THE MPT®

MULTISTATE PERFORMANCE TEST

# February 2015 MPTs and Point Sheets

National Conference of Bar Examiners
302 South Bedford Street | Madison, WI 53703-3622
Phone: 608-280-8550 | Fax: 608-280-8552 | TDD: 608-661-1275
e-mail: contact@ncbex.org

www.ncbex.org

## Contents

## 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 2015 MPT. The instructions for the test appear on page iii.

The MPT Point Sheets describe the factual and legal points encompassed within the lawyering tasks to be completed. They outline the possible issues and points that might be addressed by an examinee. They are provided to the user jurisdictions to assist graders in grading the examination by identifying the issues and suggesting the resolution of the problem contemplated by the drafters.

For more information about the MPT, including a list of skills tested, visit the NCBE website at www .ncbex.org.

## Description of the MPT

The MPT consists of two 90-minute items and is a component of the Uniform Bar Examination (UBE). It is administered by user jurisdictions as part of the bar examination on the Tuesday before the last Wednesday in February and July of each year. User jurisdictions may select one or both items to include as part of their bar examinations. (Jurisdictions that administer the UBE use two MPTs.)

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 examinee 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. Examinees 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 examinee 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 examinee's ability to use fundamental lawyering skills in a realistic situation and complete a task that a beginning lawyer should be able to accomplish. The MPT is not a test of substantive knowledge. Rather, it is designed to evaluate six fundamental skills lawyers are expected to demonstrate regardless of the area of law in which the skills arise. The MPT requires examinees 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 examinees to perform one or more of a variety of lawyering tasks. For example, examinees 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 booklet contains the following instructions:

> You will be instructed when to begin and when to stop this test. Do not break the seal on this booklet until you are told to begin. This 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.
>
> 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.
>
> 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.
>
> 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.
>
> Your response must be written in the answer book provided. If you are using a laptop computer to answer the questions, 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.
>
> Although there are no restrictions on how you apportion your time, you should allocate approximately half your time 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.
>
> 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.

# *February 2015*
# *MPT-1 File:*
# *In re Harrison*

**Barbour, Lopez & Whirley**
Attorneys at Law
788 Washington Blvd.
Abbeville, Franklin 33017

**M E M O R A N D U M**

**To:** Examinee
**From:** Esther Barbour
**Date:** February 24, 2015
**Re:** Daniel Harrison matter

---

Last year, our client Daniel Harrison bought a 10-acre tract (the Tract) of land in the City of Abbeville from the federal government, which had used the property as an armory and vehicle storage facility. The Tract is currently zoned for single-family residential development. Harrison applied for a rezoning of the property for use as a truck-driving training facility, but the City has denied the application.

Harrison wants to know whether he can pursue an inverse condemnation case seeking compensation from the City based on the denial of his rezoning application. Inverse condemnation is a legal proceeding in which a private property owner seeks compensation from a governmental entity based on the governmental entity's use or regulation of the owner's property.

Please draft a memorandum to me identifying each of the inverse condemnation theories available under Franklin and federal law and analyzing whether Harrison might succeed against the City under each of those theories. Note that there has been no physical taking, so do not address that issue. Do not prepare a separate statement of facts, but be sure to incorporate the relevant facts, analyze the applicable legal authorities, and explain how the facts and law affect your analysis.

**Barbour, Lopez & Whirley**

**MEMORANDUM TO FILE**

**From:** Esther Barbour
**Date:** February 23, 2015
**Re:** Summary of interview of Daniel Harrison

---

Today I met with Daniel Harrison regarding a 10-acre Tract he bought from the federal government. He provided the following background information about the Tract's zoning, its prior use, and his plans for development.

- From 1978 to 2014, the Franklin National Guard operated an armory and vehicle storage building on the Tract. The buildings and parking lot are located on approximately three acres, and the remaining seven acres are undeveloped, heavily sloped, and wooded.

- In 1994, the City of Abbeville enacted an R–1 (single-family residential) zoning ordinance, restricting development to single-family housing and prohibiting all commercial and industrial uses on the Tract.

- The Guard operated the armory and storage building without objection from the City until March 2014, when the property was decommissioned and the Guard began looking for buyers. The buildings were (and still are) in good shape, but they contain levels of asbestos and lead paint that may pose environmental hazards if the buildings are renovated or demolished.

- The Tract borders a City park and baseball field and is near the municipal airport. The area surrounding the Tract has had very little residential growth since the 1960s.

- In June 2014, Harrison purchased the Tract from the Guard through a bid process for $100,000 (about $10,000 per acre), intending to use the existing Guard buildings for commercial purposes. He believed that the Tract was "grandfathered in" and not subject to the 1994 residential zoning ordinance.

- There were several other bids on the Tract, ranging from $20,000 to $88,800. Harrison anticipates that the City will point to his winning bid and the other bids submitted as proof of the Tract's value. However, the other bids were made before the City rejected Harrison's proposed non-residential use of the Tract, and Harrison believes that the other bidders bid on the Tract believing (as he did) that the zoning ordinance would not be enforced.

- Harrison also believes that it is not feasible to develop the Tract for residential use (see attached emails).

- In August 2014, Harrison negotiated a lease of the Tract to a truck-driving school. After negotiating the lease, Harrison contacted the City and was informed that the City intended to enforce the residential zoning ordinance.

- He then submitted an application to the City's Planning and Zoning Board requesting that the zoning of the Tract be changed from R–1 (single-family residential) to C–1 (general commercial/industrial) to allow the Tract to be used as a truck-driving school.

- The Board recommended approval of the rezoning application, but the Abbeville City Council voted unanimously to deny it.

- At the Council meeting, some Council members were concerned about the proximity of the Tract to a park; one suggested that with a special-use permit, the property could be used for a church, medical or dental clinic, business office, or day-care center. Harrison believes that these other uses are not feasible because the Tract is in a remote area of the City with little traffic and no growth, and because of the prohibitive cost of renovating the existing structures for such non-industrial uses.

- Harrison wants to keep the Tract, but he's very concerned about losing money on it. The Tract would be worth $200,000 if used for industrial purposes (see attached appraisal). But because the City denied his rezoning application, the Tract is not producing and will not produce any income. Harrison estimates that if the Tract is not rezoned, he will lose between $10,000 and $15,000 per year due to maintenance, taxes, insurance, and deterioration.

**MASTER APPRAISALS LLP**
3200 Barker Road
Abbeville, Franklin 33020

Mr. Daniel Harrison
1829 Timber Forest Drive
Abbeville, Franklin 33027

January 9, 2015

SUBJECT: Market Value Appraisal for Harrison Tract

Dear Mr. Harrison:

Master Appraisals LLP submits the accompanying appraisal of the referenced property. The purpose of the appraisal is to develop an opinion of the market value of the fee simple interest in the property based on the highest and best use value of the property, if zoned for general commercial/industrial use. The appraisal is intended to conform to the Uniform Standards of Professional Appraisal Practice and applicable state appraisal regulations.

The subject is a parcel of improved land containing two buildings and a parking lot and consisting of an area of 10.0 acres or 435,600 square feet. The property is zoned R–1 (single-family residential) but has been used as a military armory and vehicle storage facility. The existing structures appear to be perfect for conversion to an industrial or training facility of some kind. That appears to be the highest and best use of the property, in its "as-improved" state. Thus, the appraisal assumes that the property will be used for industrial or training purposes.

**VALUE CONCLUSION**

**Appraisal Premise:** Market Value
**Date of Value:** January 6, 2015
**Interest Appraised:** Fee Simple
**Value Conclusion:** $200,000 total ($20,000/acre)

If you have any questions or comments regarding the information contained in this letter or the attached report, please contact the undersigned. Thank you for the opportunity to be of service.

Respectfully submitted,

**MASTER APPRAISALS LLP**

Margaret Jane Charleston

Margaret Jane Charleston
Certified General Real Estate Appraiser
Franklin Certificate # FR-053010

[Balance of APPRAISAL REPORT omitted]

**January 19, 2015, Email Correspondence Between Harrison and Real Estate Agent**

**From:** Daniel Harrison<dharr@cmail.com>
**To:** Amy Conner<amyc@abbevillerealty.com>
**Subject:** Development options for my land

Hi, Amy. Remember the 10-acre tract of land that I bought last year? I've been trying to get the tract rezoned as C-1 commercial so that I can lease it to a truck-driving school that wants to open a new training facility in Abbeville. The City Council denied my rezoning application and told me that the only development it will allow is single-family residential. Frankly, I just don't think anyone would want to live way down there. You've been a real estate agent for 15 years. What do you think?

---

**From:** Amy Conner<amyc@abbevillerealty.com>
**To:** Daniel Harrison<dharr@cmail.com>

I agree. I don't think the land is suitable for residential development. Assume that you could build three houses per acre—that would be 30 homes on the 10-acre tract. Typically, it costs between $15,000 and $20,000 per lot to develop land for single-family housing, including grading the land and installing utilities and drainage systems. That's a reasonable investment if the land is near a business district because people will pay a premium to live close to work.

But your land is almost 45 minutes southeast of the business district. There are several single-family lots a few miles from your tract, priced at $4,500 each, and they aren't selling. I think you'd be lucky to get $5,000 per lot if you developed the land, assuming you could sell the lots.

---

**From:** Daniel Harrison<dharr@cmail.com>
**To:** Amy Conner<amyc@abbevillerealty.com>

That's what I thought. I wasn't sure about the numbers, but I didn't think it was doable.... You've seen the tract — do you have any idea what it would cost to tear down the existing buildings and parking lot and clear the wooded areas of the tract?

---

**From:** Amy Conner<amyc@abbevillerealty.com>
**To:** Daniel Harrison<dharr@cmail.com>

In other deals I've worked on, I've seen it cost $25,000 or more to demolish a building or parking lot. Here, the property has two buildings with likely environmental issues, and a parking lot and shrubs and trees to remove. You're probably looking at a minimum expense of $75,000.

