THE MPT®

MULTISTATE PERFORMANCE TEST

February 2017 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 2017 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 problems 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 are applied. 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.
>
> Do not include your actual name anywhere in the work product required by the task memorandum.
>
> 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.

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February 2017
MPT-1 File:
In re Ace Chemical

Montagne & Parks LLC
Attorneys at Law
760 Main Street, Suite 100
Essex, Franklin 33702

MEMORANDUM

To: Examinee
From: Lauren Scott, Managing Partner
Date: February 21, 2017
Re: Ace Chemical: potential conflicts of interest

Our law firm has been approached by Ace Chemical Inc., which wants to sue Roadsprinters Inc. for breach of a shipping contract. Ace claims that Roadsprinters failed to timely deliver Ace's goods to a customer. It is likely that Ace has a good case—the contract has a "time is of the essence" clause and delivery of the goods was significantly delayed. The work on this case would be done here at our Franklin office; I would be the lead attorney, and our partner Samuel Dawes would be the lead litigator. The law firm of Adams Bailey serves as Roadsprinters' outside counsel.

As you know, our firm has 400 lawyers in 14 different offices. Recently, we've become aware of certain circumstances that might affect our ability to represent Ace: 1) our office in the state of Columbia represents the Columbia Chamber of Commerce, and Jim Pickens, the president of Roadsprinters, was at one time chair of the Chamber's board; 2) Samuel Dawes once represented Roadsprinters in a trademark registration; and 3) our office in the state of Olympia has interviewed and would like to hire Ashley Kaplan, an attorney who currently works in Adams Bailey's Franklin office.

We will not undertake this representation if barred by the Franklin Rules of Professional Conduct, but we would very much like to take on this client in this matter if it is ethically permissible. We know that Roadsprinters will not waive any conflicts of interest.

Please prepare a memorandum to me analyzing whether any potential conflicts of interest are raised by these three circumstances. If you determine that one or more conflicts of interest exist, for each conflict you should identify the action we need to take to comply with the Rules. Do not draft a separate statement of facts, but be sure to integrate the relevant facts into your analysis. Note that Franklin's Rules of Professional Conduct are identical to the ABA's Model Rules of Professional Conduct and that Franklin Ethics Opinions are persuasive but not binding authority before courts.

Montagne & Parks LLC

MEMORANDUM TO FILE

From: Lauren Scott, Managing Partner
Date: February 17, 2017
Re: Ace Chemical: potential conflicts of interest

Montagne & Parks, through its Franklin office, would like to represent Ace Chemical Inc. in its suit against Roadsprinters Inc. Ace alleges that Roadsprinters breached its contract with Ace when Roadsprinters failed to deliver goods to Ace's customer on time. Roadsprinters is represented by the law firm of Adams Bailey.

Potential conflict: Columbia Chamber of Commerce

Through our office in the state of Columbia, our firm represents the Columbia Chamber of Commerce (Chamber); we have represented the Chamber for the last 10 years. (The Chamber is a membership organization of local businesses that promotes the general interest of the business community.) In the course of our representation of the Chamber, we have lobbied before the Columbia legislature for tax reform. For purposes of this lobbying effort, we received no confidential business information from Chamber members.

In our communications with Chamber members, we clarified that we represented the Chamber, and not the members, in lobbying, and that the content of our communications with members was not confidential. The Chamber and its members acknowledged in writing that our representation was limited to lobbying for the Chamber itself. While we received confidential information from the Chamber about legislative strategies and tactics related solely to tax issues, we received no confidential information from or about any of the Chamber's members.

Roadsprinters has been a member of the Chamber since the Chamber's inception 15 years ago. Jim Pickens has been the president of Roadsprinters for the last 20 years and was chair of the board of the Chamber in one of the years of our representation; however, throughout the lobbying effort, the firm worked primarily with the Chamber's executive director and not with the officers of the board.

Potential conflict: Samuel Dawes

Samuel Dawes, a partner in this firm, has successfully represented Ace against other adversaries in several other matters, and Ace wants him to handle this litigation.

Seven years ago, while he was in solo private practice, Mr. Dawes represented Roadsprinters in an uncontested trademark registration. Mr. Dawes has been interviewed consistent with Franklin Rule of Professional Conduct 1.6(b)(7). We have concluded that no information that he learned, or could have learned, could possibly be relevant to the litigation against Roadsprinters. Mr. Dawes reports that he has not had any contact with Mr. Pickens, the president of Roadsprinters, for the last five years.

Potential conflict: Ashley Kaplan

Our Olympia office has informed us that it recently interviewed Ashley Kaplan for a position as a senior associate in that office. The Olympia office was very impressed with Ms. Kaplan and wants to make her an offer—the office badly needs someone with her expertise. Ms. Kaplan currently works for the Franklin office of Adams Bailey. Ms. Kaplan has provided a list of the clients for which she has done work at Adams Bailey, and Roadsprinters is on that list.

FRANKLIN DAILY NEWS
Spotlight on a "Rising Star" in the Community

ESSEX—(December 20, 2010) As part of our series profiling rising stars in our business community, the *Franklin Daily News* this month shines a spotlight on young attorney Samuel Dawes.

Mr. Dawes is a graduate of the University of Franklin (B.A. in English and J.D.) and is currently in solo private practice in Essex, Franklin. He specializes in litigation and intellectual property work. Although he might one day want to work at a big firm, Mr. Dawes currently enjoys both the flexibility and the challenge of working alone. Mr. Dawes has been in solo practice for about five years, and he says he truly loves the independence and the opportunity to form close and lasting relationships. When asked for a specific example, Mr. Dawes mentioned his relationship with Jim Pickens, the president of his client Roadsprinters Inc. He stated that "Mr. Pickens taught me so much. He was so generous with his time and advice. It is people like him who make me love my job."

According to Mr. Pickens, he came to Mr. Dawes for help in registering a trademark for "Roadsprinters" and saw real promise in the young lawyer. "Sam is a great guy and a great lawyer," he said. "Although it was not at all necessary for the work on the trademark registration, I told him how to develop client relationships and I introduced him to community business leaders. I knew he was someone who was going places—and I wanted to help him get there."

According to other lawyers with whom we spoke, Mr. Dawes is a rising star in the legal profession. He combines a strong intellect, a curious mind, and a desire to help others. He listens to his clients and truly seeks to help them. We expect great things of Mr. Dawes.

February 2017
MPT-1 Library:
In re Ace Chemical

Excerpts from the Franklin Rules of Professional Conduct

Rule 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

. . .

(4) to secure legal advice about the lawyer's compliance with these Rules;

. . .

