vehicles or to hitting the curb. Sergeant Kellogg testified that the manner of Pratt's driving suggested that the driver was intoxicated, so he turned on his emergency lights and pulled Pratt's car over. As a result of the evidence obtained after the stop, Sergeant Kellogg arrested Pratt for violating § 352 of the Franklin Vehicle Code and the DMV suspended Pratt's driver's license.

At the administrative hearing, Pratt's primary defense was that Sergeant Kellogg had no reasonable basis to stop his vehicle. The administrative law judge (ALJ) held that Sergeant Kellogg's testimony of Pratt's "unusual driving" and "drifting within one's own lane" provided reasonable suspicion to justify the stop. Pratt sought review of the ALJ's decision in the district court. The district court reversed, holding that slight deviations within a single lane do not give rise to reasonable suspicion that a driver has a PBAC.

The issue is whether the traffic stop violated Pratt's constitutional rights because it was not based on reasonable suspicion. Although investigative stops are seizures within the meaning of the Fourth Amendment, in some circumstances police officers may conduct such stops even where there is no probable cause to make an arrest. *Terry v. Ohio* (U.S. 1968). Such a stop must be based on more than an officer's "inchoate and unparticularized suspicion or 'hunch.'" *Id*. Rather, the

officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" the stop. *Id*. The DMV has the burden of establishing that an investigative stop is reasonable. *See Taylor v. Dept. of Motor Vehicles* (Fr. Sup. Ct. 1973).

The DMV contends that Sergeant Kellogg had reasonable suspicion to stop Pratt. It argues that, in and of itself, repeated weaving within a single lane (absent an obvious innocent explanation) provides reasonable suspicion to make an investigative stop. While we agree that the facts of the case give rise to a reasonable suspicion that Pratt was driving with a PBAC and that the investigative stop was reasonable, we reject a bright-line rule that weaving within a single lane alone gives rise to reasonable suspicion. Rather, our determination is based on the totality of the circumstances.

In *State v. Kessler* (Fr. Ct. App. 1999), a police officer observed the defendant's car traveling slowly, stopping at an intersection with no stop sign or traffic light, turning onto a cross street, and accelerating "at a high rate of speed" (but under the speed limit). The officer then saw the car pull into a parking lot where the driver opened the door and poured out a "mixture of liquid and ice" from a cup. When the officer identified himself to the driver, the driver began to walk away, at which point the officer made an investigative stop. We held that the stop was based on a reasonable suspicion, even though any of these facts alone might be insufficient to provide reasonable suspicion.

The DMV contends that repeated weaving within a single lane alone gives an experienced police officer reasonable suspicion to make an investigative stop. That view, however, conflicts with *Kessler*. Further, the DMV's proffered bright-line rule is problematic because movements that may be characterized as "repeated weaving within a single lane" may, under the totality of the circumstances, fail to give rise to reasonable suspicion. This may be the case, for example, where the "weaving" is minimal or happens very few times over a great distance. Because the DMV's proffered standard can be interpreted to cover conduct that many innocent drivers commit, it may subject a substantial portion of the public to invasions of their privacy. It is in effect no standard at all.

However, driving need not be illegal to give rise to reasonable suspicion. Thus, we adopt neither the bright-line rule proffered by the DMV that weaving within a single lane may alone give rise to reasonable suspicion, nor the bright-line rule advocated by Pratt that weaving within a single lane must be erratic, unsafe, or illegal to give rise to reasonable suspicion. Rather, we maintain the well-established principle that reviewing courts must determine whether there was reasonable suspicion for an investigative stop based on the totality of the circumstances. As the building blocks of fact accumulate, reasonable inferences about the cumulative effect can be drawn.

Sergeant Kellogg did not observe any actions that constituted traffic violations or

that, considered in isolation, provided reasonable suspicion that criminal activity was afoot. However, when considered in conjunction with all of the facts and circumstances of the case, Pratt's driving provided Kellogg with reasonable suspicion to believe that Pratt was driving while intoxicated.

Moving between the roadway centerline and parking lane is not slight deviation within one's own lane. The district court also incorporated by reference Sergeant Kellogg's testimony regarding Pratt's drifting and unusual driving. Our read of Sergeant Kellogg's testimony does not support the view that Pratt's weaving constituted only slight deviation within one lane. After initially stating that he did not have an estimate of how many times Pratt's vehicle weaved, on cross-examination Sergeant Kellogg stated that Pratt's vehicle weaved "several" or "a few" times over several feet. The manner and frequency of Pratt's weaving are not the only specific, articulable facts here. When Sergeant Kellogg first observed Pratt's vehicle, it was "canted into the parking lane" and "wasn't in the designated traffic lane." Finally, we note that the incident took place at 9:30 at night. While this is not as significant as when poor driving takes place at or around "bar time," it does lend some further credence to Sergeant Kellogg's suspicion that Pratt was driving while intoxicated.

When viewed in isolation, these individual facts may not be sufficient to warrant a reasonable officer to suspect that Pratt was driving while intoxicated. However, such facts accumulate, and as they accumulate, reasonable inferences about the cumulative effect can be drawn. We determine, under the totality of the circumstances, that Sergeant Kellogg presented specific and articulable facts, which, taken together with rational inferences from those facts, gave rise to the reasonable suspicion necessary for an investigative stop. Accordingly, the stop did not violate Pratt's constitutional right to be free from unreasonable searches and seizures.

Reversed.

Schwartz v. Department of Motor Vehicles
Franklin Court of Appeal (1994)

On October 21, 1992, at 2:25 a.m., Dixon City Police Officer James Pisano observed Gil Schwartz's vehicle straddling the southbound lanes of Valley Road at 60 miles per hour. Officer Pisano stopped Schwartz's vehicle at that time and, after making contact with him, noted that Schwartz had slurred speech, bloodshot eyes, a strong odor of alcohol, and an unsteady gait. Officer Pisano then administered field sobriety tests on which Schwartz performed poorly. Officer Pisano then arrested Schwartz.