---

**From:** Daniel Harrison<dharr@cmail.com>
**To:** Amy Conner<amyc@abbevillerealty.com>

I just don't have that kind of money.... If I can't lease the land to the truck-driving school and I can't develop it for residential housing, what do you think it's worth in its current condition?

---

**From:** Amy Conner<amyc@abbevillerealty.com>
**To:** Daniel Harrison<dharr@cmail.com>

Not much. Maybe a few hundred dollars an acre. But that's about it.

*February 2015*
*MPT-1 Library:*
*In re Harrison*

**Franklin Constitution, Article I, Section 13**

No person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person . . . .

**United States Constitution, Fifth Amendment ("Takings Clause")**

No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**Newpark Ltd. v. City of Plymouth**
Franklin Court of Appeal (2007)

This appeal involves an inverse condemnation claim in which a developer (Newpark Ltd.) contends that the City of Plymouth's denial of its rezoning application effected an unconstitutional regulatory taking of property. We affirm the trial court's judgment against the developer.

The property at the center of this dispute consists of 93 acres of land acquired by Newpark for $930,000 ($10,000 per acre). The tract is located in an area zoned "SF–E" (single-family residential development). The area has been zoned for one-acre-minimum lots since 1967. The tract was used primarily for pastureland at the time of purchase. While Newpark was unaware that the tract was zoned for one-acre-minimum lots when it signed the purchase contract, it was aware of the zoning by the time of closing.

In August 2000, after closing on the tract, Newpark applied for a zoning change to allow the development of 325 single-family lots on the 93 acres with a density of approximately 3.5 units per acre. The City Council considered and denied the application. Newpark then sued the City, seeking damages for inverse condemnation.[1] The trial court found in favor of the City, and this appeal followed.

At the outset, we note that the fact that the zoning restriction had already been enacted when Newpark bought the tract does not bar it from bringing a takings action against the City, regardless of whether Newpark had notice of the restriction. Unreasonable zoning regulations do not become less so through the passage of time or title. *See Palazzolo v. Rhode Island,* 533 U.S. 606 (2001) (rejecting argument that post-zoning purchasers cannot challenge a regulation under the Takings Clause).

The Takings Clause of the Fifth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment, prohibits the government from taking private property for public use

[1] Inverse condemnation occurs when the government takes private property for public use without paying the property owner, and the property owner sues the government to recover compensation for the taking. Because the property owner in such situations is the plaintiff, the action is called *inverse* condemnation because the order of the parties is reversed as compared to a direct condemnation action where the government is the plaintiff who sues a defendant landowner to take the owner's property.

without just compensation. *Id.* A taking can be physical (e.g., land seizure, continued possession of land after a lease to the government has expired, or deprivation of access to the property owner), or it can be a regulatory taking (where the regulation is so onerous that it makes the regulated property unusable by its owner). *See Soundpool Inv. v. Town of Avon* (Franklin Sup. Ct. 2003). The constitutionality of a regulatory taking involves the consideration of a number of factual issues, but whether a zoning ordinance is a compensable taking is a question of law.

The state of Franklin's prohibition against taking without just compensation is set forth in Article I, Section 13, of the Franklin Constitution and is comparable to the Takings Clause of the United States Constitution, despite minor differences in wording. *See Sheffield Dev. Co. v. City of Hill Heights* (Franklin Sup. Ct. 2006). Therefore, Franklin courts look to federal cases for guidance in these situations.

The United States Supreme Court recently clarified the types of regulatory taking: (1) a total regulatory taking, where the regulation deprives the property of all economic value; (2) a partial regulatory taking, where the challenged regulation goes "too far"; and (3) a land-use exaction, which occurs when governmental approval is conditioned upon a requirement that the property owner take some action that is not proportionate to the projected impact of the proposed development (e.g., a developer is required to rebuild a road but the improvements are not necessary to accommodate the additional traffic from the proposed development). *Lingle v. Chevron,* 544 U.S. 528 (2005).[2]

Here, Newpark does not argue that the City has physically taken its property, nor does it assert a partial regulatory taking or a land-use exaction. Thus, we need only consider the first type of regulatory taking: whether the City ordinance restricting development of Newpark's land to one-acre-minimum lots constitutes a total regulatory taking.

A total regulatory taking occurs when a property owner is called upon to sacrifice *all* economically beneficial uses in the name of

[2]The Franklin Supreme Court recognizes a fourth type of regulatory taking in situations where a regulation does not "substantially advance" a legitimate governmental interest. In *Lingle,* the United States Supreme Court rejected the "substantially advances" formula under federal constitutional law. Its continuing validity is still an issue under Franklin law, but the parties have not raised it. Thus, we need not determine whether the "substantially advances" test remains valid in a regulatory takings case under the Franklin state constitution.

the common good. This type of regulatory taking was first articulated by the United States Supreme Court in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). A *Lucas*-type total regulatory taking is limited to the extraordinary circumstance when no productive or economically beneficial use of the land is permitted and the owner is left with only a token interest.

Newpark contends that the only way to achieve an economically productive use of the property is for the City to allow single-family development of some type. This argument not only mischaracterizes the zoning ordinance but also misapplies the *Lucas* test upon which the argument is premised. The SF–E zoning *does* permit the development of a single-family residential subdivision, albeit in one-acre-minimum lots. The appraisal experts for both parties testified that, due to market conditions and the current zoning, the cost to develop one-acre lots would exceed the potential for revenue. The City's appraiser testified that the highest and best use of the property is to hold the property for the future.

Although the testimony established that the development would not be profitable under current conditions, the absence of profit potential does not equate with impossibility of development. To the contrary, the takings clause does not require the government to guarantee the profitability of every piece of land subject to its authority, although lost profits are a relevant factor to consider in assessing the value of property and the severity of the economic impact of rezoning on a landowner.

The City's expert testified that the property's value is approximately $5,000 per acre. Newpark's expert testified that the property is worth $2,000 per acre. Both experts testified that Newpark paid more for the property ($10,000 per acre) than it is worth. The court reasonably concluded that Newpark had assumed certain risks attendant to real estate investment. But such risks have no place in a total takings analysis because the government has no duty to underwrite the risk of developing and purchasing real estate. Although investment-backed expectations are relevant to a *partial* regulatory taking analysis rather than a total taking analysis, we note that when such expectations are measured, the historical uses of the property are critically important. Here, the zoning always required one-acre-minimum lots, and the historical use of the property was farmland.

Newpark's expert testified that the value of the property, if capable of being developed, is $25,000 per acre. Expert testimony on both sides provides a range of value for the property in an undeveloped state from $2,000 to $5,000 per acre. Newpark claims that the $2,000 constitutes no value at all.

We do not read *Lucas* to hold that the value of land is a function of whether it can be profitably developed. To the contrary, the economic viability test "entails a relatively simple analysis of whether value remains in the property after governmental action." *Sheffield.* The appropriate *Lucas* inquiry is whether the value of the property has been completely eliminated. The deprivation of value must be such that it is tantamount to depriving the owner of the land itself. *Id.*

Newpark also argues that the property is valueless because if it cannot be developed as a residential subdivision, it will remain vacant, with a value equivalent to that of parkland. The fallacy of this approach is that it equates the lack of availability of a property for its most economically valuable use with the condition of being "valueless." Although the regulation in *Lucas* precluded the development of oceanfront property, the property still had value. The owner could enjoy other attributes of the property: he could picnic, camp, or live on the land in a mobile trailer. The owner also retained other valuable property rights—the right to exclude others and to alienate the land. *Id.* (Blackmun, J., dissenting); *see also Wynn v. Drake* (Fr. Sup. Ct. 2003) (no taking when zoning left owner with only recreational and horticultural uses). Here, the court could reasonably conclude that the property retains residual uses and therefore some value.

Newpark's insistence that it is virtually impossible to find a tract of land without value is instructive. The fact that a piece of land will rarely be deemed utterly lacking in economic viability is consistent with the *Lucas* limitation of such claims to extraordinary circumstances. Here, because the property has a value of at least $2,000 per acre, we conclude that those extraordinary circumstances are not present. Because the ordinance does not completely eliminate the property's value, there has been no unconstitutional taking.[3]

Affirmed.

[3] We note that a necessary result of a taking under these circumstances—had Newpark prevailed—would be that upon payment of adequate compensation, the City would own the property. Thus, had Newpark prevailed in its claim for inverse condemnation, Newpark would have been required to transfer title of the property to the City.

**Venture Homes Ltd. v. City of Red Bluff**
Franklin Court of Appeal (2010)

Appellant Venture Homes Ltd. owns two apartment buildings in the City of Red Bluff. After the City rezoned adjacent land, Venture sued the City, alleging that the rezoning had reduced the value of its property. The trial court granted the City's summary judgment motion. We affirm.

## Background

In 1999, upon application of developer Austin Inc., the City created Planned Unit Development No. 12 (PUD 12). (A PUD is an alternative to traditional zoning containing a mix of residential, commercial, and public uses.) PUD 12 is a 195-acre mixed-use development, consisting of multi-family housing, shopping centers, and office buildings. The original development plan allowed a maximum of 900 apartment units to be built on the site. Austin built two apartment buildings, containing 800 units, which Venture subsequently purchased in 2002. Austin retained ownership of the remaining land in PUD 12.

When Venture bought the 800-unit apartment complex, it assumed that only 100 additional apartment units could be built in PUD 12. Because Venture thought that a 100-unit apartment building would be too small to be commercially viable, and because Venture believed that the City needed Venture's consent to allow additional apartment units in PUD 12, Venture assumed that it effectively had 100 additional units in reserve for future expansion of the two apartment buildings that it had purchased.