(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Rule 1.7 Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

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Rule 1.9 Duties to Former Clients

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

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

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rule 1.6 . . . that is material to the matter; unless the former client gives informed consent, confirmed in writing.

***

Rule 1.10 Imputation of Conflicts of Interest: General Rule

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

(1) the prohibition is based on a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or

(2) the prohibition is based upon Rule 1.9(a) or (b) and arises out of the disqualified lawyer's association with a prior firm, and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;

(ii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; a statement of the firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures; and

(iii) certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.

Franklin Ethics Opinion 2015-212

Ten lawyers are forming a new law firm in the state of Franklin. Each of the lawyers has, until recently, been a partner at a major law firm. All of them were at different firms, and many of those firms had several offices. In establishing the new firm, the lawyers want to properly assess potential conflicts of interest and thus determine their obligations regarding clients of their former firms. Specifically, they ask the following three questions:

1) Under Rule 1.9(a) of the Franklin Rules of Professional Conduct, how does a lawyer determine whether a matter is "substantially related" to another matter?
2) How do the Rules of Professional Conduct deal with lawyers who move from one firm to another firm?
3) How do the Rules of Professional Conduct treat a law firm with offices in multiple states?

Question One. Under Rule 1.9(a) of the Franklin Rules of Professional Conduct, how does a lawyer determine whether a matter is "substantially related" to another matter?

A lawyer has always been prohibited from using confidential information that he or she has obtained from a client against that client. But because this prohibition has not seemed enough by itself to make clients feel secure about reposing confidences in lawyers, the Rules have added a further prohibition: a lawyer may not represent an adversary of his or her former client if the subject matter of the two representations is "substantially related." A substantial relationship exists when the lawyer *could* have obtained confidential information in the first representation that would be relevant in the second representation. It is immaterial whether the lawyer actually obtained such information and used it against the former client, or whether—if the lawyer is a firm rather than an individual practitioner—different people in the firm handled the two matters and scrupulously avoided discussing them. The reason that the disqualification occurs regardless of whether the lawyer actually obtained confidential information is practical: conducting a detailed factual inquiry into whether confidences had actually been revealed would likely compromise the confidences themselves.

In addition, the "substantial relationship" test is in keeping with the profession's aspiration to avoid the appearance of impropriety. For a law firm to represent one client today, and the client's adversary tomorrow in a closely related matter, creates an unsavory appearance of conflict of interest that is difficult to dispel in the eyes of the lay public—or for that matter the bench and bar. Clients will not share confidences with lawyers whom they distrust and will not trust firms that switch sides.

Question Two. How do the Rules of Professional Conduct deal with lawyers who move from one firm to another firm?

Rule 1.9 itself removes some of the harshness of the "substantial relationship" test when a lawyer moves from one firm to another. "A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client: (1) whose interests are materially adverse to that person; and (2) about whom the lawyer had acquired information protected by Rule 1.6 . . . that is material to the matter." Thus the new firm may represent a client with materially adverse interests to the client of the moving lawyer's old firm so long as the lawyer did not *actually* acquire confidential information. Even if the lawyer acquired confidential information, Rule 1.10 allows the law firm to continue representation of the client so long as the moving lawyer is screened from all contact with the matter. In order to properly screen, the lawyer must be denied access to all digital and physical files relating to the client and/or the matter. All digital files must be password protected and the screened lawyer must not have the password. All physical files must be under lock and the screened lawyer must not have the key. In addition, all lawyers in the firm must be admonished that they cannot speak with or communicate in any way with the screened lawyer about the matter. Finally the lawyer cannot receive any compensation resulting from representation in the matter from which she or he is being screened. Screening must take place as soon as possible, but in no case may it occur after the screened lawyer has had any contact with information about the matter from which he or she is being screened.

In addition, Rule 1.10 requires that the law firm promptly give written notice to any affected former client in order to enable the former client to ascertain compliance with the provisions of the Rule. This notice shall include a description of the screening procedures employed; a statement of the firm's and of the screened lawyer's compliance with these Rules; a

statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures.

Question Three. How do the Rules of Professional Conduct treat a law firm with offices in multiple states?

A confidence is defined by Rule 1.6 as "information relating to the representation." This is intended to be applied broadly. It includes anything that the lawyer learns that has any bearing on the matter in which the lawyer is representing the client. Even information that is publicly available is confidential if it meets the definition in Rule 1.6. The Franklin Rules of Professional Conduct presume that confidences are shared by members of a law firm. This is why Rule 1.10 presumptively imputes a conflict of one member of a firm to the entire firm. Especially in these days of telecommuting, electronic files, and multi-state transactions, the imputation of Rule 1.10 applies to all members of the law firm, regardless of the office in which they work. Thus the conflict of one member of the firm is imputed to the entire firm—every office of that firm, regardless of the number of offices the firm maintains.

Hooper Manufacturing, Inc. v. Carlisle Flooring, Inc.
Franklin Supreme Court (2002)

In this action, Carlisle Flooring, Inc., has filed a complaint alleging that Hooper Manufacturing, Inc., has interfered with Carlisle's ability to contract with other manufacturers that produce the wax necessary for the creation of Carlisle's hardwood floors. Carlisle has a contract with Hooper, and for the last 10 years, Carlisle has bought all of its wax from Hooper. In its complaint, Carlisle alleges that Hooper has recently raised its prices for wax to the point that Carlisle can no longer produce hardwoods at a competitive price. In addition, Carlisle alleges that it sought out other wax producers but was told by each of them that Hooper would not allow them to sell to Carlisle.

The case is in the early stages of discovery, and Carlisle has filed a motion to disqualify Hooper's counsel, the venerable law firm of Klein and Wallace (K&W). The trial court denied the motion to disqualify, and Carlisle filed an interlocutory appeal to the Franklin Court of Appeal. The Court of Appeal reversed the trial court, and Hooper appeals.

According to affidavits filed by Carlisle, attorneys from K&W work as lobbyists for the professional trade association to which Carlisle belongs. Hooper counters that the lobbying organization is distinct from its members. Thus, according to Hooper, K&W should not be disqualified as its counsel.

Lobbying is an activity in which attorneys often engage. For purposes of determining whether a lawyer previously represented or is currently representing a client, we will take for granted that lobbying constitutes representation by an attorney. The harder question here is whether K&W's representation of the trade association is tantamount to representation of a member of that trade association.