Officer Pisano had Schwartz's blood drawn at 3:45 a.m. at the Dixon City hospital. The blood-alcohol lab test disclosed a blood-alcohol concentration of 0.129 percent. The lab test results were immediately noted on the lab's internal records but, because of an error, not on the official § 353 report until November 29, 1992, over a month after Schwartz's arrest and blood draw.

Pursuant to § 353 of the Franklin Vehicle Code, the Department of Motor Vehicles (DMV) suspended Schwartz's driver's license. Schwartz challenged the suspension at an administrative hearing. At the hearing, Officer Pisano testified and the administrative law judge (ALJ) received the lab test report offered by the DMV showing Schwartz's blood-alcohol concentration. Schwartz did not offer any evidence of his own, but raised several evidentiary objections, including that the lab test report was hearsay. The ALJ overruled his objections, concluded that the lab test report came within the public-records exception to the hearsay rule, Fr. Evid. Code § 1280, found that the DMV had proved by a preponderance of the evidence that Schwartz had operated a motor vehicle with a blood-alcohol concentration of at least 0.08 percent, and upheld the suspension.

Schwartz petitioned for review in the district court, seeking to overturn the ALJ's decision. The court concluded that the lab report did not come within the public-records exception to the hearsay rule because the results of the test were not recorded close in time to the performance of the test, as required, but more than a month later. The court thus ruled that the suspension was not supported by a preponderance of the evidence. The DMV appeals.

Under § 353 of the Franklin Vehicle Code, the ALJ was bound to uphold the suspension if he found by a preponderance of the evidence—that is, if he found it more likely than not—that Schwartz was driving with a blood-alcohol concentration of 0.08 percent or more. The DMV has now conceded that the § 353 analysis in this case does not satisfy the public-records exception to the hearsay rule because of the late recording of the results. Therefore, we must consider what weight to give it.

Pursuant to Franklin Administrative Procedure Act § 115, if the blood-alcohol analysis

satisfies an exception to the hearsay rule, it may conclusively establish a violation of § 352. If not, additional evidence is needed to support such a finding.

In this case, the lab test report supplements Officer Pisano's testimony. Although a chemical blood-alcohol test report is one means of establishing that a driver's blood-alcohol concentration was 0.08 percent or more, it is not the only means. Both parties are free to introduce circumstantial evidence bearing on whether the driver's blood-alcohol concentration was at least 0.08 percent. Officer Pisano testified that he observed Schwartz driving in an erratic and dangerous manner, and that Schwartz had bloodshot eyes, gave off a strong odor of alcohol, had an unsteady gait and slurred speech, and performed poorly on field sobriety tests. This evidence that Schwartz was driving while heavily intoxicated provided sufficient support for the ALJ's finding that Schwartz was driving with a blood-alcohol concentration of at least 0.08 percent.

We emphasize that our decision does not justify license suspensions based solely on circumstantial evidence. A police officer's observations, standing alone, cannot establish that a driver's blood-alcohol concentration is at least 0.08 percent or more. Here, however, the record contains a blood test report, which (though inadmissible in court because it does not meet the public-records exception) may still be used in an administrative proceeding "for the purpose of supplementing or explaining other evidence." Franklin APA § 115.

Thus, the ALJ could properly consider whether this blood test report, together with the police officer's observations, supported a finding on the critical fact of blood-alcohol concentration. We conclude that the ALJ's decision is properly supported by the record in this case.

Reversed.

Rodriguez v. Department of Motor Vehicles
Franklin Court of Appeal (2004)

Following suspension of his driver's license by the Department of Motor Vehicles (DMV), Peter Rodriguez sought review in the district court seeking to vacate the suspension. The district court vacated the suspension, and the DMV appeals. We affirm.

Rodriguez was stopped by Town of Ada Police Officer Mac Huber on June 20, 2003, after failing to stop at a stop sign. When Officer Huber observed that Rodriguez was exhibiting symptoms of intoxication, he arrested him. Rodriguez submitted to a blood test, which purportedly showed a blood-alcohol concentration of 0.17 percent.

The DMV suspended Rodriguez's driver's license. At the hearing on the suspension held pursuant to the "Administrative Per Se" Law (Fr. Veh. Code § 353), the DMV submitted Officer Huber's written police report describing in perfunctory fashion the circumstances of the stop and the arrest. The DMV also submitted a one-page document entitled "blood-alcohol test results," which stated that Rodriguez's blood had been tested and found to contain "0.17 percent alcohol." The blood-alcohol test report was on letterhead from the "Town of Ada Police Department Crime Laboratory." The report bore the signature of "Virginia Loew, Criminalist."

Rodriguez challenged the sufficiency of the blood-alcohol test report under § 115 of the Franklin Administrative Procedure Act. He contended that the DMV had failed to show that the blood-alcohol test report satisfied the public-records exception to the hearsay rule because the DMV did not establish that the report had been prepared by a person with an official duty to perform a forensic alcohol analysis, as required by § 121 of the Franklin Code of Regulations. The administrative law judge (ALJ) rejected the challenge to the report and found that Rodriguez was driving with a blood-alcohol level of 0.08 percent or more, a finding based solely on the report.

Section 115 of the Franklin Administrative Procedure Act provides: "Hearsay evidence shall be admissible at an administrative hearing. If hearsay evidence would be admissible in a judicial proceeding under an exception to the hearsay rule under the Franklin Evidence Code, it shall be sufficient in itself to support a finding. If hearsay evidence would not be admissible in a judicial proceeding under an exception to the hearsay rule under the Franklin Evidence Code, it may nonetheless be used for the purpose of supplementing or explaining other evidence."

Rodriguez maintains that there is not sufficient evidence to support the ALJ's finding that he was driving with a blood-alcohol level of at least 0.08 percent because the report purporting to show his blood-alcohol concentration at 0.17 percent was hearsay that would not have been admissible at a

judicial proceeding under the public-records exception.

As the proponent of the blood-alcohol test report, the DMV bore the burden of establishing the foundation for the public-records exception, which entailed findings that (1) the forensic alcohol analysis was performed within the scope of the public employee's duty, (2) the results were recorded close in time to the performance of the analysis, and (3) the analysis and results were generally trustworthy. *See* Fr. Evid. Code § 1280.