However, in April 2006, at Austin's request, the City carved out an area from PUD 12 and rezoned it. Austin then filed an application for creation of a new PUD within the boundaries of PUD 12. After public hearings, the City passed an ordinance creating PUD 30, an eight-acre tract zoned for 350 additional multi-family units.

## Discussion

Venture alleges that creation of PUD 30 gives rise to a claim for inverse condemnation under the Franklin Constitution. Venture does not claim that its

property was physically invaded or that the City's zoning regulations eliminated all economically beneficial uses of its property. Rather, Venture argues that the City's creation of PUD 30 amounted to a partial regulatory taking for which Venture should be compensated.

**A. Partial Regulatory Takings Test**

A partial regulatory taking may arise where there is not a complete taking, either physically or by regulation, but the regulation goes "too far," causing an unreasonable interference with the landowner's right to use and enjoy the property. *See Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). Because the Franklin Constitution's takings clause is similar to the Takings Clause of the Fifth Amendment to the United States Constitution, we look to federal law to analyze Venture's takings claims. *See Newpark Ltd. v. City of Plymouth* (Franklin Ct. App. 2007).

For a partial regulatory taking to occur, the governmental regulation must, at a minimum, diminish the value of an owner's property. Not every regulation that diminishes the value of property, however, is a taking.

There is no bright-line test for determining whether a partial, *Penn Central*–type regulatory taking has occurred. Whether a regulation goes "too far" requires a factual inquiry using the following guiding factors: (1) the economic impact of the regulation, (2) the extent to which the regulation interferes with the property owner's reasonable investment-backed expectations, and (3) the character of the governmental action. *Sheffield Dev. Co. v. City of Hill Heights* (Franklin Sup. Ct. 2006) (citing *Penn Central*).

Our goal is to determine, after analyzing and balancing all relevant evidence, whether a regulatory action is the functional equivalent of a classic taking in which the government directly appropriates private property, such that fairness and justice demand that the burden of the regulation be borne by the public rather than by the private landowner.

Our analysis must not be merely mathematical. Rather, while applying the balancing test, we must remember that purchasing and developing real estate carries with it certain financial risks, and it is not the government's duty to underwrite those risks.

***(1) Economic Impact of the Regulation***

The first *Penn Central* factor, the regulation's economic impact on the property owner, is undisputed for the purpose of this appeal. Venture presented expert testimony that the value of its apartment properties was reduced from $65.6 million to $62.9 million. The City stipulated to Venture's figure for purposes of this appeal. While significant in absolute terms, this diminution in value of $2.7 million reflects a loss of only about 4%.

The City cites several cases that suggest that such a small diminution in value is rarely if ever held to be a taking. The City claims that because Venture's loss was a small part of its property's value, Venture failed to show that creation of the new PUD unreasonably interfered with its use of the property. Although this one factor is not dispositive, the City is correct when it asserts that the small relative amount of Venture's loss weighs heavily against Venture's claims.

***(2) Interference with Reasonable Investment-Backed Expectations***

The second *Penn Central* factor requires us to consider the extent to which the regulation has interfered with Venture's reasonable investment-backed expectations. The record shows that the ordinance at issue caused minimal interference with Venture's *reasonable* investment-backed expectations.

Venture concedes that the only harm it has suffered is increased competition and a resulting diminution in the value of its property. The City has not rezoned Venture's property to prohibit a current or proposed use, nor has the City substantially altered the character of the surrounding land use. The City simply increased the number of multi-family units permitted within the original boundaries of PUD 12, which already included a significant number of multi-family units.

In *Sheffield*, the Franklin Supreme Court held that the existing and permitted uses of the property constitute the "primary expectation" of an affected landowner for purposes of determining whether a regulation interferes with the landowner's reasonable investment-backed expectations.

In creating PUD 30, the City has not altered the existing or permitted uses of Venture's property and therefore has not interfered with Venture's "primary expectation." Venture can continue to operate its 800-unit complex and can build an additional 100

units on its property, should it decide to do so.

***(3) Character of the Governmental Action***

The third *Penn Central* factor is the character of the governmental action. This factor is the least concrete and carries the least weight. This factor's purpose, when viewed in light of the goal of the takings test (to determine if the Constitution requires the burden of the regulation to be borne by the public or by the landowner) is to elicit consideration of whether a regulation disproportionately harms a particular property. If the rezoning was general in character, that weighs against the property owner, whereas if the rezoning impacted the owner's property disproportionately harshly, that weighs in the owner's favor that a taking did occur.

Venture asserts that the governmental action in this case targeted a small subsection of an otherwise cohesive PUD, thereby increasing competition for its apartment complex. Venture claims that the City created PUD 30 solely to satisfy Austin. The City disputes this and responds by citing language from the ordinance creating PUD 30 and public meeting minutes that suggest that the new PUD was crafted to "create a more modern pedestrian-friendly and urban environment."

The issue is whether the City created PUD 30 for the public welfare or did so to benefit the private interests of Austin. Venture presented evidence that could lead a reasonable fact finder to conclude that one of the City's purposes, or perhaps even its primary purpose, for enacting the ordinance was to benefit Austin. That evidence does not preclude summary judgment for the City, however, because the other two *Penn Central* factors—particularly the first (the economic impact of the regulation)—weigh so heavily against Venture that, as a matter of law, there is no taking here.

**B. The "Substantial Advancement" Takings Test**

Venture also argues that the City's ordinance creating PUD 30 effects a taking of its property because the ordinance does not "substantially advance legitimate state interests." The United States Supreme Court rejected this test in *Lingle v. Chevron,* 544 U.S. 528 (2005). Prior to *Lingle*, the Franklin Supreme Court applied the "substantial advancement" test to state regulatory-takings claims, but it has not yet

addressed whether the test still applies in light of *Lingle*. Assuming that the test is still valid in Franklin, there was no taking under the "substantial advancement" test.

The "substantial advancement" test examines the nexus between the effect of the ordinance and the legitimate state interest it is supposed to advance. This requirement is not, however, equivalent to the "rational basis" standard applied to due process and equal protection claims. The standard requires that the ordinance "substantially advance" the legitimate state interest sought to be achieved rather than merely analyzing whether the government could rationally have decided that the measure achieved a legitimate objective.

The City asserts that the new PUD promotes a mixed-use, pedestrian-friendly, urban development that will enhance the quality of life of its citizens. Venture contends that the City's stated goal is a pretext—that its real goal was only to benefit Austin by making Austin's land more valuable. Even if that were true, however, we are not required to consider the City's *actual* purpose. Instead, we look for a nexus between the effect of the ordinance and the legitimate state interest it is *supposed* to advance. The City could reasonably have concluded that increasing housing density in a PUD already zoned for multi-family housing, shopping centers, and office space would advance the legitimate state interest of enhancing the quality of life of citizens by decreasing traffic, lowering commuting times, and encouraging citizens to walk. Accordingly, the creation of PUD 30 is not a taking under the "substantial advancement" test.

Affirmed.

*February 2015*

*MPT-2 File:*

*In re Community*

*General Hospital*

**Jackson, Gerard, and Burton LLP**
**Attorneys at Law**
222 St. Germaine Ave.
Lafayette, Franklin 33065

**MEMORANDUM**

**To:** Examinee
**From:** Hank Jackson, Partner
**Date:** February 24, 2015
**Re:** Community General Hospital; Response to OCR Audit

Our client, Community General Hospital, is subject to the Health Insurance Portability and Accountability Act of 1996, commonly called "HIPAA," and its related regulations. Frances Paquette, the hospital CEO, sent me the attached letter from the Office of Civil Rights (OCR) of the U.S. Department of Health and Human Services outlining three cases in which allegations have been made of improper disclosures of patient health information. She is very concerned about the inquiry and fears that the government may file an enforcement action resulting in penalties and adverse publicity. She needs our assistance in responding.

Please review the accompanying materials and draft a letter responding to the OCR and persuading it that no enforcement action under HIPAA is warranted. The OCR has discretion as to whether it brings an enforcement action. Take that into account in drafting your letter: be persuasive but not confrontational. Your response should cite the specific applicable regulations and apply them to the facts of each case.

An investigative report from the hospital's medical records director is attached. To help orient you, I have also attached a short memorandum I wrote to the CEO when the federal HIPAA regulations, known as the "Privacy Rule," were put into final form in 2002. While there have been updates to the HIPAA regulations since this 2002 memorandum was drafted, I have reviewed its content in light of those changes and have confirmed that the content is unaffected by subsequent additions or clarifications to the HIPAA regulations.

**U.S. Department of Health and Human Services**

Office of Civil Rights
1717 Federal Way
Lafayette, Franklin 33065

February 9, 2015

Community General Hospital
600 Freemont Blvd.
Lafayette, Franklin 33065

Re: Results of Audit for Compliance with HIPAA Regulations

Dear Community General Hospital:

As a result of complaints received and a recent audit of patient health care records at your facility, we preliminarily find that disclosures of protected health information may have been made in violation of the provisions of 45 C.F.R. § 164.500 *et seq*. We found no written authorization for disclosure of the protected health information in the medical charts of three patients: Patient #1 (reporting a wound to police over the patient's objection); Patient #2 (disclosing to police suspicions about arsenic poisoning of a decedent and then releasing the decedent's entire medical record); and Patient #3 (disclosing information relating to a patient's treatment which later resulted in the patient's arrest).

You are hereby notified that unless we receive a response justifying the disclosures within 20 days of your receipt of this letter, this office will consider pursuing an enforcement action and seeking appropriate civil penalties.

Please direct your response to the undersigned at the address noted above. Thank you.