The first issue we must address is what law to apply to this case. Both parties have cited the Franklin Rules of Professional Conduct. We acknowledge that the Rules of Professional Conduct are only intended to govern the regulation of lawyers. They are thus not binding on courts when faced with questions other than attorney discipline. Nonetheless, it would be foolish for courts to ignore those Rules when they are applicable to a lawyer's conduct. In the absence of any overriding policy considerations, courts in this state will be guided by the Rules of Professional Conduct, in addition to any other applicable law, in determining motions for disqualification based on conflicts of interest.

Since this case involves a concurrent conflict of interest, we look to Rule 1.7 of the Franklin Rules of Professional Conduct.

K&W is representing Hooper in direct opposition to Carlisle. The question thus posed is whether the representation of the trade association to which Carlisle belongs is equivalent to the representation of Carlisle itself.

In making this determination, the Court must be guided by the facts of the particular situation. The critical question one must ask is whether the trade association member provided confidential information to the lawyer that was necessary for the lawyer's representation of the trade association. If the answer is "yes," then the representation of the trade association is equivalent to representation of the member. However, even if the answer to that question is "no," the representation might still be deemed equivalent if the lawyer advised the member of the trade association that any and all information provided to the lawyer would be treated as confidential.

Confidential information is any information related to the representation of the client and learned during the course of the representation. Franklin Rule of Professional Conduct 1.6. The definition is very broad and includes all information, even publicly available information, that the lawyer discovers or gleans while representing the client. The information must, however, be related to the representation. A client cannot protect extraneous information simply by telling his or her lawyer. A client may have many conversations with the lawyer about any number of matters which have no relevance to the representation for which the lawyer was retained. These conversations cannot later be used by the client to prevent the lawyer from representing a party who is adverse to the client.

In this case, Carlisle, as a member of the trade association, provided only publicly available information to K&W lawyers for their work of lobbying on behalf of the trade association. While information related to the representation is normally treated as confidential if it meets the other requirements of Rule 1.6, we hold that a member's provision of publicly available information to counsel for the trade association does not, in and of itself, disqualify counsel for the trade association from representing a client who is adverse to the member.

We must then ask whether the lawyers for the trade association (here K&W) advised the member (here Carlisle) that information provided to the lawyers for the trade association would be treated as confidential. Affidavits submitted by attorneys from K&W state that they informed

the members of the trade association, including Carlisle, that the information provided to K&W and in support of the representation of the trade association would not be kept confidential.

Based on the fact that Carlisle provided only publicly available information to K&W in its representation of the trade association and that K&W told Carlisle that any information provided to K&W would not be kept confidential, we hold that representation of the trade association is not equivalent to representation of Carlisle. Thus, K&W's representation of Hooper is not directly adverse to a former client (i.e., the trade association).

But our analysis does not end there. Under Rule 1.7(a)(2), we must next ask whether representation of both Hooper and the trade association will materially limit the firm's ability to represent either client.

The critical factual inquiry is whether an employee of Carlisle had an important position in the trade association and, in that position, worked closely with the lawyers for the trade association. The affidavits filed by Carlisle state that Carlisle's chief executive officer, Nina Carlisle, serves as one of three members of the trade association's legislative and policy committee. In this capacity, Nina Carlisle works closely with K&W attorneys, developing legislative strategy and directing K&W lawyers on legislative tactics. The affidavit notes that Nina Carlisle meets with these attorneys in person and communicates with them via email every day during the legislative session, and an average of every two weeks during the rest of the year.

Under Rule 1.7(a)(2), this contact between K&W attorneys and Carlisle's chief executive officer materially limits K&W's ability to represent both Hooper and the trade association. The language of Rule 1.7(a)(2) refers to the "personal interest of the lawyer." This standard requires us to focus on the nature and extent of the relationship between the attorneys and Carlisle's representatives. The closer and more frequent the contact and the more active the role of the member representative in directing the lawyer, the greater the risk that the lawyer's ability to engage in concurrent representation is "materially limited." In this case, Carlisle's CEO plays an active role in directing K&W's attorneys and has frequent contact with them. This creates a substantial risk that the K&W attorneys' personal interests would materially limit the concurrent representation.

Carlisle's motion to disqualify Hooper's counsel should have been granted. The order of the Court of Appeal is AFFIRMED and the matter remanded to the trial court.

February 2017
MPT-2 File:
In re Guardianship of Henry King

Sibley and Wallace Law Office, P.C.
232 Cable Car Road
Dry Creek, Franklin 33808

MEMORANDUM

To: Examinee
From: Eleanor Wallace
Date: February 21, 2017
Re: Guardianship of Henry King

We represent Ruth King Maxwell in an adult guardianship case in which she seeks to be named as the guardian for her father, Henry King. Ruth's brother, Noah King, opposes Ruth's petition to become guardian. Noah is asking the court to appoint him as guardian instead.

In 2013, Henry King learned that he had a condition that might leave him incompetent to manage his affairs. At that time, Henry executed an advance health-care directive naming Noah as his health-care agent and a durable power of attorney giving Noah the power to make financial decisions for him. Those documents also nominated Noah to become Henry's guardian if that later proved necessary.

Since then, Ruth has become increasingly concerned about Noah's handling of his authority over their father's finances and medical care. Her concerns came to a head after a series of events which led to conflict with her brother and caused her to seek our representation.

We filed a petition to have Ruth named as guardian for Henry. There was an evidentiary hearing on Ruth's petition last week; relevant portions of the transcript are attached. The court ruled that Henry's nomination of Noah as prospective guardian in 2013 was valid at the time it was made. It also ruled that Henry is now incompetent, cannot manage his affairs, and needs a guardian. All counsel (Henry's court-appointed attorney, Noah's attorney, and our office on behalf of Ruth) have been instructed to submit proposed Findings of Fact and Conclusions of Law. Our proposed Findings and Conclusions should persuade the court that (1) it has authority to override the nomination, and (2) Ruth should be appointed guardian.

Please draft our proposed Findings of Fact and Conclusions of Law to submit to the court. Be sure to review and follow our office guidelines on drafting proposed Findings of Fact and Conclusions of Law so that the court will be more likely to adopt them and rule in our favor.

Sibley and Wallace Law Office, P.C.

OFFICE MEMORANDUM

To: All attorneys
From: Managing partner
Date: March 4, 2016
Re: Preparation of proposed Findings of Fact and Conclusions of Law

In bench trials, trial courts usually require the parties to file proposed Findings of Fact and Conclusions of Law. Findings of Fact are the court's final factual determinations based on the evidence presented. Conclusions of Law are the court's legal determinations when it applies the law to its factual findings. A judge will often adopt one party's proposed Findings of Fact and Conclusions of Law. It is thus critical that we draft our proposed Findings and Conclusions so that the court will adopt them. This memo states our firm's conventions for this kind of filing.