The DMV claims that it established the proper foundation for the public-records exception to the hearsay rule regarding the blood-alcohol test report because under § 664 of the Franklin Evidence Code, "[i]t is presumed that official duty has been regularly performed."

We generally agree with the DMV that when a blood-alcohol test is performed within the scope of a public employee's duty, under § 664 of the Franklin Evidence Code it is presumed that the results were recorded close in time to the performance of the blood test and that the test and its results were generally trustworthy, inasmuch as the public employee's duty imposes such requirements.

We disagree, however, with the DMV that Rodriguez's blood-alcohol test was performed within the scope of duty of the public employee in question. Indeed, we conclude that the public employee here was not authorized to perform the forensic alcohol analysis in the first place.

The performance of forensic alcohol analysis is subject to strict regulation by § 121 of the Franklin Code of Regulations. Section 121 authorizes *only* "forensic alcohol analysts" to perform forensic alcohol analysis—and none others, including "criminalists."

On this record, it is evident that the blood-alcohol test here was performed by a public employee who was not authorized to perform forensic alcohol analysis. Virginia Loew is identified solely as a "criminalist"—and criminalists, as is evident, are not authorized to perform such blood-alcohol analyses.

The DMV argues that *Schwartz v. Department of Motor Vehicles* (Fr. Ct. App. 1994) permits the ALJ to consider an otherwise inadmissible blood test report, together with other circumstantial evidence, including a police officer's observations of the driver. But *Schwartz* involved very different facts. The DMV in that case conceded that the blood test report did not come within the public-records exception to the hearsay rule. Because the blood test report, by itself, was insufficient to support a finding, the DMV took great pains to establish the police officer's observations in detail. Here, by contrast, the DMV provided only cursory proof of the officer's observations. Indeed, this case illustrates a danger in the *Schwartz* ruling, especially if it permits the DMV to "rescue" testing by an unqualified person with unscientific testimony. For these

reasons, we reject the DMV's reliance on *Schwartz.*

In this case, it follows that the DMV failed to meet its burden of establishing the necessary foundation for the public-records exception to the hearsay rule with respect to the blood-alcohol test report. A police report void of detail and a blood test report that lacks proper foundation, even in combination, do not add up to the necessary quantum of evidence. Consequently, the DMV failed to prove by a preponderance of the evidence that Rodriguez had an excessive blood-alcohol concentration, and the district court did not err in granting Rodriguez's petition and vacating the suspension of his driver's license.

Affirmed.

POINT SHEET

MPT-1: *Phoenix Corporation v. Biogenesis, Inc.*

Phoenix Corporation v. Biogenesis, Inc.

DRAFTERS' POINT SHEET

About six years ago, Phoenix Corporation, a medical research company represented by the Collins Law Firm, brought a breach-of-contract action in state court seeking about $80 million in damages against Biogenesis, Inc., a biotechnology company represented by Amberg & Lewis LLP. A jury trial is set to begin in a month and is expected to last six weeks. Two weeks ago, however, Phoenix filed a motion to disqualify Amberg & Lewis as Biogenesis's attorneys. Phoenix claims that Amberg & Lewis violated an ethical obligation threatening incurable prejudice through its handling of one of Phoenix's attorney-client privileged documents, which Phoenix assumes was disclosed inadvertently.

Amberg & Lewis has retained applicants' law firm to consult on the motion for disqualification. Applicants' task is to prepare an objective memorandum evaluating the merits of Phoenix's argument to disqualify.

The File contains the following materials: a memorandum from the supervising attorney describing the assignment (task memo), the transcript of the client interview, the document that is the subject of the disqualification motion, and Phoenix's brief in support of its motion for disqualification. The Library contains Rule 4.4 of the Franklin Rules of Professional Conduct and two cases bearing on the subject.

The following discussion covers all of the points the drafters intended to raise in the problem. Applicants need not cover them all to receive passing or even excellent grades. Grading is left entirely to the discretion of the user jurisdictions.

I. Overview

Applicants are given a general call: "Please prepare a memorandum evaluating the merits of Phoenix's argument for Amberg & Lewis's disqualification. . . ." To complete the assignment, applicants should identify and discuss two key issues: (1) whether Amberg & Lewis has violated the rules of professional conduct, and (2) whether disqualification is indeed the appropriate remedy on the facts as given.

There is no specific format for the assigned task. Applicants' work product should resemble a legal memorandum such as one an associate would draft for a supervising partner. Applicants may choose to follow the lead of Phoenix's motion to disqualify and organize their answer in response to each of the issues raised in Phoenix's supporting brief. However, it should be an objective memorandum; applicants who draft a memorandum that is persuasive in tone have not followed instructions (jurisdictions may want to consider whether points should be

deducted from such papers). The task memorandum instructs applicants not to draft a statement of facts but to be sure to incorporate the relevant facts into their discussions.

Applicants should conclude that even if Amberg & Lewis has violated an ethical obligation (and it is not at all clear that it has), disqualification is not the appropriate remedy in this case.

II. Detailed Analysis

These are the key points that applicants should discuss, taking care to incorporate the relevant facts and explain and/or distinguish the applicable case law, in an objective memorandum evaluating the merits of Phoenix's argument to disqualify Amberg & Lewis:

As a preliminary matter, applicants should set forth the basis for why the Schetina letter may trigger disqualification under the Franklin Rules of Professional Conduct.

- Franklin Evidence Code § 954 provides that a client has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and attorney.
- It appears undisputed that the Schetina letter is protected by the attorney-client privilege under § 954.
    - It is a communication, labeled "CONFIDENTIAL," from Phoenix's then president, Schetina, to one of its attorneys, Horvitz.
    - Amberg & Lewis concedes that the letter is privileged.
    - Even if the Schetina letter were not privileged, it relates "to the representation of the attorney's client," which is the standard used in Rule 4.4. In other words, a document does not have to be attorney-client privileged for its handling by opposing counsel to constitute a violation of the Rule.
- In *Indigo v. Luna Motors Corp.* (Fr. Ct. App. 1998), the court affirmed the granting of a motion for disqualification in a case where an attorney inadvertently received privileged materials and did not return them forthwith to opposing counsel.