Sincerely,

Robert Fields

Robert Fields
Investigator

**COMMUNITY GENERAL HOSPITAL**
**INTRAOFFICE MEMORANDUM**

TO: Frances Paquette, CEO
FROM: Megan Larson, Medical Records Director
DATE: February 13, 2015
RE: Your request relating to Office of Civil Rights letter

As requested, I investigated the facts and circumstances relating to the patients identified in the Office of Civil Rights letter of February 9, 2015. I also reviewed the relevant health care records and interviewed hospital personnel. In each instance, the disclosure of the patient's health information was duly noted in the patient's chart. In no case does the chart contain a signed authorization from the patient or the patient's representative for release of protected health information on our usual form. My investigation discovered information beyond that which appears in the medical charts, information that would not have been available to the OCR when it conducted its audit of the charts.

Patient #1

Patient #1, an 18-year-old male, was brought to the Emergency Department on September 20, 2014, with a gunshot wound to his right calf. Patient #1 said that he was the victim of a gang dispute. The treating physician told Patient #1 that the physician would have to report the gunshot wound to the police. Patient #1 vehemently objected, saying that any report would further endanger him because a police inquiry would certainly prompt retribution from gang members.

After treating the wound, and despite the patient's objection, the treating physician called the Lafayette Police Department and reported the wound. The next day, the physician sent a written report by first-class mail to the police department. See Attachment A. The report contained no additional records.

I was told that the patient's family had filed a complaint with the OCR.

Patient #2

Patient #2, a 67-year-old man, was admitted to the hospital on November 7, 2014, and died at the hospital on November 9, 2014. On admission, the patient complained of severe headaches and diarrhea, confusion, and drowsiness. Soon after admission, the patient began vomiting, complained of stomach pain, and experienced severe convulsions. Nursing staff observed leukonychia (white fingernail pigmentation). After death, an autopsy was conducted. The pathologist concluded that the cause of death was multi-system organ failure caused by arsenic poisoning. See Attachment B, pathology report.

Our executive vice president knows the decedent's family, which owns a large-scale manufacturing business in Lafayette. She was also aware of considerable strife between the decedent and members of the family over ownership of the business. She reviewed the pathology report the day after the decedent's death. That same day, she invited a police detective to lunch and informed him of the patient's death, of the conclusion of the pathology report, and of her awareness of the serious conflict between the patient and other members of his family. Later that day, she told the Medical Records Department to give to the detective the entirety of the records of the patient's last two hospital stays (the most recent stay and one six months before his death), including the admission records, his progress notes, and the pathology report. The hospital provided the earlier records because the pathologist had used those records to rule out other causes for the fatal illness.

A family member learned of the disclosure to the police and is quite upset. He has filed a complaint about the disclosure to the OCR.

Patient #3

Patient #3, a 35-year-old male, was admitted to the Emergency Department on December 17, 2014, accompanied by his sister. The sister said that a neighbor had called her to the patient's apartment after hearing loud noises. The sister had found the patient emptying his cupboards and throwing plates and glassware against the wall. The sister persuaded the patient to come to the hospital with her.

An interview with the patient eventually established that he had taken PCP ("angel dust"), together with alcohol. Throughout the interview, the patient became increasingly agitated and belligerent. His speech was rapid, and his thoughts were disorganized and chaotic. He

reported being threatened by persons who his sister later stated had died years ago. By the end of the interview, the patient had focused his agitation on his employer, saying that he was angry about work conditions and constantly felt belittled and undermined at his workplace.

The patient wanted to leave the hospital. The treating physician advised him not to leave, but the patient insisted. The patient began shouting, "I hate my boss and I hate what she's done. I'm going to get her . . ." He then ran out of the hospital. The patient's sister then told the hospital staff that she thought the patient had a gun at home.

Shortly thereafter, a Franklin state trooper came into the Emergency Department on an unrelated matter. Because of a concern for the safety of others, the treating physician reported to the trooper Patient #3's name, his combative demeanor, and the threat to his employer, but not a specific cause of the patient's combative behavior. Patient #3 was later arrested on the street two blocks from his workplace, but was unarmed. The County Jail released him shortly thereafter. Patient #3's lawyer has complained to the OCR about the treating physician's disclosure of protected health information to the trooper.

**Attachment A**

# COMMUNITY GENERAL HOSPITAL
# EMERGENCY DEPARTMENT

**Luke Ridley, M.D.**
600 Freemont Blvd.
Lafayette, Franklin 33065

September 21, 2014

Via First-Class Mail, USPS

Chief of Police Alexander Mason
Lafayette Police Department
Municipal Building
1102 Third Avenue
Lafayette, Franklin 33065

Re: Report of gunshot wound

Dear Chief Mason:

Following up on my telephone call to you yesterday, this is to report that on September 20, 2014, I treated David Meyers of 55 Baker Street, Lafayette, Franklin 33065, at Community General Hospital in Lafayette, Franklin, for a gunshot wound to his right calf.

Sincerely,

Luke Ridley

Luke Ridley, M.D.

**Community General Hospital**
Pathology Report

| | | | |
|---|---|---|---|
| Patient Name: | Stewart Weller | Case No.: | CGH-0-03-13231 |
| DOB: | 1/16/1947 | | |
| Sex: | Male | Collected: | 11/9/2014 |
| MRN: | 51552435 | Received: | 11/10/2014 |
| Provider: | Blue Cross / Blue Shield | | |
| | | Deliver to: | File |

POST-MORTEM PATHOLOGY REPORT

| | |
|---|---|
| Diagnosis: | Arsenic poisoning |
| Tests: | Admission and Emergency Department records<br>Physical examination<br>Stomach wash<br>Blood (10 ml), hair, urine, feces |

*Admission and ER records*:
On admission on 11/7/2014, patient complained of headaches, diarrhea, confusion, drowsiness. In the Emergency Department, patient vomited, suffered severe convulsions, and complained of stomach pain. Patient pronounced dead on 11/9/2014 at 20:43.

*Physical examination (post-mortem)*:
Observable white fingernail pigmentation (leukonychia), including transverse white lines across fingernails (Mee's lines). Faint garlic odor around mouth. Irritation of nasal mucosa, pharynx, larynx, and bronchi. Fatty yellow liver. Lungs display excessive accumulation of serous fluid. Degenerative changes to liver. Heart displays excessive accumulation of serous fluid.

*Blood, hair, urine, feces*:
Toxic levels of arsenic compounds, more than 12 times expected from normal environmental exposure, and most likely ingested as arsenic trioxide.

| | |
|---|---|
| Conclusion: | Death resulting from multi-organ system failure caused by acute arsenic poisoning. |

Charlotte Maxsimic

November 10, 2014

Charlotte Maxsimic, M.D.
CGH Pathology

**Jackson, Gerard, and Burton LLP**
**Attorneys at Law**
222 St. Germaine Ave.
Lafayette, Franklin 33065

**MEMORANDUM**

**To:** Frances Paquette, CEO, Community General Hospital
**From:** Hank Jackson, Partner
**Date:** August 30, 2002
**Re:** Federal HIPAA Regulations, or the "Privacy Rule"

You asked me to review the new federal HIPAA regulations and to provide you with an introduction to them as they relate to the privacy of health information held by Community General Hospital. This memo is a very brief summary of what is known as the "Privacy Rule" and what can happen if the Hospital does not comply with the Privacy Rule's provisions.

The Health Insurance Portability and Accountability Act of 1996 (HIPAA), 42 U.S.C. § 201 *et seq.*, required creation of published standards and regulations for the exchange, privacy, and security of patient health information. The regulations were published in final form on August 14, 2002. Community General Hospital is a "covered entity" under the regulations.

The regulations govern the circumstances under which a covered entity may disclose to others information in any form or medium, whether electronic, paper, or oral, that can be individually identifiable with a patient. "Individually identifiable" health information means that the information identifies the individual or provides a reasonable basis to believe that it can be used to identify the individual. The Privacy Rule refers to such information as "protected health information" (PHI).

A covered entity may not disclose PHI, except either (1) as permitted or required by the Privacy Rule or (2) as authorized by the identified individual (or personal representative) in writing. PHI includes information, including demographic data, that relates to

- the individual's past, present, or future physical or mental health or condition;
- the provision of health care to the individual; or
- the past, present, or future payment for the provision of health care to the individual.

As a general proposition, Community General should not disclose PHI to outside persons unless permitted by the regulations or upon a patient's written authorization. Community General may, of course, disclose PHI internally to the individual. Community General may also use and disclose PHI internally without written authorization for purposes of its own treatment, payment, and health care operations. Other permitted disclosures include certain public interest and benefit activities and certain carefully defined research, public health, and health care operations.

The Privacy Rule also permits use and disclosure of PHI without an individual's authorization for several national priority purposes. Some of these national priority purposes permit disclosures to public health authorities responsible for protecting public health and safety, or to agencies responsible for auditing and investigating the health care system and public benefits programs. Still others relate to disclosures required in judicial or administrative proceedings, or to disclosures concerning decedents to coroners, pathologists, medical examiners, and funeral home directors.

Finally, several of these national priority purposes relate to disclosures required by law or for purposes of law enforcement or public safety. They permit a covered entity to disclose PHI without individual authorization under the following circumstances:

- As required by law (including by statute, regulation, or court order).
- For law enforcement purposes, in six carefully defined circumstances, including:

  (1) as required by law or by administrative requests;

  (2) to identify or locate a suspect, fugitive, material witness, or missing person;

  (3) to respond to a law enforcement official's request for information about a victim or suspected victim of a crime;

  (4) to alert law enforcement to a person's death, if the covered entity suspects that criminal activity caused the death;

  (5) when a covered entity believes that PHI is evidence of a crime that occurred on its premises; and

  (6) in a medical emergency not occurring on its premises, when necessary to inform law enforcement about the commission and nature of a crime, the location of the crime or crime victims, and the perpetrator of the crime.