All proposed Findings of Fact on all issues are grouped together in one section under the heading "Findings of Fact." They are then followed by all Conclusions of Law on all issues grouped together under the heading "Conclusions of Law."

Each section should consist of separate, sequentially numbered paragraphs. In general, each "Finding" or "Conclusion" should consist of one sentence stating a single fact or legal conclusion. Use the following conventions:

(1) *Proposed Findings of Fact:* Set forth those facts that the testimony and other evidence support and that are necessary to our claim or defense. Think about how to sequence and structure your Findings to lead to the legal conclusions that you would like the court to reach. This will help you to identify the facts that support your legal conclusions and to put them in the most persuasive order. Be sure that the Findings accurately reflect the record. (Our paralegal will add citations to the record as appropriate.)

The Findings should cover all the relevant facts, including those *not* favorable to our position. For those Findings that are unfavorable to our client's position, frame them in a way that minimizes their effect.

Omit any facts not relevant to the Conclusions of Law.

(2) *Proposed Conclusions of Law:* Concisely state the legal conclusions necessary to support our claim or defense. Organize this section by first stating general rules and then applying these rules to specific facts from the Findings of Fact. Include citations to the legal authorities that support the relevant conclusions.

Your proposed Findings of Fact and Conclusions of Law, while drafted to favor your client, should not be explicitly argumentative. *In re Guardianship of Martinez* (Fr. Ct. App. 2009) contains a trial court's Findings of Fact and Conclusions of Law that the appellate court approved as an example of how to effectively write proposed Findings and Conclusions.

Contrast the example in *Martinez* with the example below, which states too many facts in one paragraph and does not present them in a coherent or persuasive sequence:

> 1. Testator died on July 3, 2015, and Petitioner submitted Testator's will for probate on July 10, 2015. Testator executed a will on May 6, 2003. The will submitted on July 10, 2015, is identical to the one executed on May 6, 2003. This will contained signature lines for Testator and for two witnesses; Testator signed on the line designated for his signature. One of the witness lines was empty.

The following represents a more appropriate draft of these Findings of Fact:

> 1. Testator executed a will on May 6, 2003.
>
> 2. The will contained a signature line for Testator, signed by him.
>
> 3. The will contained two signature lines for witnesses, only one of which contained a signature.
>
> 4. Testator died on July 3, 2015.
>
> 5. Petitioner submitted this will for probate on July 10, 2015.

Transcript of Testimony of Ruth King Maxwell
February 13, 2017

Att'y Wallace: Could you state your name?

Ruth Maxwell: Ruth King Maxwell.

Wallace: Your address?

Maxwell: 4465 East Canyon Avenue, Dry Creek, Franklin.

Wallace: What is your relationship to Henry King?

Maxwell: I am his daughter.

Wallace: Could you tell the court why you brought this case?

Maxwell: I want to be named guardian for my father and to keep my brother from becoming guardian. I'm worried about how my brother has treated my father.

Wallace: Your brother already has authority to act for your father, is that right?

Maxwell: Yes. He has my father's power of attorney for financial matters and is his health-care agent.

Wallace: Tell the court how that came about.

Maxwell: My father is 74 years old now. Our mother died in 2012; a year after that, he started to have trouble with his memory and began to lose his attention span. He consulted his doctor, who referred him to a neurologist and a psychiatrist. He was told that he had early signs of dementia.

When that happened, Dad set up arrangements for his health care and finances if he did become incompetent. At that time, I lived in a different state. My brother, Noah, lived here in Dry Creek. We all talked it over and agreed that it made sense for my father to give Noah the authority to make health-care and financial decisions for him and to nominate Noah as his prospective guardian. Noah was closer and could respond more quickly.

So Dad signed an advance directive and a power of attorney and in both documents nominated Noah as his prospective guardian. Dad was doing well then.

Wallace: Your honor, we have stipulated to the validity of those documents that were signed May 20, 2013. Ms. Maxwell, what happened then?

Maxwell: For a while, my father was fine. Then, about two years ago, he began to get worse. Eventually, he wouldn't go out of the house; he would sit in his

favorite chair and stare out the window or at a book or at the TV. Sometimes he would talk with one of us, but he made less and less sense. He wasn't upset, but he was very different from the way he had been before. Not as sharp or funny. It has been like that for nearly two years. His doctor tells us that his condition is permanent. I know that he can't take care of himself, and I'm worried about my brother's ability to take care of Dad.

Wallace: Why are you worried about your brother?

Maxwell: About a year and a half ago, I came back to Dry Creek to visit my father. When I talked with him, I saw that he was favoring his right arm, leaning away from that side in his chair. I asked him what had happened, and he said, "Nothing." I insisted, and he eventually said that he had fallen in the shower, but that everything was okay. I asked him to show me his arm, and he finally did. It was bruised up and down the back of his arm.

I talked with Noah, and he said that he knew about the fall, but that Dad hadn't really complained that much about it, so he didn't think it was much of a problem. He agreed to take Dad to the doctor, and I went with him. The arm was just bruised, badly, but there were no broken bones, thank God.

Wallace: What did you do next?

Maxwell: I had it out with my brother a few days later. He said that I shouldn't worry, that he knew how to take care of Dad, and that I should just stay out of it. He got pretty angry. I couldn't figure out why, so I let it go.

Wallace: What happened after that?

Maxwell: In August 2016, I was able to transfer to a nearby office for my company. I started to spend two or three evenings a week with my father. This is when I found out that my father had broken his wrist in June when he tripped over a rug in his bedroom. Noah did not tell me about this until I confronted him about it after I had moved back to Dry Creek.

Wallace: What else did you notice about your father's condition?

Maxwell: I began to notice that Noah wasn't buying any food for him. The refrigerator was always nearly empty, just skim milk and a little bread, and there was only canned soup in the cupboards. I started buying food and cooking for him, whenever I could. Eventually, I hired someone to shop and cook for him.

Wallace: What did you learn about the state of your father's finances?

Maxwell: One day I arrived at Dad's house and found an overdue notice from the electric company. I called the company, and they said that they would only deal with Noah. So I called Noah, and he said that he had missed a few months' payments but not to worry about it.

Wallace: What did you do then?

Maxwell: I decided to look through Dad's bank statements and his bills. Noah kept all of that at Dad's house. It turns out that Noah had not been paying a lot of different bills. Nothing was too far behind, but the electric bill wasn't the only one where he had received threatening letters. Some were from Dad's doctor, who was about to send his account to collection.