A. Whether Amberg & Lewis violated its ethical obligation by its handling of the Schetina letter

Applicants should incorporate into their discussion of this issue the following facts surrounding Amberg & Lewis's receipt of the Schetina letter:

- On February 2, 2009, Amberg & Lewis obtained the Schetina letter as a result of the letter's unauthorized disclosure by some unidentified person at the Collins Law Firm,

which represents Phoenix. (The letter arrived in an envelope bearing Collins's return address and was accompanied by a note reading "From a 'friend' at the Collins Law Firm.") The letter is dated January 2, 1998, and is labeled "CONFIDENTIAL."[1]

- Amberg & Lewis did not notify Collins of its receipt of the letter.
- Indeed, Amberg & Lewis would like to use the letter in its case against Phoenix—Schetina's statement is essentially an admission that Biogenesis's interpretation of the royalty agreement is the correct one.
- Also on February 2, 2009, Phoenix learned, by chance, that Amberg & Lewis had obtained the Schetina letter, but assumed, incorrectly, that it had done so as a result of inadvertent disclosure by Collins in the course of discovery. Collins instructed Amberg & Lewis to return the letter, but Amberg & Lewis refused.
- In response, Phoenix filed the present motion to disqualify Amberg & Lewis.

Phoenix's argument regarding Amberg & Lewis's handling of the Schetina letter

- In its brief, Phoenix's first argument assumes that the Schetina letter's disclosure was inadvertent and cites Rule 4.4 in support of its position that, at a minimum, Amberg & Lewis was required to "promptly notify the sender" (i.e., the Collins Law Firm) after it received the Schetina letter.
- If the letter's disclosure was unauthorized, Phoenix contends that *Mead v. Conley Machinery Co*. (Fr. Ct. App. 1999) "imposed an ethical obligation similar to that of Rule 4.4 to govern cases of unauthorized disclosure."
    - Contrary to both Rule 4.4 and *Indigo*, Amberg & Lewis chose to examine the Schetina letter, failed to notify Collins of its receipt, and then refused to return it at Collins's demand.
    - So, either way, whether the disclosure was inadvertent or unauthorized, Phoenix argues that Amberg & Lewis has committed an ethical violation.

Application of Rule 4.4 and relevant case law

Applicants should realize that Phoenix's argument overstates its position and that it is not so clear that Amberg & Lewis has violated the Franklin Rules of Professional Conduct.

[1] The letter states in its entirety: "I am writing with some questions I'd like you to consider before our meeting next Tuesday so that I can get your legal advice on a matter I think is important. I have always understood our agreement with Biogenesis to require it to pay royalties on specified categories of pharmaceuticals. I learned recently how much money Biogenesis is making from other categories of pharmaceuticals. Why can't we get a share of that? Can't we interpret the agreement to require Biogenesis to pay royalties on other categories, not only the specified ones? Let me know your thoughts when we meet."

- Rule 4.4 provides in its entirety that "[a]n attorney who receives a document relating to the representation of the attorney's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender."
- Thus, under Rule 4.4, an attorney receiving a document disclosed inadvertently need do no more than notify the sender.
- On its face, the text of the rule pertains only to situations involving *inadvertent* disclosure. The comments to Rule 4.4 are very clear on this point. In short, Rule 4.4 does not address the ethical implications for cases of *unauthorized* disclosure of privileged communications.
- Accordingly, Amberg & Lewis's conduct is not forbidden by the plain language of Rule 4.4.

1. *Indigo v. Luna Motors Corp*. is not dispositive.

- In *Indigo*, the plaintiff's attorney received an attorney-client privileged document during document production as a result of inadvertent disclosure. The attorney closely examined the document, which discussed the opposing side's technical evidence, and then used the document at deposition to obtain damaging admissions from the opposing party. Plaintiff's attorney refused opposing counsel's demands to return the document. The court held that this conduct by plaintiff's attorney constituted a violation of an ethical obligation and was grounds for disqualification.
- The *Indigo* court then articulated the following standard for how attorneys should proceed in such situations:
  - An attorney who receives materials that on their face appear to be subject to the attorney-client privilege, under circumstances in which it is clear they were not intended for the receiving attorney, should refrain from examining the materials, notify the sending attorney, and await the instructions of the attorney who sent them.
- The facts of the present case distinguish it from *Indigo*. Here, an unknown Collins employee intentionally sent the Schetina letter to Amberg & Lewis. (Phoenix could not know this, because it is unaware of how Amberg & Lewis came into possession of the Schetina letter.)
  - Presumably, someone at Amberg & Lewis kept the envelope and note that came with the Schetina letter ("From a 'friend' at the Collins Law Firm") and so it can easily prove that the disclosure was unauthorized, as opposed to inadvertent.
- More to the point, in adopting Rule 4.4, the Franklin Supreme Court expressly pulled back from the holding in *Indigo*. *See* Rule 4.4, Comment 2. The Comment explains that when there is an inadvertent disclosure, the attorney "must promptly notify the

sender, but need do no more. . . . *Indigo v. Luna Motors Corp.* conflicted with this rule and, ultimately, with the intent of the Franklin Supreme Court in adopting it."

- Thus, to the extent that it concluded otherwise, *Indigo* conflicts with Rule 4.4 and, ultimately, with the intent of the Franklin Supreme Court in adopting it. Rule 4.4 does not apply to unauthorized disclosure. Notwithstanding *Mead* (discussed below), the Franklin Supreme Court has declined to adopt a rule imposing any ethical obligation in such cases.