- Where the covered entity believes that disclosure is necessary to prevent or lessen a serious and imminent threat to a person or the public, when such disclosure is made to someone it believes can prevent or lessen the threat (including the target of the threat).

In most cases, when the Privacy Rule *permits* Community General to disclose PHI, it requires Community General to make reasonable efforts to limit the information that it discloses to the "minimum necessary" to accomplish the intended purpose of the disclosure. While the "minimum necessary" standard applies to many uses and disclosures, there are situations (specified in the HIPAA regulations) in which covered entities are not subject to this "minimum necessary" limitation.

The U.S. Department of Health and Human Services Office for Civil Rights (OCR) is responsible for administering and enforcing compliance with the Privacy Rule and may conduct complaint investigations, review compliance, and impose substantial civil money penalties for violations of the Privacy Rule.

*February 2015*
*MPT-2 Library:*
*In re Community*
*General Hospital*

**Excerpt from Franklin Statutes**

**Chapter 607. Professions and Occupations, Mandatory Reporting**

**§ 607.29 Gunshot or stab wounds to be reported.** The physician, nurse, or other person licensed to practice a health care profession treating the victim of a gunshot wound or stabbing shall make a report to the chief of police of the city or the sheriff of the county in which treatment is rendered by the fastest possible means. In addition, within 24 hours after initial treatment or first observation of the wound, a written report shall be submitted, including a brief description of the wound and the name and address of the victim, if known, and shall be sent by first-class U.S. mail to the chief of police of the city or the sheriff of the county in which treatment was rendered.

**Excerpts from Health Insurance Portability and Accountability Act (HIPAA) regulations, 45 C.F.R. §§ 164.502 and 164.512**

**45 C.F.R. § 164.502 Uses and disclosures of protected health information: general rules.**

(a) **Standard.** A covered entity may not use or disclose protected health information, except as permitted or required by this subpart . . . .

(1) **Covered entities: Permitted uses and disclosures.** A covered entity is permitted to use or disclose protected health information as follows:

(i) To the individual;

. . . and

(vi) As permitted by and in compliance with this section, [or] § 164.512 . . . .

* * *

(b) **Standard: Minimum necessary**

(1) **Minimum necessary applies.** When using or disclosing protected health information or when requesting protected health information from another covered entity . . . , a covered entity must make reasonable efforts to limit protected health information to the minimum necessary to accomplish the intended purpose of the use, disclosure, or request.

(2) **Minimum necessary does not apply.** This requirement does not apply to:

(i) Disclosures to or requests by a health care provider for treatment;

* * *

(v) Uses or disclosures that are required by law, as described by § 164.512(a); and

(vi) Uses or disclosures that are required for compliance with applicable requirements of this subchapter.

* * *

(f) **Standard: Deceased individuals.** A covered entity must comply with the requirements of this subpart with respect to the protected health information of a deceased individual.

(g) (1) **Standard: Personal representatives.** As specified in this paragraph, a covered entity must . . . treat a personal representative as the individual for purposes of this subchapter.

* * *

(4) **Implementation specification: Deceased individuals.** If under applicable law an executor, administrator, or other person has authority to act on behalf of a deceased individual or of the individual's estate, a covered entity must treat such person as a personal representative under this subchapter, with respect to protected health information relevant to such personal representation.

* * * *

**45 C.F.R. § 164.512 Uses and disclosures for which an authorization or opportunity to agree or object is not required.**

A covered entity may use or disclose protected health information without the written authorization of the individual . . . in the situations covered by this section, subject to the applicable requirements of this section. When the covered entity is required by this section to inform the individual of, or when the individual may agree to, a use or disclosure permitted by this section, the covered entity's information and the individual's agreement may be given orally.

(a) **Standard: Uses and disclosures required by law.**

(1) A covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law.

(2) A covered entity must meet the requirements described in paragraph . . . (f) of this section for uses or disclosures required by law.

* * *

(f) **Standard: Disclosures for law enforcement purposes.** A covered entity may disclose protected health information for a law enforcement purpose to a law enforcement official if [any of] the conditions in paragraphs (f)(1) through (f)(6) of this section are met, as applicable.

(1) **Permitted disclosures: Pursuant to process [or] as otherwise required by law.** A covered entity may disclose protected health information:

(i) As required by law including laws that require the reporting of certain types of wounds or other physical injuries . . . .

* * *

(3) **Permitted disclosure: Victims of a crime.** Except for disclosures required by law as permitted by paragraph (f )(1) of this section, a covered entity may disclose protected health information in response to a law enforcement official's request for such information about an individual who is or is suspected to be a victim of a crime . . . if:

(i) The individual agrees to the disclosure; or

(ii) The covered entity is unable to obtain the individual's agreement because of incapacity or other emergency circumstance, provided that:

(A) The law enforcement official represents that such information is needed to determine whether a violation of law by a person other than the victim has occurred, and such information is not intended to be used against the victim;

(B) The law enforcement official represents that immediate law enforcement activity that depends upon the disclosure would be materially and adversely affected by waiting until the individual is able to agree to the disclosure; and

(C) The disclosure is in the best interests of the individual as determined by the covered entity, in the exercise of professional judgment.

(4) **Permitted disclosure: Decedents.** A covered entity may disclose protected health information about an individual who has died to a law enforcement official for the purpose of alerting law enforcement of the death of the individual if the covered entity has a suspicion that such death may have resulted from criminal conduct.

* * *

(j ) **Standard: Uses and disclosures to avert a serious threat to health or safety.**

(1) **Permitted disclosures.** A covered entity may, consistent with applicable law and standards of ethical conduct, use or disclose protected health information, if the covered entity, in good faith, believes the use or disclosure:

(i) (A) Is necessary to prevent or lessen a serious and imminent threat to the health or safety of a person or the public; and

(B) Is to a person or persons reasonably able to prevent or lessen the threat, including the target of the threat;

* * *

(4) **Presumption of good faith belief.** A covered entity that uses or discloses protected health information pursuant to paragraph (j)(1) of this section is presumed to have acted in good faith with regard to a belief described in paragraph (j)(1)(i) . . . of this section, if the belief is based upon the covered entity's actual knowledge or in reliance on a credible representation by a person with apparent knowledge or authority.

* * *

# *February 2015*
# *MPT-1 Point Sheet:*
# *In re Harrison*

**In re Harrison**

**DRAFTERS' POINT SHEET**

In this performance test, the client, Daniel Harrison, is seeking legal advice as to whether he can pursue an inverse condemnation action against the City of Abbeville based on the City's denial of his application to rezone a 10-acre tract of land (the Tract). The Tract is currently zoned R–1 for single-family residential development. The City has denied Harrison's application to rezone his property as C–1 (commercial/industrial) for use as a truck-driving school.

Harrison purchased the Tract for $100,000 (i.e., $10,000 per acre) in a government bid process. For more than 35 years, the Tract had been used as a National Guard armory and vehicle storage facility. At the time he purchased the Tract, Harrison believed it had been "grandfathered in" and was therefore not subject to the residential zoning ordinance, because the National Guard facilities pre-dated the City's adoption of the zoning ordinance in 1994 and the City had never objected to the ongoing use of the Tract by the National Guard.

Examinees' task is to draft an objective memorandum identifying each of the inverse condemnation theories available under Franklin and federal law and analyzing whether Harrison might succeed against the City under each of those theories. In doing so, examinees must determine whether the denial of Harrison's rezoning application constitutes a taking of his property under the federal and Franklin constitutions. This requires examinees to analyze the facts presented and apply a number of different "takings" tests to determine whether one of four potential regulatory takings claims can be asserted.

The File contains the instructional memo from the supervising attorney, a summary of the client interview, a recent appraisal, and emails between Harrison and a real estate agent. The Library contains the Franklin and federal constitutional "takings" clauses and two Franklin cases.

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

## I. Overview

No specific formatting guidelines are provided. However, examinees are instructed not to prepare a statement of facts but to incorporate the relevant facts, analyze the applicable legal authorities, and explain how the facts and law affect their analyses.

## II. Constitutional Provisions and Cases

The Franklin takings clause provides that "No person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person . . . ." Article I, Section 13, Franklin Constitution.

- The Franklin takings clause is comparable to the federal takings clause of the Fifth Amendment to the U.S. Constitution, and therefore Franklin courts look to federal cases for guidance in such cases. *See Newpark Ltd. v. City of Plymouth* (Fr. Ct. App. 2007).

- Consequently, examinees should recognize that Harrison can assert claims under the Franklin and federal takings clauses and should engage in a consolidated analysis of both takings

clauses. (This point sheet treats the two clauses as interchangeable except where separate treatment is warranted.)

- Inverse condemnation occurs when property is taken for public use and the property owner attempts to recover compensation for the taking. *Newpark*. A regulation may, in some circumstances, constitute a taking requiring compensation. *Id.* There are three federally recognized types of regulatory takings: (1) a total regulatory taking, where the regulation deprives the property of all economic value; (2) a partial regulatory taking, where the challenged regulation goes "too far"; and (3) a land-use exaction, which occurs when governmental approval is conditioned upon a requirement that the property owner take some action that is not proportionate to the projected impact of the proposed development (e.g., a developer is required to rebuild a road but the road improvements are not necessary to accommodate the additional traffic generated by the proposed development). *Id.* (citing *Lingle v. Chevron,* 544 U.S. 528 (2005)).

- The Franklin Supreme Court recognizes a fourth type of regulatory taking in situations where a regulation does not "substantially advance" a legitimate governmental interest. However, in *Lingle,* the U.S. Supreme Court rejected the "substantially advances" takings test and held it inapplicable to *federal* inverse condemnation claims. *Id.* (fn. 2).