I also saw that Dad had been spending a lot of money. His checking account statement showed a lot of charges from Amazon and other online retailers, but I didn't see anything new around the house. When I asked Dad, he said that he wanted to give his friends gifts, to make sure that they came to visit him. All told, for the two months that I reviewed that day, he had spent roughly $2,200 online. Dad only gets about $2,500 a month between his pension and his Social Security.

Wallace: Did you talk with your brother?

Maxwell: I confronted Noah the same day. He got very angry and told me to let it go . . . not so nicely, I'm afraid. He said that he had known about the online purchases and that it was hard to keep Dad from doing what he wanted. He said that it was those purchases that made it hard to keep up with the bills. Noah said that he had all of these other bills under control and that nothing would get shut off. I said that wasn't good enough. We had a bad argument.

Wallace: No further questions.

Transcript of Testimony of Noah King
February 13, 2017

Att'y Wallace: Could you state your name?

King: Noah King.

Wallace: What is your relationship to the proposed ward Henry King?

King: I am his son. I am also his health-care agent and have his durable power of attorney.

. . .

Wallace: I have here several bank statements. These are your father's, aren't they?

King: Yes, these are my father's bank statements for the last 12 months.

Wallace: How do you know about them?

King: I manage my father's finances, so I see these every month.

Wallace: Don't these statements show a series of purchases from Amazon and eBay?

King: Yes, they do. About a year ago, I saw that my father had started to buy things online. I checked his accounts and saw that he had asked to ship these items to various friends. When I asked my father about it, he said that he wanted to make those gifts because he felt that he owed his friends favors and because he wanted them to come visit him. I didn't feel comfortable calling his friends to ask for these things back. I also didn't have the heart to tell him to stop. So I just let it go on.

Wallace: Your father is on a fixed income, isn't he?

King: Yes, he is. He gets $2,515 per month, between his Social Security and his pension.

Wallace: These charges total about $9,000 over the past 12 months, isn't that correct?

King: Yes, it is.

Wallace: In some months, he charged as much as $1,200, isn't that so?

King: Yes, that's right. After that month, I did ask him to stop it and tried to explain how it was hurting him. But he didn't seem to understand.

Wallace: You didn't take any other steps to stop the spending, did you?

King: No, I didn't. Like I said, I didn't think it was my place to keep him from spending his money the way he wanted. And he has enough money.

. . .

Wallace: I'm showing you medical records concerning your father's treatment over the last year. You're not familiar with these, are you?

King: Not with these records, no.

Wallace: Are you familiar with your father's medical condition over the past year?

King: Of course I am.

Wallace: I want to ask you about his condition on June 22, 2016. Your father broke a bone in his wrist, isn't that so?

King: Yes, but it was an accident. I went by one evening to check on Dad, and he complained of being a little stiff, but he didn't seem in all that much pain. The next day at lunch, a neighbor called me and said that I should come look at him, that his wrist was swollen. I came over, and she was right. I took him to the emergency room right away. I watched them put on a cast. They discharged him that night.

Wallace: You don't know how this happened, do you?

King: I wasn't there and he wouldn't tell me at the time. I think he was embarrassed. I later learned that he had tripped on a rug. His wrist is completely healed now.

Wallace: You didn't tell your sister about it at the time, did you?

King: No, I didn't. I just didn't think she needed to know. I knew she would get upset with me and blame me for it.

. . .

February 2017
MPT-2 Library:
In re Guardianship of Henry King

Excerpts from Franklin Guardianship Code

§ 400 Definition of Guardian

"Guardian" means an individual appointed by a court to manage the income and assets and provide for the essential requirements for health and safety and personal needs of someone found incompetent.

§ 401 Order of Preferences for Appointment of Guardian for an Adult

(a) The court shall appoint as guardian that individual who will best serve the interest of the adult, considering the order of preferences set forth in this Code section. The court may disregard an individual who has preference and appoint an individual who has a lower preference or no preference, provided, however, that the court may disregard the preference listed in paragraph (1) of subsection (b) of this Code section only upon good cause shown.

(b) Individuals who are eligible have preference in the following order:

(1) The individual last nominated by the adult in accordance with the provisions of subsection (c) of this Code section;

(2) The spouse of the adult;

(3) An adult child of the adult;

. . .

(c) At any time prior to the appointment of a guardian, an adult may nominate in writing an individual to serve as that adult's guardian should the adult be judicially determined to be in need of a guardian, and that nomination shall be given preference as described in this Code, provided:

(1) it expressly identifies the individual who shall serve as guardian; and

(2) it is signed and acknowledged by the adult in the presence of two witnesses who sign in the adult's presence.

§ 402 Revocation or Suspension of Guardian

Upon petition of an interested party or upon its own motion, whenever it appears to the court that good cause may exist to revoke or suspend the guardian or to impose sanctions, the court shall investigate the allegations and may require such accounting as the court deems appropriate. After investigation, the court may, in the court's discretion, revoke or suspend the guardian, impose any other sanction or sanctions as the court deems appropriate, or issue any other order as in the court's judgment is appropriate under the circumstances of the case.

Matter of Selena J.
Franklin Court of Appeal (2011)

This appeal presents an all-too-familiar scenario in guardianship cases, in which one sibling claims a breach of fiduciary duty by another sibling who has been nominated as the proposed guardian of a parent.

The proposed ward, Selena J., is 81 years old and lives with her daughter Naomi (a registered nurse). In 2008, Selena executed an advance directive naming Naomi as her health-care agent, and a durable financial power of attorney naming Naomi as her agent to manage her finances. Both documents nominated Naomi as Selena's guardian in the event of a later guardianship.

The petitioner, Michael, is Selena's son. In 2010, he petitioned to become his mother's guardian. He claimed that Naomi had failed to use the power of attorney to manage their mother's assets after Selena's mental decline became apparent. He also claimed that Naomi had failed to provide care for their mother, ignoring signs of mental decline and failing to seek medical care for various illnesses that their mother had suffered.

Naomi responded and asked the trial court to name her as guardian. She requested that the court give priority to Selena's expressed wishes, as required by Franklin Guardianship Code § 401(b)(1).

After discovery, Naomi moved for summary judgment, which the trial court granted. The court noted that neither party contested Selena's competency at the time that she nominated Naomi, and found that the nominations had complied with the formalities laid out in Franklin Guardianship Code § 401(c). Both parties conceded that Selena presently needed a guardian. The trial court ruled as a matter of law that it had to honor Selena's wishes. It appointed Naomi as guardian. Michael appealed.