2. Application of *Mead*

- In *Mead*, the Franklin Court of Appeal held that an attorney who received privileged documents belonging to an adverse party through an unauthorized disclosure should do the following: "upon recognizing the privileged nature of the materials, either refrain from reviewing such materials or review them only to the extent required to determine how to proceed; he or she should notify the adversary's attorney that he or she has such materials and should either follow instructions from the adversary's attorney with respect to the disposition of the materials, or refrain from using the materials until a definitive resolution of the proper disposition of the materials is obtained from a court."
- But the court goes on to state that violation of this standard, standing alone, does not warrant disqualification.
- So, while *Mead* appears to require Amberg & Lewis to notify the Collins firm that it received the Schetina letter, following the offended law firm's instructions on what to do with the letter is optional—instead, Amberg & Lewis can wait for the court to weigh in on the issue.
    - But, under *Mead*, Amberg & Lewis must still refrain from using the materials until such court resolution is obtained.
    - In addition, astute applicants will point out that, while Amberg & Lewis wanted to use the Schetina letter in its case against Phoenix, Phoenix found out that Amberg & Lewis had the Schetina letter the *same day* that Amberg & Lewis received it (when Peter Horvitz, Phoenix's attorney, overheard the associates talking about the letter at lunch). Arguably, Amberg & Lewis could have notified the Collins firm that it had received the letter, if not for the fact that Horvitz found out about it before Amberg & Lewis had a chance to tell him.
- Again, applicants should note that *Mead* was decided in 1999, before the Franklin Supreme Court enacted Rule 4.4 in 2002. It could be implied that, had the court intended that there be an ethical rule regarding the use of privileged documents that were disclosed without authorization, it could have created one.

- In fact, Comment 3 to Rule 4.4 mentions the *Mead* case and then notes that "[t]he Franklin Supreme Court . . . has declined to adopt a rule imposing any ethical obligation in cases of unauthorized disclosure."

- As a consequence, *Mead* may lack continuing vitality on the ground that it is inconsistent with the Franklin Supreme Court's presumed intent not to impose any ethical obligation.
- That being said, it is also arguable that Amberg & Lewis did indeed violate an ethical obligation. Although the Franklin Supreme Court declined to adopt a rule imposing any ethical obligation in cases of unauthorized disclosure, it may have done so because it was satisfied with *Mead*, which had already imposed such an ethical obligation.

3. Even if there was no ethical violation, a violation of a rule is not necessary for disqualification.

- Language in both *Indigo* and *Mead* suggests that a motion for disqualification may be granted by a court even if there has been no rule violation. "It has long been settled in Franklin that a trial court may, in the exercise of its inherent power, disqualify an attorney in the interests of justice." *Indigo*, citing *In re Klein* (Fr. Ct. App. 1947). *See also Mead* ("[w]ith or without a violation of a specific rule, a court may . . . disqualify an attorney . . . where necessary to guarantee a fair trial") citing *Indigo*.

4. Conclusion of Issue A

- Phoenix's argument that Amberg & Lewis violated an ethical obligation by its handling of the Schetina letter fails insofar as it incorrectly assumes that Amberg & Lewis obtained the letter as a result of inadvertent, rather than unauthorized, disclosure.
- It appears that Amberg & Lewis would *not* have violated the ethical obligation imposed by *Indigo*. *Indigo* conflicts with Rule 4.4 and, ultimately, with the intent of the Franklin Supreme Court in adopting it, and therefore lacks continuing vitality.
- By contrast, Phoenix's argument that Amberg & Lewis violated an ethical obligation may succeed insofar as it assumes in the alternative that Amberg & Lewis obtained the letter as a result of unauthorized disclosure, depending, as indicated above, on whether *Mead* is still good law in light of the comments to Rule 4.4.
- Accordingly, there is a strong argument to be made that Amberg & Lewis has not violated the letter of the Professional Rules. Nevertheless, because the import of the *Mead* decision is uncertain, that does not end the inquiry and the court will still, most likely, go on to consider whether disqualification is required in the interests of justice.

B. Whether disqualification of Amberg & Lewis is the appropriate remedy

- A trial court may, in the exercise of its inherent power, disqualify an attorney in the interests of justice. It must exercise that power, however, in light of the important right enjoyed by a party to representation by an attorney of its own choosing. Such a right must nevertheless yield to ethical considerations that affect the fundamental principles of the judicial process. *Indigo*.
- Phoenix contends that Amberg & Lewis has threatened it with incurable prejudice and therefore disqualification must follow. In Phoenix's view, whether or not any *direct* harm could be prevented by exclusion of the Schetina letter from evidence, the *indirect* harm that might arise from its use in trial preparation cannot be dealt with so simply, inasmuch as "[t]he bell has been rung, and can hardly be unrung." (Pltf's br.)
    - It is true that in *Mead* the court suggested in a footnote that, in cases of unauthorized disclosure, the "threat of 'incurable prejudice'. . . is neither a necessary nor a sufficient condition for disqualification." But that suggestion is mere dictum, inasmuch as *Mead* did not involve the threat of *any* prejudice, incurable or otherwise (in *Mead*, the court described the document at issue as "little more than a paraphrase of a handful of [the plaintiff's] allegations").
- Applicants should conclude that disqualification is not mandated in this case.
- Even if Amberg & Lewis violated an ethical obligation, it should not be disqualified.
- Under *Mead*, disqualification in all cases of disclosure, whether inadvertent or unauthorized, depends on a balancing of six factors: (1) the receiving attorney's actual or constructive knowledge of the material's attorney-client privileged status; (2) the promptness with which the receiving attorney notified the opposing side of receipt; (3) the extent to which the receiving attorney reviewed the material; (4) the material's significance, i.e., the extent to which its disclosure may prejudice the party moving for disqualification, and the extent to which its return or other measure may cure that prejudice; (5) the extent to which the party moving for disqualification may be at fault for the unauthorized disclosure; and (6) the extent to which the party opposing disqualification would suffer prejudice from disqualification.
    - Contrary to any implication in *Indigo*, the threat of incurable prejudice is neither a necessary nor a sufficient condition for disqualification.
- The balance weighs *against* disqualification here.
    - As in the *Mead* case, where the documents were covertly copied, Phoenix is not at fault (Factor 5)—the Schetina letter was passed on to Amberg & Lewis by a disgruntled Collins employee. This favors disqualification.