- Although the "substantially advances" test is no longer valid in the *federal* inverse condemnation context, it is unclear whether that test remains valid in a regulatory takings case under the Franklin state constitution because the Franklin Supreme Court has not had occasion to rule upon its validity. In *Newpark,* the Franklin Court of Appeal noted this uncertainty but did not discuss the issue further because the parties had not raised the issue. However, in *Venture Homes Ltd. v. City of Red Bluff* (Fr. Ct. App. 2010), the Franklin Court of Appeal applied the "substantially advances" test to the facts.

- Because of the uncertainty whether the "substantially advances" test remains valid under Franklin law, examinees should analyze whether denial of the rezoning application "substantially advances" a legitimate state interest under the *Venture* opinion.

## III. Analysis

Examinees should begin by explaining that inverse condemnation is a legal proceeding in which a landowner seeks compensation from the government for the use or regulation of the owner's property, and then analyze whether Harrison can pursue the inverse condemnation theories against the City. Examinees are instructed that no physical taking has occurred and so they should not address it; their work product should focus only on the four regulatory takings claims—the three that apply under both federal and Franklin law, and the substantial advancement test that may apply under Franklin law. Examinees should also recognize that the fact that Harrison was aware that the Tract was zoned R–1 when he bought it at auction does not preclude any potential inverse condemnation claims. "Unreasonable zoning regulations do not become less so through the passage of time or title." *Newpark* (citing *Palazzolo v. Rhode Island,* 533 U.S. 606 (2001)).

**A. The Total Regulatory Takings Test**

- A total regulatory taking occurs when a property owner is called upon to sacrifice *all* economically beneficial uses in the name of the common good. *Newpark* (citing *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992)).

- A *Lucas*-type total regulatory taking is limited to the *extraordinary* circumstance when no productive or economically beneficial use of land is permitted and the landowner is left with only a token interest. The deprivation of value must be such that it is tantamount to depriving the owner of the land itself. *See Newpark.*

- In *Newpark,* the developer challenged a city's one-acre-minimum zoning ordinance. The court determined that no regulatory taking had occurred because the developer's property retained a value of $2,000 to $5,000 per acre (according to the competing experts' testimony). The court reasoned that although the developer had paid more for the property than it was currently worth, the developer had assumed certain risks attendant to real estate investment and it was not the government's duty to underwrite the risk of developing real estate or to guarantee a profit.

- The *Newpark* court rejected the developer's assertion that property is "valueless" if it cannot be developed for its most economically valuable use.

- Harrison is worried about losing money on the Tract; even in its idle state, taxes, maintenance, insurance, etc., cost between $10,000 and $15,000 per year. (*See* Client Interview.) These facts are relevant to a *partial* regulatory takings analysis (discussed below), which includes consideration of an owner's reasonable investment-backed expectations, but they have no bearing upon whether a *total* regulatory taking has occurred. Rather, the economic viability determination for a total regulatory taking "entails a relatively simple analysis of whether value remains in the property after governmental action." *Newpark* (quoting *Sheffield Dev. Co. v. City of Hill Heights* (Fr. Sup. Ct. 2006)).

- Therefore, in this part of their analyses, examinees should focus not on Harrison's investment potential, but on the Tract's *value* in its current residential-zoning-restricted condition. He paid $10,000 per acre for the Tract, and it is now worth only a few hundred dollars per acre in its current, idle state (per emails with real estate agent Amy Conner).

- Whether a value of a few hundred dollars an acre constitutes a "token" value is not a slam dunk; examinees may receive full credit regardless of their conclusions if their analyses are thorough and if they consider and apply the factors and requirements for total regulatory takings set forth in *Newpark.*

- Given that total regulatory takings are limited to *extraordinary* circumstances where the landowner is essentially deprived of the land itself, that in *Newpark* a residual value of $2,000 per acre was held to be more than "token," and that property will rarely be deemed utterly lacking in economic viability, examinees may conclude that a total regulatory taking has *not* occurred.

- Perceptive examinees may observe that while Harrison cannot lease the Tract to the truck-driving school, he nonetheless can enjoy the property's other attributes (e.g., he can picnic, camp, or live on the property in a mobile trailer), and he retains other valuable property rights (e.g., the right to exclude others and the right to alienate the land). These same attributes and rights persisted in *Newpark* and were cited by that court in support of the conclusion that a total regulatory taking had *not* occurred. *See also Wynn v. Drake* (Fr. Sup. Ct. 2003) (cited in *Newpark*), holding that no taking occurred when despite the zoning regulation, the owner could still enjoy the recreational and horticultural opportunities offered by the property.

- Examinees may also note that Harrison wants to keep the Tract, and that if he were to prevail on a total regulatory takings claim, ownership of the Tract would be transferred to the City. *Newpark* (fn. 3). This would be contrary to Harrison's expressed desire to keep the land. (*See* Client Interview.)

- Those examinees who conclude that a value of a few hundred dollars per acre is only a "token" value for which compensation is required may also receive credit if they apply the *Newpark* factors and distinguish *Newpark* and *Lucas.* Facts that support such a conclusion include the presence of lead and asbestos on the Tract's developed part and the dense woods and steep slopes on the undeveloped part. Arguably, there is very little use or enjoyment other than the use proposed by Harrison or a similar industrial use.

**B. The Partial Regulatory Takings Test**

- A partial regulatory taking may arise where there is not a complete taking, either physically or by regulation, but the regulation goes "too far," causing an unreasonable interference with the landowner's right to use and enjoy the property. *Venture* (citing *Penn Central Transp. Co. v. New York City,* 438 U.S. 104 (1978)). For a partial regulatory taking to occur, a governmental regulation must, at a minimum, diminish the value of an owner's property. Not every regulation that diminishes the value of property, however, is a taking. *Venture.*

- There is no formulaic test for determining whether a partial, *Penn Central*–type regulatory taking has occurred. Whether a regulation goes "too far" requires a factual inquiry that considers (1) the economic impact of the regulation, (2) the extent to which the regulation interferes with the property owner's reasonable investment-backed expectations, and (3) the character of the governmental action. *Sheffield,* cited in *Venture.*

- The ultimate issue is whether a regulatory action is the functional equivalent of a classic taking in which the government directly appropriates private property, such that fairness and justice demand that the burden of the regulation be borne by the public rather than by the private landowner.

*Factor #1: Economic Impact of the Regulation*

- In *Venture,* the plaintiff developer sued after the City rezoned adjacent land, which allowed another 350 housing units on that property, units that would compete with the

plaintiff's apartment buildings. In analyzing the economic impact of the City's rezoning (which created a new "planned unit development" or PUD), the court focused on the diminution in value of the plaintiff's apartment properties that was attributable to the new development. Expert testimony suggested that the reduction in value was $2.7 million, which was significant in absolute terms. However, percentage-wise, the $2.7 million was equivalent to a drop in value of approximately 4%; the developer's property was still worth $62.9 million. Because the developer's loss was such a small part of its property's value, the court concluded that the developer had failed to show that the City's creation of the new PUD unreasonably interfered with its use of the property. The court further noted that although this one factor is not dispositive, the (relatively small) magnitude of the change in value weighed heavily against the developer's claims.

- Here, in contrast, Harrison paid $10,000 per acre, the Tract would have been worth $20,000 per acre if used for industrial purposes (*see* Appraisal), but it is worth only a few hundred dollars per acre in its as-is, idle condition (*see* Harrison/Conner emails), as it is unsuitable for residential development or other non-industrial uses.

- The City may argue that the per-acre value of the Tract is more than a few hundred dollars, even in its as-is, idle condition, citing the other bids made for the property, which ranged from $20,000 to $88,800. Examinees should note, however, that those bids were made before the City rejected Harrison's proposed non-residential use of the Tract, that other bidders (like Harrison) bid on the Tract expecting that the R–1 zoning would not be enforced, and therefore the other bids are not indicative of the property's as-is value.

- Although purchasing and developing real estate carries with it certain financial risks, and it is not the government's duty to underwrite these risks, arguably a diminution in value of over 99% is excessive and provides strong support for the argument that the regulation is the functional equivalent of a classic taking. Thus fairness and justice demand that the burden of the regulation be borne by the public rather than by Harrison alone.

- Examinees should conclude that denial of Harrison's rezoning application reduced the Tract's value to a fraction of what it would have been had his rezoning application been granted, and that the magnitude of Harrison's loss weighs heavily in his favor.

*Factor #2: Interference with Reasonable Investment-Backed Expectations*

- The partial regulatory takings analysis also considers the extent to which the regulation interferes with the landowner's *reasonable* investment-backed expectations. In doing so, courts look to the historical uses of the property and assess whether the government regulation has altered the existing or permitted uses of the property. *Newpark.*

- In *Newpark,* the zoning always required one-acre-minimum lots, the historical use of the property was farmland, and the property had been used as a pasture and was proposed for residential development (albeit higher density than the one-acre minimum). In *Venture,* the developer conceded that the only harm it had suffered was more competition from the City's creation of a new PUD that increased the number of housing units and a 4%

diminution in the property's value. In neither case had the city rezoned the property at issue to prohibit a current or proposed use.

- Here, in contrast, the Tract had been used as an industrial-type operation as a Franklin National Guard armory and vehicle storage facility for over 35 years. Even though the Tract was zoned R–1 in 1994, the National Guard continued its operations on the Tract without objection from the City. On these facts, Harrison had a reasonable belief that the Tract was "grandfathered in" and was not subject to the R–1 ordinance.

- The existing and permitted uses of the property constitute the "primary expectation" of a landowner affected by a regulation. *Venture* (citing *Sheffield*). Given the long-standing use of the Tract for industrial-type operations, arguably the City did alter the Tract's "existing and permitted uses" and interfered with Harrison's "primary expectation" when it denied his rezoning application.