We begin with the proposition that the law recognizes and protects an individual's right to make decisions about her medical and financial affairs. An advance directive permits the individual to specify the medical care she would prefer to receive and to name a "health-care agent" to make those decisions when she lacks the competency to do so. A durable financial power of attorney gives the individual the right to name an agent to handle financial matters when she lacks the competency to do so. Both documents create a fiduciary relationship. Both a

health-care agent and the holder of a durable financial power have a legal obligation to act in the principal's best interest and to avoid self-dealing.

These documents can raise difficult questions when someone later petitions for the appointment of a guardian. Franklin law has long held that a later guardianship overrides an earlier grant of authority through either an advance directive or a power of attorney. The authority granted to the guardian supersedes any conflicting authority granted to the agent under either document. *Matter of Collins* (Fr. Sup. Ct. 2002).

At the same time, the law also permits an individual to nominate a person (including the individual's agent) as a possible future guardian, provided that the nomination is in writing and complies with certain formal requirements. Franklin Guardianship Code § 401(c). Should this happen, the statute accords the person so nominated the highest preference for appointment as guardian. *Id.* § 401(b)(1).

The trial court correctly relied on these statutes in concluding that Selena had named Naomi as her preferred guardian. However, the trial court erred in appointing Naomi as a matter of law.

The statute does not make the nomination of a preferred guardian binding in a later guardianship proceeding. The statute states that a court in a guardianship proceeding "may disregard an individual who has preference and appoint an individual who has a lower preference or no preference." *Id*. § 401(a). The statute makes clear that a court may disregard an advance nomination of a guardian, but "only upon good cause shown." *Id*. This language creates a preference in favor of the nominated person. But this preference may be overcome with a sufficient factual showing of good cause.

In this case, the trial court erred in failing to consider Michael's evidence that good cause existed not to appoint his sister as guardian. Michael's affidavits indicate evidence that Naomi had neglected her mother's financial affairs and that she had also neglected to arrange for needed medical care for her mother. Without assessing the persuasive effect of this evidence, at the very least it creates an issue of fact on whether "good cause" exists to override Selena's nomination of Naomi.

No Franklin case has yet ruled on the "good cause" standard as it relates to overturning a *proposed* ward's previously stated preference for a guardian. As noted, the trial court failed to discuss the available evidence as it related to good cause.

The trial court on remand should apply a good cause standard to determine whether Selena's nomination of Naomi should be honored. This court has previously analyzed good cause in the context of the *removal* of a court-appointed guardian. Franklin Guardianship Code § 402; *In re Guardianship of Martinez* (Fr. Ct. App. 2009). The same good cause standard applies in this context: a court may refuse to appoint a proposed guardian when that person's previous actions would have constituted a breach of a fiduciary duty had the person been serving as a guardian. Such conduct is of special concern when that person has actually served as a fiduciary for the proposed ward under an advance directive or power of attorney.

For these reasons, we reverse the trial court's judgment and remand the case for proceedings consistent with this opinion.

In re Guardianship of Martinez
Franklin Court of Appeal (2009)

Evelyn Waters appeals from a judgment against her in connection with expenditures that she made while guardian of her niece, Marlena Martinez, who is an incapacitated adult. Evelyn also appeals from an order removing her as Marlena's guardian.

A trial court has authority to remove a guardian for good cause pursuant to Franklin Guardianship Code § 402. That statute gives the trial court discretion to determine whether the available information establishes good cause. *Id.* That statute also permits the trial court to "issue any other order as in the court's judgment is appropriate under the circumstances of the case."

We will affirm the trial court's exercise of discretion unless its decision is clearly erroneous. In this case, the trial court issued written Findings of Fact and Conclusions of Law that specified the basis for its decision. These Findings and Conclusions, which we adopt, state as follows:

FINDINGS OF FACT:

1. Evelyn Waters has served as guardian of her niece, Marlena Martinez, since November 2005.

2. Marlena was born in May 1984 and suffered significant injuries at birth that left her profoundly disabled.

3. In 1988, a medical malpractice action arising from complications during Marlena's birth led to a substantial settlement that resulted in an annuity to Marlena of over $8,000 per month.

4. In 2005, Marlena's last surviving parent died, after which a trial court appointed Evelyn as Marlena's guardian.

5. Since Evelyn's appointment, Marlena has lived with Evelyn, who has served as Marlena's primary caregiver.

6. In July 2006, Evelyn purchased a house for herself in her own name, using $25,000 in funds from Marlena's estate for the down payment.

7. In August 2006, Marlena moved into the house with Evelyn.

8. In November 2006, Evelyn submitted her first annual report as guardian, which described the home purchase and mentioned several other expenditures without providing a detailed accounting.

9. This first annual report included expenditures during the previous year for an automobile, for mortgage payments, and for $2,500 per month to Evelyn as "caregiver's salary."

10. Despite repeated requests from this court, Evelyn did not submit more detailed reports or any statement justifying these expenses.

11. In May 2007, this court appointed counsel to represent Marlena.

12. In June 2007, Marlena's counsel petitioned this court to remove Evelyn as guardian and to require her to reimburse Marlena's estate for any expenses not specifically used to provide for Marlena's care.

13. This court granted the motion and appointed Marlena's uncle, Joseph Sears, as guardian to succeed Evelyn.

14. On July 30, 2007, Evelyn filed her final accounting about Marlena's estate. Both Marlena's counsel and the new guardian objected to that accounting.

15. This court has reviewed both of the reports filed by Evelyn, covering the period from December 2005 to June 2007. During this period, Evelyn spent over $137,000 from Marlena's monthly annuity payments.

16. Evelyn has sufficiently documented that $55,000 in expenditures, including the salary paid to Evelyn, was necessary for Marlena's individual needs, and that an additional $35,000 reflected Marlena's prorated share of household outlays (such as mortgage payments, real estate taxes, moving expenses, groceries, utilities, and car payments).

17. Evelyn has provided no documentation to justify the remaining $47,000 expended from Marlena's monthly annuity.

18. The $25,000 down payment for the house purchased in Evelyn's name (*see* ¶ 6) was cash from the sale of investments in Marlena's estate.

CONCLUSIONS OF LAW:

1. A guardian has the responsibility to apply the income and principal of the ward's estate "so far as necessary for the comfort and suitable support of the ward." *Nonnio v. George* (Fr. Sup. Ct. 1932).

2. A guardian acts in a fiduciary capacity toward the ward, which requires the guardian not to expend the ward's funds so as to benefit the guardian. *See In Re Samuels* (Fr. Sup. Ct. 2002).

3. The law does not require approval of expenditures in advance, but a trial court may disapprove of expenditures after they have been made. *Id.*

4. Good cause exists to remove a guardian when a guardian breaches her fiduciary duty by using the ward's funds to benefit the guardian. *Nonnio v. George*.