- Furthermore, Amberg & Lewis knew or should have known of the letter's attorney-client privileged status (Factor 1), did not notify Collins of its receipt (Factor 2), and reviewed it thoroughly—in part because of its brevity (Factor 3). Concededly, these factors favor disqualification.
- But that being said, the Schetina letter nonetheless proves to be of dubious significance (Factor 4). True, it amounts to an admission by Phoenix that Biogenesis was correct in its understanding of its royalty obligation under the 1978 agreement. But its exclusion from evidence would prevent any prejudice to Phoenix. (Contrary to the situations in *Indigo* and *Mead*, where the attorneys in each case made use of the disclosed materials at depositions, here Amberg & Lewis has not yet made any use of the letter.) Moreover, any harm arising from any conceivable non-evidentiary use of the letter would be at best speculative.
- By contrast, Biogenesis would suffer substantial prejudice from Amberg & Lewis's disqualification, inasmuch as it would have to incur appreciable costs if it were forced to attempt to substitute new attorneys for a trial set to begin in a month after six years of preparation. These factors (Factors 4 and 6) disfavor disqualification—and they appear to predominate.
    - Biogenesis enjoys an "important right" to representation by Amberg & Lewis as its chosen attorneys. *Indigo*.
    - And there appear to be no "ethical considerations" so affecting the "fundamental principles of our judicial process" as to require that "right" to "yield." *Id*.
    - In sum, disqualification of Amberg & Lewis does not appear necessary to guarantee Phoenix a fair trial.
    - Contrary to Phoenix's argument, which relies on language that appears in *Indigo*,[2] disqualification of Amberg & Lewis does not depend solely on the threat of incurable prejudice. Although Phoenix attempts to dismiss the court's analysis in *Mead* as mere dictum, the *Mead* court intended its analysis at least to clarify, and at most to supersede, its earlier language in *Indigo* in order to make plain that disqualification depends on a balancing of factors not reducible to the threat of incurable prejudice alone. In any event, there is no threat of incurable prejudice here. As stated, the exclusion of the Schetina

[2] In *Indigo*, the court relied on the opinion in *In re Klein*, which held that the threat of incurable prejudice "has long been recognized as a sufficient basis for disqualification." *Indigo*, citing *In re Klein*.

letter from evidence would avoid any prejudice, and any harm arising from its presence in the memory of Amberg & Lewis attorneys would be at best speculative.

POINT SHEET

MPT-2: *Ronald v. Department of Motor Vehicles*

Ronald v. Department of Motor Vehicles

DRAFTERS' POINT SHEET

In this performance test, applicants work for a sole practitioner who represents Barbara Ronald. The Franklin Department of Motor Vehicles (DMV) suspended Ronald's driver's license for one year under § 353 of the Franklin Vehicle Code for driving with a blood-alcohol level of 0.08 percent or more in violation of § 352 of the same code. Ronald requested an administrative hearing to challenge the suspension. The evidentiary portion of the administrative hearing occurred on February 23, 2009. By the close of business on February 24, counsel must submit written arguments to the administrative law judge (ALJ). Applicants have a single task, to draft a persuasive memorandum arguing that (1) the officer did not have a reasonable suspicion warranting the stop of Ronald's vehicle; (2) the ALJ cannot rely solely on a blood test report to make a finding that Ronald was driving with a blood-alcohol concentration of at least 0.08 percent; and (3) in light of all the evidence, the DMV has not met its burden of proving that Ronald was driving with a blood-alcohol concentration of that percentage.

The File contains the memorandum from the supervising attorney, the administrative hearing transcript, the police report, and the § 353 test results. The Library contains a selection of Franklin statutes, administrative code provisions, and three cases.

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

I. Overview

Applicants' task is to prepare a persuasive memorandum setting forth three arguments for why the ALJ should vacate the suspension of Ronald's driver's license for driving with a prohibited blood-alcohol concentration. No specific format is given for the task. Applicants are instructed not to draft a statement of facts. However, applicants are told to incorporate the relevant facts into their arguments. In addition, applicants should anticipate the arguments that the DMV may make in support of the suspension.

Because this is an administrative proceeding, and not a criminal matter, applicants should recognize that the DMV has a lower burden of proof: it need prove that Ronald violated § 352 only by a preponderance of the evidence. With respect to the three issues, it is expected that applicants will make the following points:

1. The officer did not have a reasonable suspicion justifying the stop of Ronald's vehicle and the contrary case law (*Pratt v. Department of Motor Vehicles* (Fr. Ct. App. 2006)) is readily distinguishable.

2. The blood test report would not be admissible hearsay in a judicial proceeding as it does not fall within the applicable exception to the hearsay rule—the public-records exception. Therefore it cannot, by itself, support a finding that Ronald was driving with a prohibited blood-alcohol concentration.

3. The remaining evidence (the police report and testimony), coupled with the limited weight accorded to the blood test report, falls far below what is required (and thus the DMV cannot meet its burden of proof) to show that Ronald was driving a motor vehicle with a prohibited blood-alcohol concentration.

II. Analysis

A. Officer Thompson did not have reasonable suspicion to stop Ronald.

In *Pratt v. Department of Motor Vehicles* (Fr. Ct. App. 2006), the court discussed the circumstances under which a weaving automobile presents reasonable suspicion justifying a traffic stop.

- Driving does not have to be illegal to give rise to reasonable suspicion.
- Rather, reasonable suspicion exists when an officer can "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" the stop. *Pratt*, quoting *Terry v. Ohio* (U.S. 1968). Rejecting a bright-line rule for such situations, the court held that there was reasonable suspicion for stopping the defendant in *Pratt* based on his erratic driving.
- Under the totality of the circumstances test, the court concluded that Pratt's driving created a reasonable suspicion. Pratt's driving went beyond slight deviation within one lane—his vehicle moved from the parking lane to within one foot of the centerline and then to within six to eight feet of the curb. This conduct occurred several times. In addition, when first observed, Pratt's vehicle was not in the designated driving lane but was "canted" in the parking lane. And the incident occurred at 9:30 at night. Taken together, these facts and the reasonable inferences therefrom provided the officer with a reasonable suspicion to stop Pratt.