- In addition, Harrison's email exchange with the real estate agent Amy Conner makes clear that the Tract cannot feasibly be developed for residential or other non-industrial uses. It would cost $15,000 to $20,000 per lot just to grade the land and install utilities and drainage improvements, plus at least $75,000 to remove the existing buildings and parking lot and clear the wooded areas. And then, according to Conner, Harrison would be "lucky" to sell each lot for $5,000. Moreover, the Tract is on the outskirts of the City in an area with very little residential growth in the last 50 years. (*See* Client Interview.)

- Thus, examinees should conclude that the denial of Harrison's rezoning application substantially interfered with his reasonable investment-backed expectations.

*Factor #3: Character of the Governmental Action*

- This factor is the least concrete and carries the least weight. *See Venture.* The purpose of this factor is to determine whether a regulation disproportionately harms a particular property. If a governmental zoning action is general in character, that weighs against the argument that a taking has occurred, whereas if the governmental action affects the owner's property disproportionately harshly, that weighs in the owner's favor. *Venture.*

- In *Venture,* the plaintiff argued that the city had created the new PUD to benefit another private developer, as opposed to the general public. Although there was evidence to support the argument that the city's action was motivated by a desire to benefit the competing developer, the court held that that this was not enough to outweigh the other two *Penn Central* factors and no partial regulatory taking had occurred.

- Here, it is unknown whether other nearby properties were included in the 1994 R–1 zoning ordinance. Thus, it is unclear whether the zoning restriction affected other property or the extent to which it was "general in character." However, the denial of Harrison's rezoning application clearly affected his property. Thus, examinees should conclude that this third factor likely weighs in Harrison's favor.

- Even if this third factor is neutral as to Harrison, because it is accorded the least weight of the three and because the other two factors weigh heavily in his favor, examinees should conclude that a partial regulatory taking has occurred.

**C. Land-Use Exaction**

- A land-use exaction occurs when governmental approval is conditioned upon a requirement that the property owner take some action that is not proportionate to the projected impact of the proposed development. *Newpark.*

- There is no indication that the City Council offered to condition approval of Harrison's rezoning application upon his taking some action.

- To the contrary, the Council unanimously denied the application. No Council member suggested that there were conditions under which the application would be approved.

- Accordingly, there has been no land-use exaction.

**D. The "Substantial Advancement" Regulatory Takings Test**

- Whether the "substantially advances" test for a regulatory taking remains valid under Franklin law is questionable in light of the U.S. Supreme Court's holding in *Lingle* and the discussion in *Newpark*. However, because the Franklin Supreme Court has not yet ruled on the validity of the "substantially advances" test, and because the court in *Venture* employed the test, examinees should analyze whether it would apply to the facts stated.

- This particular test would apply only to a claim asserted under the Franklin takings clause, because *Lingle* clearly invalidated such a claim in federal takings cases.

- The "substantial advancement" requirement examines the nexus between the effect of the ordinance and the legitimate state interest it is supposed to advance. The standard requires that the ordinance "substantially advance" the legitimate state interest sought to be achieved rather than merely analyzing whether the City could rationally have decided that the measure achieved a legitimate objective. Note that this test is not, however, equivalent to the "rational basis" standard used in equal protection and due process claims. *Venture.*

- In *Venture,* the developer alleged that the City's stated goal in adopting a rezoning ordinance (to promote a mixed-use, pedestrian-friendly, urban development that would enhance the quality of life of its citizens) was a pretext, and that the City's actual purpose was to benefit another developer. The court concluded that it was not required to consider the City's *actual* purpose. Instead, it focused on the nexus between the effect of the ordinance and the legitimate state interest it was *supposed* to advance, and concluded that the rezoning ordinance passed the "substantially advances" test.

- Here, it is likely that a court would look at the stated reasons for the denial of Harrison's rezoning application (i.e., City Council members' concerns about allowing a truck-driving school to operate near an existing park, and the belief that the property could be

developed for non-industrial uses such as a church or office) and conclude that denying Harrison's rezoning application would substantially advance those stated goals.

- Thus, if the substantial advancement test remains valid under the Franklin constitution, it is unlikely that Harrison would prevail on such a claim.

**IV. Conclusion**

Examinees should conclude that Harrison has (1) a colorable, but unlikely, total regulatory takings claim, (2) a strong partial regulatory takings claim, and (3) no claim for a land-use exaction. Finally, assuming that the "substantially advances" test remains viable under the Franklin constitution, he is unlikely to prevail on such a claim.

# *February 2015*
# *MPT-2 Point Sheet:*
# *In re Community*
# *General Hospital*

**In re Community General Hospital**

**DRAFTERS' POINT SHEET**

This performance test involves the interpretation and application of federal regulations to three factual scenarios. The examinee is an associate at a law firm representing Community General Hospital. The hospital has received a letter from the Office of Civil Rights (OCR) of the U.S. Department of Health and Human Services stating that an OCR audit has found three cases in which Community General disclosed protected health information without a written patient authorization, that these disclosures suggest a possible violation of the federal regulations, and that, if the disclosures are determined to be unjustified, the OCR will consider pursuing an enforcement action seeking civil penalties. The hospital has 20 days to provide a response justifying the disclosures of health information. Examinees' task is to draft a letter responding to the OCR. The goal of the letter is to persuade the OCR that the disclosures of protected health information by hospital personnel without written authorization did not violate the law, but were in fact permitted by the governing regulations.

The governing law is the HIPAA (Health Insurance Portability and Accountability Act) regulations found at 45 C.F.R. § 164.500 *et seq.,* also known as the "Privacy Rule." The general rule is that disclosures of protected patient health information may not be made to a third person without written patient authorization. However, there are a number of exceptions to the general rule that a written authorization from a patient or someone authorized under law to act on the patient's behalf is required before a disclosure may be made. Examinees' task is to identify these relevant exceptions and explain how each of the three patient cases falls within one or more of those exceptions.

The File consists of the memorandum from the supervising partner, the letter from the OCR investigator, a memorandum from the hospital's medical records director discussing the three cases cited by the OCR, a letter from a treating physician, a pathology report, and a memorandum from the supervising partner outlining the purpose, nature, and structure of the HIPAA regulations. The Library contains a Franklin state statute requiring health care professionals to report gunshot and stabbing wounds to law enforcement, and excerpts from 45 C.F.R. §§ 164.502 and 164.512.

The following discussion covers all the points the drafters of the item intended to raise in the problem.

## I. FORMAT AND OVERVIEW

The challenge for examinees is to review the HIPAA regulations in light of the reported facts and to draft a letter persuading the OCR that no enforcement action is warranted in any of the three cases. The task requires examinees not just to spot the issues but to draft a letter to the OCR applying the relevant C.F.R. sections and Franklin statute to the facts in a manner designed to persuade the government that it should not pursue the threatened enforcement action.

The letter should argue that the hospital did not violate the "Privacy Rule" because of applicable exceptions to the general rule that a disclosure of patient-identifiable health information must be accompanied by a written authorization from the patient, or in the case of a deceased patient, from the personal representative of the patient's estate. *See* 45 C.F.R. § 164.502(b), (f), and (g)(1). The letter should cite the pertinent regulations, apply the facts to the regulations, explain why no violation of law has taken place, and conclude that no enforcement action is warranted.

There is no required form for the letter, but an examinee's work product should be a well-organized, persuasive letter that addresses each of the three cases raised by the OCR. Examinees are directed not to be confrontational in the letter because OCR has discretion over whether it brings an enforcement action.

The following is a very brief overview of the law, without citations to the applicable regulations. HIPAA prohibits covered entities such as Community General Hospital from disclosing protected health information unless the individual or the individual's authorized representative consents. However, HIPAA also permits a number of exceptions if the hospital can meet the requirements of the regulations. The three cases each fit within one of the permitted exceptions.

The first case deals with the exception permitting a disclosure where it is required by law. In the first case, Franklin law requires the reporting of gunshot wounds. Because this is a **required** disclosure, it need not meet the minimum necessary requirement but it must meet the limitations of the exception that it complies with and is limited to the requirements of the operative law.

The second case, which involves two disclosures, deals with alerting law enforcement to a suspicion that a patient may have died as a result of criminal conduct. It is a **permissible** exception and must meet the minimum necessary requirement.

The third case is an example of the exception that permits the entity to make a disclosure when the entity believes in good faith that the disclosure is necessary to prevent or lessen a serious and imminent threat to the safety of a person or the public. This exception, as a **permissible** disclosure, must meet the minimum necessary requirement.

## II. ANALYSIS

The following analysis contains a more complete description of the regulations and the various requirements and conditions, as well as appropriate reference to the regulations and the relevant facts.

**Patient #1:** Patient #1, an 18-year-old male, was brought to the hospital with a gunshot wound in his right calf. The attending physician told the patient that he would be reporting the wound to law enforcement. The patient strongly objected, saying that a report would endanger him. Despite this objection, the physician promptly telephoned law enforcement and reported the wound, following up with a written report the next day providing the patient's name and address, a short description of the wound, and the doctor's opinion that the wound was the result of a gunshot. The patient's family filed a complaint with the OCR.

45 C.F.R. § 164.502(a)(1)(vi) permits the disclosure of protected health information as permitted by and in compliance with § 164.512. Section 164.512 permits a covered entity to disclose protected health information in the absence of a written authorization under the conditions specified in that section and subject to two requirements. Section 164.512(a)(1) permits a disclosure to the extent that such disclosure is required by law and the disclosure complies with and is limited to the relevant requirements of that law. Additionally, the entity must meet the requirements of paragraph (f) for any disclosure required by law. 45 C.F.R. § 164.512(a)(2).

45 C.F.R. § 164.512(f)(1) provides that a covered entity may disclose protected health information for law enforcement purposes to a law enforcement official if the applicable conditions of paragraphs (f)(1) through (f)(6) are met. Under paragraph (f)(1)(i), a covered entity may disclose protected health information "[a]s required by law including laws that require the reporting of certain types of wounds or other physical injuries."