5. As guardian for Marlena, Evelyn had a fiduciary duty to use Marlena's funds for Marlena's comfort and suitable support and not to benefit herself as guardian. *Nonnio v. George; In Re Samuels.*

6. Those expenditures totaling $55,000 that directly benefitted Marlena and those totaling $35,000 for Marlena's pro rata share of household expenses did not breach Evelyn's fiduciary obligations as guardian. *Nonnio v. George*.

7. All other expenditures benefitted Evelyn personally and breached her fiduciary obligations as guardian. *Id.*

8. The use of $25,000 from the sale of investments from Marlena's estate to purchase a house in Evelyn's name also breached Evelyn's fiduciary obligations as guardian. *Id.*

9. These breaches constitute good cause for revoking Evelyn's authority as guardian for Marlena. *Id.*

DISCUSSION

On appeal from this order, Evelyn claims that the trial court abused its discretion in removing her as guardian of Marlena. She insists that in managing Marlena's estate, her "primary goal" was to make Marlena's life "as comfortable and pleasurable as possible." Evelyn

contends that the trial court's requirement that she repay Marlena's estate for all undocumented expenses punished her for insignificant errors in reporting.

A guardian owes a fiduciary duty to her ward. This duty obligates the guardian to act in the best interest of the ward and not to use her decision-making authority to benefit the guardian. A guardian can breach this duty by action or neglect, if the action or neglect harms the ward. A fiduciary can harm the ward through mismanagement of finances, neglect of the ward's physical well-being, or similar actions. A fiduciary can also be held accountable if she uses her decision-making authority to benefit the guardian at the ward's expense.

The Findings of Fact belie Evelyn's argument that the trial court punished her for reporting errors. The Findings demonstrate that, even if Marlena received excellent care, Evelyn almost completely disregarded her fiduciary obligation to preserve and manage the estate to provide for Marlena's needs. Instead, Evelyn drew upon estate funds for her own support and comfort. Far from an abuse of discretion, the trial court's order carefully distinguishes between those funds used for Marlena's needs, those funds used for her fair share of common expenses, and those funds for the use of which no justification existed. "No abuse of discretion exists where a trial court identifies clearly and specifically those facts which support its Conclusions of Law." *Nonnio*.

The trial court's decision fully accords with the applicable principles of guardianship law. It does not punish Evelyn for minor failures in accounting. Instead, it uses the court's statutory authority to "issue any other order as in the court's judgment is appropriate under the circumstances of the case." Franklin Guardianship Code § 402.

This court acknowledges that caring for Marlena at home may have been an exceptionally expensive undertaking. But that expense did not relieve Evelyn of the obligation of establishing which expenses were necessary and related to Marlena's individual needs. The trial court's Findings of Fact established that Evelyn treated the estate not as Marlena's separate funds to be used for Marlena's needs, but as a personal asset available to pay for Evelyn's food, housing, and other personal expenses.

Judgment affirmed.

February 2017
MPT-1 Point Sheet:
In re Ace Chemical

In re Ace Chemical

DRAFTERS' POINT SHEET

In this performance test, examinees work for Montagne & Parks (the Firm), a law firm which has been asked to represent Ace Chemical Inc. in a lawsuit against Roadsprinters Inc. In that lawsuit, Ace will be claiming that Roadsprinters failed to deliver goods to Ace's customer in a timely manner. The issues in the problem do not relate to that lawsuit; rather, they relate to three potential conflicts of interest: 1) the Firm's Columbia office represents the Columbia Chamber of Commerce (Chamber), and Jim Pickens, the president of Roadsprinters, was once the chair of the board of the Columbia Chamber of Commerce; 2) Samuel Dawes, who would be the litigation partner in charge of the Ace litigation, once represented Roadsprinters in a trademark registration; and 3) the Firm's Olympia office has interviewed and would like to hire attorney Ashley Kaplan, who is currently employed by the Franklin office of Adams Bailey, the firm representing Roadsprinters.

The managing partner has asked the examinee to draft a memo analyzing the three potential conflicts of interest. The analysis should include the relevant law, determining in each circumstance whether a conflict of interest exists and, if so, how the Firm should handle the conflict. While the Firm will decline the case if necessary, the partner would very much like the Firm to be able to engage in the representation. The memo should therefore include any possible action that the firm could take to ameliorate the conflict.

The File contains 1) the instructional memorandum; 2) a file memorandum from Lauren Scott, the managing partner; and 3) an article from the *Franklin Daily News* spotlighting Samuel Dawes. The Library contains 1) excerpts from the Franklin Rules of Professional Conduct, specifically Rules 1.6, 1.7, 1.9, and 1.10; 2) Franklin Ethics Opinion 2015-212; and 3) the case of *Hooper Manufacturing v. Carlisle Flooring*. The following discussion covers all the points the drafters intended to raise in the problem.

I. FORMAT AND OVERVIEW

Examinees must, first, master the facts as revealed by the memo from Lauren Scott and the newspaper article; second, master the relevant law, including the Franklin Rules of Professional Conduct; and third, apply that law to the facts so as to determine whether a conflict of interest exists. If the examinee determines that a conflict exists, in each instance the analysis should include a discussion of whether the conflict disqualifies the Firm from representing Ace or whether steps can be taken that will allow the Firm to take the case.

1) The Firm's concurrent representation of the Chamber of Commerce: The question is whether the Firm's ongoing representation of the Chamber, of which Jim Pickens once served as board chair, is a conflict of interest that would disqualify the Firm from representing Ace Chemical in its suit against Roadsprinters.

2) Samuel Dawes's prior representation of Roadsprinters in a trademark registration: Mr. Dawes is a partner at the Firm and will be the chief litigator on behalf of Ace in the litigation. Seven years ago, when he was in solo private practice, he represented Roadsprinters in a trademark registration. The question is whether Mr. Dawes's prior representation of Roadsprinters is a conflict of interest that would disqualify the Firm from representing Ace Chemical in its suit against Roadsprinters.

3) The hiring of Ashley Kaplan, a current attorney at Adams Bailey: The Olympia office of the Firm has interviewed and wants to hire Ashley Kaplan. She is currently employed as an attorney at the Franklin office of Adams Bailey, the firm which will presumably be representing Roadsprinters in the litigation.

II. DISCUSSION

A. Facts

Although examinees are instructed not to restate the facts, they must be mastered properly and incorporated into the legal analysis.

Montagne & Parks (the Firm) is a law firm with 400 lawyers in 14 different offices. Lawyers in the Franklin office of the Firm would like to represent Ace Chemical in its suit against Roadsprinters. Ace alleges that Roadsprinters breached its contract with Ace when Roadsprinters failed to deliver goods to Ace's customer on time. Samuel Dawes would be the lead litigator in the case. Roadsprinters is represented by the law firm of Adams Bailey.