Applying the *Pratt* standard to the *Ronald* facts

Applicants should argue that the ALJ should reject the DMV's assertion that there was reasonable suspicion for the traffic stop of Ronald's vehicle.

- First, there was no traffic violation.
    - Officer Thompson admitted that had Ronald been speeding, he would have noted so in his report.
    - Ronald's vehicle never crossed into another lane.
- Second, there is an innocent explanation for the weaving of Ronald's vehicle.
    - Ronald testified that when she noticed that a vehicle was following her closely (so closely that she could not see it in her side mirrors), she became frightened and began "to weave in my lane as I paid more attention to the car in my rearview mirror than to the road ahead."
    - And she was very tired, having just finished working an 18-hour shift.
    - By contrast, in *Pratt*, the defense did not offer any innocent explanation for Pratt's erratic driving.
    - Further, unlike the situation in *State v. Kessler* (Fr. Ct. App. 1999) (discussed in *Pratt*), there are no actions by the driver that provide additional facts supporting reasonable suspicion. In *Kessler*, the driver did not break any traffic laws, but did stop at an intersection where there was no traffic signal, accelerated at a high rate of speed, and then pulled into a parking lot where the driver then poured a "mixture of liquid and ice" from a cup onto the ground. When the officer identified himself to the driver, the driver began to walk away and at that point the officer executed a *Terry* stop.
- Officer Thompson's account of the stop does not contradict or undercut Ronald's testimony that she began to weave in her lane because she was frightened by the car following her. In fact, his testimony corroborates her description of the stop.
    - A fair reading of both Officer Thompson's testimony and his police report supports the conclusion that Ronald did not begin to weave in her lane until Thompson began following her.
    - Unlike *Pratt*, where there was detailed testimony describing the extreme nature of how the defendant weaved in his lane, here there are no details about the weaving beyond Officer Thompson's statement that "I didn't see her cross into another lane, but she wasn't driving straight, either."
    - Also, Officer Thompson testified that he used his high-beam lights. This would distract Ronald and make it difficult for her to see who was following her so closely.
- While it is relevant that Officer Thompson saw Ronald's vehicle leave the Lexington Club at 1:00 a.m., the time that bars close in Hawkins Falls, without more, that fact is not enough to constitute reasonable suspicion for the traffic stop.

    - Granted, in *Pratt*, the court noted that it is more suggestive of intoxication when poor driving occurs "at or around 'bar time.'"
- In short, there are only three facts weighing in favor of reasonable suspicion: that Ronald had left a restaurant where alcohol was served, that she was driving around "bar time," and that she was weaving within her lane (but only after being closely followed).
- Applicants should argue that when viewed in light of the totality of circumstances—Ronald broke no traffic laws, and began weaving only after Officer Thompson began to follow her so closely that his vehicle could not be seen in her side mirrors, and he had his high-beam lights on—the facts fall far short of establishing reasonable suspicion for the traffic stop.

B. The blood test report cannot, by itself, support a finding that Ronald was driving with a prohibited blood-alcohol concentration (0.08 percent or more).

- The relevant facts regarding the test of Ronald's blood are undisputed:
    - On December 19, 2008, at 2:50 a.m., a sample of Ronald's blood was drawn at Mercy Hospital in Hawkins Falls.
    - On December 29, 2008, the Crime Laboratory of the Hawkins Falls Police Department issued a "Vehicle Code § 353 Blood Alcohol Test Results" stating that Ronald's blood sample was subjected to a chemical test on December 21 and reflected a blood-alcohol concentration of 0.08 percent. The document bears the signature of Charlotte Swain, who is identified by the title of "Senior Laboratory Technician," and the name "Daniel Gans," who is identified by the title of "Forensic Alcohol Analyst." Gans did not sign the document. Rather, his name was signed by Swain.
- The burden is on the DMV to prove by a preponderance of the evidence, that is, to prove that it is more likely than not, that Ronald was driving with a blood-alcohol concentration of at least 0.08 percent. Fr. Veh. Code § 353(b); *Schwartz v. Dept. of Motor Vehicles* (Fr. Ct. App. 1994).
- The ALJ should give limited weight to the § 353 lab report as evidence that Ronald had a prohibited blood-alcohol concentration.
    - The § 353 lab report is hearsay: it is an out-of-court statement offered to prove the truth of the matter asserted—that Ronald was driving with a blood-alcohol concentration of 0.08 percent or more. *See* Fr. Evid. Code § 1278 (defining hearsay).

- The DMV asserts that the § 353 lab report should be considered as evidence and that, by itself, the lab report is sufficient to prove by a preponderance of the evidence that Ronald was driving with a prohibited blood-alcohol concentration.
- The § 353 lab report does not fall within an exception to the hearsay rule and therefore cannot, by itself, support a finding at an administrative proceeding.
    - Under § 115 of the Franklin Administrative Procedure Act, if hearsay evidence would be admissible in a judicial proceeding under an exception to the hearsay rule, it is sufficient to support a finding at an administrative hearing. *See Rodriguez v. Dept. of Motor Vehicles* (Fr. Ct. App. 2004).
    - Thus, the question is whether the § 353 lab report comes within the public-records exception of § 1280 of the Franklin Evidence Code. *Rodriguez*; *Schwartz*. Section 1280 provides: "Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered in any judicial proceeding to prove the act, condition, or event, if (a) the writing was made by and within the scope of duty of a public employee, (b) the writing was made at or near the time of the act, condition, or event, and (c) the sources of information and method and time of preparation were such as to indicate its trustworthiness."
        - The report of a forensic alcohol analysis, when performed by an authorized person, comes within the public-records exception of § 1280 of the Evidence Code by virtue of the presumption of § 664 as described in *Rodriguez*, that the "official duty has been regularly performed."
        - However, under § 121 of the Franklin Code of Regulations, forensic alcohol analysis "may be performed only by a forensic alcohol analyst." *See also Rodriguez*.
        - The § 353 lab report proffered by the DMV bears the signature of Charlotte Swain, who is identified by the title of "Senior Laboratory Technician," not the requisite "Forensic Alcohol Analyst." *See Rodriguez*. The "signature" of Daniel Gans, a "Forensic Alcohol Analyst," was executed by Swain.
        - As a result, the § 353 lab report does not comply with the requirements of § 121 of the Code of Regulations. As in *Rodriguez*, "the public employee here was not authorized to perform the forensic alcohol analysis in the first place."
        - Therefore, the DMV cannot establish the necessary foundation for the public-records exception to the hearsay rule with respect to the § 353 lab report.
        - In addition, there is a question as to whether the § 353 lab report was prepared "at or near the time of the . . . event." Fr. Evid. Code § 1280.