Franklin Statute § 607.29 **requires** the reporting of gunshot wounds to law enforcement by the "fastest possible means," followed by a written report within 24 hours. The facts state that the physician telephoned the police after treating the gunshot wound, and followed up with a written report that was sent by U.S. mail within 24 hours. Because the disclosure was required by law, the disclosure met the requirements of § 164.512(a)(2).

The disclosure of the protected health information regarding the gunshot wound also met the requirements of 45 C.F.R. § 164.512(a)(1); namely, the disclosure complied with and was limited to that required by law. The letter to the Lafayette Police Department included only that information required by Franklin Statute § 607.29 (name and address of patient, description of the wound, and the physician's opinion that the wound resulted from a gunshot), and nothing more.

There is no question that the disclosure of the gunshot wound was permitted even over the patient's objection, and examinees should argue accordingly, citing the relevant C.F.R. sections noted here.

Perceptive examinees might note that Franklin Statute § 607.29 does not provide the doctor with discretion in reporting of gunshot or stab wounds; thus, Dr. Ridley had no discretion in complying with the Franklin law. They also might point out that there is no language in § 607.29 or in any of the cited federal regulations prohibiting a report even if the patient objects. Perceptive examinees might also argue that since Franklin Statute § 607.29 requires the disclosure, the regulation creating the minimum necessary standard does not apply. 45 C.F.R. § 164.502(b)(1).

NOTE: There are two other exceptions from the "minimum necessary" requirement that are not applicable here, and examinees should not rely on them: disclosures to individuals, 45 C.F.R. § 164.502(b)(2)(i), and disclosures required to meet the requirements of HIPAA itself, 45 C.F.R. § 164.502(b)(2)(vi).

**Patient #2:** Patient #2 died at the hospital. Shortly thereafter, the hospital's executive vice president, who was aware of strife between the patient and his family relating to ownership of the family's business, reviewed Patient #2's chart. After noting the cause of death, she invited a police detective to lunch and told him that the pathology report had concluded that the patient died of multiple organ failure due to arsenic poisoning, and that the vice president knew the family and was aware of conflict between the decedent and his relatives relating to the ownership of the family business. The vice president also directed the hospital's Medical Records Department to deliver the chart from the patient's last admission, and the charts from a previous admission (six months earlier) to the detective. Both of these disclosures were done without any written authorization for release of protected health information from any person authorized by law to act on behalf of the decedent or his estate. 45 C.F.R. § 164.502(f) and (g). A family member learned of the disclosure and complained to OCR.

Examinees should argue that despite the HIPAA provisions stating that a covered entity must accord a decedent the protections of a live individual (which would ordinarily require written authorization for a disclosure of health information from the personal representative of a decedent, *see* 45 C.F.R. § 164.502(b), (f), (g)(1), and (g)(4)), the disclosure by the executive vice president to the detective in this instance was permitted, even without the consent of the patient's personal representative. Pursuant to 45 C.F.R. § 164.512(f)(4), "A covered entity may disclose protected health information about an individual who has died to a law enforcement official for the purpose of alerting law enforcement of the death of the individual if the covered entity has a suspicion that such death may have resulted from criminal conduct." The vice president had a suspicion that Patient #2's death may have resulted from criminal conduct. She knew he had died and had died of arsenic poisoning. She also knew that he and his family were involved in an ongoing dispute concerning ownership of the family business. These factors together provided the basis for the suspicion of death due to criminal conduct and permitted the hospital to disclose information to a law enforcement official. The executive vice president made the disclosure to a law enforcement official—a detective. Therefore, the vice president's disclosure to the detective meets the requirements of paragraph (f)(4).

A second issue in this case is whether the executive vice president disclosed too much information to the detective during the conversation at lunch. 45 C.F.R. § 164.502(b) requires that any disclosure be "the minimum necessary to accomplish the intended purpose of the use, disclosure, or request." The disclosure in Case #2 was **not required** by law. If the disclosure had been **required** by law, as in the case of the first patient discussed above, the "minimum necessary" rule would not apply.

Because the disclosure was **permitted,** the "minimum necessary" rule applies, with exceptions not relevant here. *See* 45 C.F.R. § 164.502(b)(1) and (2). An examinee should assess what the executive vice president said against the "minimum necessary" standard: that the patient died, that the pathology report found arsenic poisoning to be the cause of death, and that there was serious conflict between the patient and his family. An examinee would most likely conclude that these facts represent the minimum amount the executive vice president could say to explain her suspicions to the detective.

A third issue in this patient's case is whether, even assuming that the executive vice president disclosed the minimum necessary, the Medical Records Department may have exceeded the scope of a permitted disclosure. Arguably, disclosing *all* medical records pertaining to the patient's previous admission to the hospital six months earlier was more than "the minimum necessary" for "alerting law enforcement of the death of the individual if the covered entity has a suspicion that such death may have resulted from criminal conduct." 45 C.F.R. § 164.512(f)(4). Examinees should anticipate this objection and argue that the disclosure of the entirety of the record was a necessary part of making a credible "alert" to law enforcement and providing detail in support of the hospital's suspicion of murder.

The disclosed records include records from both Patient #2's last stay and the next-to-last stay (six months prior to death). An examinee may find difficulty in arguing the necessity for disclosure of the older records, especially since the File does not describe the content of the older records. An examinee can address this by arguing that the older records are necessary to provide a context for the severe condition observed during the stay that ended with the decedent's death. Indeed, the memorandum summarizing the hospital's investigation (2/13/2015 memo from Megan Larson) notes that the pathologist had used the records of Patient #2's earlier admission to rule out other possible causes of death.

NOTE: The Library contains a provision dealing with "Permitted disclosure: Victims of a crime," 45 C.F.R. § 164.512(f)(3), that does not apply to this disclosure because the 512(f)(3) exception requires the disclosure be in response to a law enforcement official's request for such information. In the case of Patient #2, the disclosures were not made in response to a law enforcement officer's request but were initiated by the hospital's executive vice president.

**Patient #3:** In this case, a treating physician in the hospital's emergency department reported to a state trooper that a combative patient had left the hospital against medical advice. The patient's sister had brought him to the hospital after finding the patient in his apartment emptying cupboards and throwing plates and glassware against the wall. During a hospital interview, the agitated patient revealed that he had been using PCP ("angel dust") and alcohol. His speech was rapid, and his thoughts were disorganized and chaotic. He reported being threatened by persons who, according to his sister, were dead.

Later in his stay at the hospital, the patient focused his agitation on his employer, saying that he was angry about work conditions and constantly felt belittled and undermined at his workplace. The treating physician advised the patient not to leave the hospital, but he did so. As he was leaving the hospital, the patient shouted, "I hate my boss and I hate what she's done. I'm going to get her . . ." The patient's sister informed hospital personnel that she believed that the patient had a gun at home.

The physician made a report to a Franklin state trooper who was at the Emergency Department on an unrelated matter. The physician disclosed to the trooper the patient's name, his combative behavior, and the threat to his employer, but not the cause of his behavior. The patient was later arrested just two blocks from his workplace, but was unarmed. The patient's lawyer

complained to OCR about the treating physician disclosing private health information to the state trooper.

Examinees should recognize and argue that the disclosure to the trooper was permitted under HIPAA. 45 C.F.R. § 164.512(j) permits disclosures of protected health information if the covered entity, in good faith, believes the disclosure is necessary to prevent or lessen a serious and imminent threat to the health or safety of a person or the public. Examinees may use these facts to show the good-faith belief that a threat was serious and imminent: First, the patient made a threat that he was "going to get" his boss. Second, the sister believed that the patient had access to a gun. Third, his sister reported that, prior to coming to the hospital, the patient had been throwing dishware and glasses. Fourth, while at the hospital, the patient's speech was rapid and his thoughts were disorganized and chaotic; he appeared agitated and belligerent; and he reported being threatened by persons who were dead. Fifth, while at the hospital, he had admitted consuming alcohol and illegal drugs. And, last, he left the hospital against medical advice.

The HIPAA regulation also requires that the covered entity make the disclosure "to a person or persons reasonably able to prevent or lessen the threat, including the target of the threat." 45 C.F.R. § 164.512(j)(1)(i)(B). Reporting the threat to a state trooper who appeared in the Emergency Department shortly after the threat satisfies this requirement.

Further, because this is a **permitted** disclosure, the "minimum necessary" standard applies. 45 C.F.R. § 164.502(b). The examinee should note that the treating physician disclosed only the patient's name, his combative behavior, and the threat, but did not disclose the nature of the patient's condition. This appears to satisfy the "minimum necessary" standard.

Finally, an examinee should also note that, to the extent that any doubt exists about the propriety of this disclosure, the regulation allows a presumption of good faith where the entity's assessment of the threat is based on its own "actual knowledge" or "in reliance on a credible representation by a person with apparent knowledge" at 45 C.F.R. § 164.512(j)(4). The treating physician had actual knowledge of the patient's condition from observations of the patient while he was at the hospital. Moreover, the physician also relied on the sister's information regarding the patient's possible possession of a gun and his conduct prior to his arrival at the hospital. The examinee can argue that this should satisfy the "reliance" portion of the test.

These facts demonstrate that hospital personnel had grounds for a good-faith belief that the disclosure to the trooper was necessary to prevent or lessen a serious and imminent threat.

## III. CONCLUSION

The examinee should conclude that each disclosure was justified under HIPAA regulations and should ask the Department to use its discretion and refrain from pursuing an enforcement action.

NOTES

NOTES

www.ncbex.org

National Conference of Bar Examiners
302 South Bedford Street | Madison, WI 53703-3622
Phone: 608-280-8550 | Fax: 608-280-8552 | TDD: 608-661-1275
e-mail: contact@ncbex.org