- In *Schwartz*, the lab test results were recorded over five weeks after the defendant's arrest and blood draw, and the DMV conceded that, as a result of the delay, the § 353 lab report did not satisfy the public-records exception to the hearsay rule.
- Here, Ronald's blood sample was tested just two days after her arrest, and the § 353 lab report was completed and certified eight days later, on December 29, 2008, during a holiday week.
- While much shorter than the five-week delay in *Schwartz*, an applicant could argue that the delay in preparing the report places it outside of the public-records exception.
- Applicants who make this argument may receive some credit, but the delay should not be the sole focus of their public-records exception argument.
- Rather, the fact that the alcohol analysis was performed by a laboratory technician and not a forensic alcohol analyst categorically precludes the report from satisfying the public-records exception. *See Rodriguez*.

To recap, the § 353 lab report would be inadmissible to support a finding in a judicial proceeding because it does not satisfy the requirements of the public-records exception to the hearsay rule. Although hearsay is admissible in administrative proceedings such as Ronald's, it is accorded limited weight; it cannot support a finding by itself, but may be used only to supplement or explain other evidence. *See* Fr. Admin. Proc. Act § 115.

C. In light of all the evidence, the DMV has not met its burden of proving that Ronald was driving with a prohibited blood-alcohol concentration.

- Assuming, *arguendo*, that there was reasonable suspicion for the traffic stop, the DMV still cannot meet its burden to prove by a preponderance of the evidence that Ronald had a blood-alcohol concentration of 0.08 percent or more.
- The only evidence in addition to the problematic § 353 lab report of Ronald's possible intoxication is found in the police incident report and Officer Thompson's testimony.
- Officer Thompson's report notes that he observed Ronald's vehicle "weaving back and forth in her lane." When he stopped her vehicle, he noted that "her eyes appeared

bloodshot and watery" and that she told him that she had had two glasses of white wine. According to Officer Thompson, her gait was unsteady, she performed poorly on field sobriety tests, and she was distracted.

- Officer Thompson's incident report was undermined by the testimony of Thompson himself, who made admissions supporting Ronald's testimony.
  - At the hearing, he conceded that Ronald had not exceeded the speed limit and that he had been following her closely with his high beams on.
  - Furthermore, he agreed, upon questioning, that Highway 13 is a busy truck route, and that Ronald performed the balancing and coordination tests while wearing high heels and standing on the shoulder of a busy highway.
  - Most telling, he could not recall smelling alcohol on Ronald's breath, nor is there any mention of his smelling alcohol in his report.
- Ronald's counsel called Ronald herself, who testified as follows:
  - She had no more than two glasses of white wine at dinner.
  - She was not under the influence of alcohol, but was drained after working for 18 hours straight.
  - She weaved while she was driving because the police officer was following too closely and she became distracted and afraid.
  - She noted that when she performed the field sobriety tests she was wearing high heels, her arthritis was acting up, and "traffic was whizzing by the side of the road."
  - Finally, she averred that she was sure that she was not under the influence of alcohol because she had long worked in the hospitality business and knew how persons acted when they were under the influence.
- Without more, the circumstantial evidence proffered by the DMV (the police report and the testimony) is insufficient to show that it was more likely than not that Ronald was driving with a prohibited blood-alcohol concentration.
- In *Schwartz*, the arresting officer testified that the driver, after being stopped for driving in an erratic manner, exhibited "slurred speech, bloodshot eyes, a strong odor of alcohol, and an unsteady gait," and then performed poorly on field sobriety tests. The court of appeal held that this circumstantial evidence of intoxication, when supplemented by a blood test (which, as is the case here, did not meet the public-records hearsay exception, and therefore could not by itself prove intoxication), provided adequate support for the ALJ's finding that the driver had a blood-alcohol level of 0.08 percent or more.

- However, in *Rodriguez*, the court emphasized the danger of allowing the DMV to "'rescue' testing by an unqualified person with unscientific testimony." Thus, where the DMV proffered "only cursory proof of the officer's observations" of the driver's intoxication, a § 353 lab report that did not meet the exception to the hearsay rule could not be used to bolster the scant circumstantial evidence of intoxication even though, under APA § 115, such a blood test could be used "for the purpose of supplementing or explaining other evidence."
- Applicants should argue that the case at hand is much closer to *Rodriguez* than to *Schwartz*, and therefore the § 353 lab report cannot sufficiently buttress Officer Thompson's testimony.
    - Unlike the facts in *Schwartz*, there is no evidence that Ronald slurred her words during her interchange with Officer Thompson, or that she gave off any odor of alcohol—two clear symptoms of intoxication.
    - Ronald explained that she was tired, having just finished working 18 hours straight. Under the circumstances, her alleged poor performance on the field sobriety tests is reasonably explained by the facts that she has arthritis, was wearing high heels, and was forced to perform the tests next to a busy highway.
        - Such factors militating against intoxication were not present in *Schwartz*.
    - Moreover, the demeanor of the driver in *Rodriguez* was at least as suggestive of intoxication as Ronald's, but was nevertheless held insufficient.
- Even if, considered together, all of the evidence, including the flawed § 353 lab report, shows that it is *possible* that Ronald was driving with a blood-alcohol level of at least 0.08 percent, it fails to show that it is *more likely than not* that she was doing so.

Because the DMV has not carried its burden to prove by a preponderance of the evidence that Ronald was driving with a blood-alcohol level of at least 0.08 percent, the ALJ must vacate the suspension of her driver's license.

NOTES

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