Potential conflict: Chamber of Commerce

The Firm's Columbia office currently represents (and has represented for the last 10 years) the Columbia Chamber of Commerce. The Chamber is a membership organization of local businesses that promotes the general interest of the business community. The Firm's representation of the Chamber principally consists of lobbying before the Columbia legislature for tax reform. For purposes of this lobbying effort, the Firm received no confidential business information from Chamber members.

In its communications with Chamber members, the Firm has always made clear that it represents the Chamber, and not its members, in lobbying, and that the content of the Firm's communications with members is not confidential. While the Firm received confidential information from the Chamber about legislative strategies and tactics related solely to tax issues, it received no confidential information from or about any of the members of the Chamber.

Roadsprinters Inc. has been a member of the Chamber since the Chamber's inception 15 years ago. Jim Pickens has been the president of Roadsprinters for the last 20 years and was chair of the board of the Chamber during one of the years of the Firm's representation. Throughout its lobbying effort on behalf of the Chamber, the Firm worked primarily with the Chamber's executive director and not with the officers of the board.

Potential conflict: Samuel Dawes

Samuel Dawes, a member of the Firm, would serve as trial counsel for Ace Chemical in this matter. Seven years ago, while he was in solo private practice, Mr. Dawes represented Roadsprinters in a trademark registration. Mr. Dawes has been extensively interviewed by members of the Firm who have concluded that no information that Mr. Dawes learned, or could have learned, during the trademark registration could possibly be relevant to this litigation. There is a seven-year-old article from the *Franklin Daily News* spotlighting Mr. Dawes. In that article Mr. Pickens, president of Roadsprinters, is quoted as saying: "[Samuel Dawes] is a great guy and a great lawyer. Although it was not at all necessary for the work on the trademark registration, I told him how to develop client relationships and I introduced him to community business leaders. I knew he was someone who was going places—and I wanted to help him get there." Mr. Dawes reports that he has not had any contact with Mr. Pickens for the last five years.

Potential conflict: Ashley Kaplan

The Firm's Olympia office recently interviewed Ashley Kaplan for a position as a senior associate in that office. The Olympia office was very impressed with Ms. Kaplan and wants to make her an offer—the office badly needs someone with her expertise. Ms. Kaplan currently works for the Franklin office of Adams Bailey. Ms. Kaplan has provided a list of the clients for which she has done work at Adams Bailey, and Roadsprinters Inc. appears on that list.

B. Analysis

The analysis of this problem should be consistent with the Franklin Rules of Professional Conduct, which are identical to the ABA Model Rules.

1. Concurrent Representation of Trade Association

The concurrent representation of the trade association and Ace Chemical should be analyzed under Rule 1.7 of the Franklin Rules of Professional Conduct. Rule 1.7 prohibits an attorney from representing a client when "the representation of [that] client will be directly adverse to another client; or there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer."

The examinee should determine whether it matters that the potentially conflicting interests are represented by different offices of the Firm. To answer this question, the examinee should refer to Ethics Opinion 2015-212, which states that, regardless of the number of attorneys and/or offices, a law firm is one unified whole for purposes of imputation of conflicts of interest. Thus, it does not matter that the Columbia office represents the Chamber while the Franklin office represents Ace Chemical. If there is a conflict, it is imputed to the entire firm. While the Firm's representation of the Chamber is limited to lobbying, the *Hooper Manufacturing* court determined that lobbying is a form of legal representation.

The representation would only be "directly adverse" to another client if representation of the Chamber, of which Roadsprinters is a member (and Jim Pickens was once the board chair), is equivalent to the direct representation of Roadsprinters itself. According to the *Hooper Manufacturing* case, there is a multi-factor test for determining the answer to this question: First, did the Chamber member provide confidential information about the member's business to the lawyer that was necessary for the lawyer's representation of the trade association? And, even if not, did the lawyer tell the member that the information would be kept confidential? If the member did provide confidential information, or if the attorney told the member that information would be kept confidential, then the representation of the trade association is equivalent to the representation of the member.

Neither Roadsprinters nor Pickens provided confidential information about Roadsprinters' business to the Firm. In addition, the Firm was careful to tell all the Chamber members that any information they provided to the Firm was not confidential and that the Firm was representing the Chamber, not its members. Thus the representation of the Chamber is not equivalent to the representation of Roadsprinters, and, consequently, the Firm's representation of Ace would not be "directly adverse" to that of a current client.

Even if the representation is not directly adverse, Rule 1.7 requires that the analysis go further to determine whether there is a significant risk that the lawyer's representation of a client will "materially limit[]" his or her representation of another client. To this end, again according to *Hooper Manufacturing*, one must determine whether an employee of the member was in a powerful position in the trade association and directed the work of the attorney for the trade association. The closer the relationship between the member and the law firm, the more likely it is that the representation of the trade association—in this case the Chamber—would materially limit the lawyer's ability to represent an opponent of the member. Although Pickens served as chair of the board of the Chamber, he had limited contact with the Firm during that period. The work of the Firm was directed by the executive director of the Chamber, rather than by board members. Thus, it is unlikely that the Firm would be materially limited by any loyalty to Pickens or to Roadsprinters.

The Firm's representation of the Chamber does not pose a conflict of interest to its representation of Ace Chemical in its suit against Roadsprinters.

2. Dawes's Prior Representation of Roadsprinters

First the examinee must determine whether a conflict of interest of Mr. Dawes would be imputed to the Firm. Rule 1.10 provides: "While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9." Thus a conflict of Mr. Dawes would be imputed to the Firm.

The examinee must then determine if a conflict exists. The resolution of this issue is governed by Rule 1.9, which analyzes duties of loyalty to former clients. Rule 1.9(a) states: "A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are

materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing." The interests of the two clients are materially adverse—the current client, Ace, would be in direct opposition to the former client, Roadsprinters. Thus the question to be determined is whether the current representation is "substantially related" to the trademark registration Mr. Dawes pursued on behalf of Roadsprinters. According to Ethics Opinion 2015-212, a substantial relationship exists when the lawyer *could* have obtained confidential information during the first representation that would be relevant to the subsequent representation. It is immaterial whether the lawyer actually obtained such information or whether the lawyer actually uses it against the former client.

In this case, the matters are not substantially related—the information needed to pursue the trademark registration is not at all relevant to this representation. Mr. Dawes has been fully vetted, and the partners are convinced that nothing he learned or could have learned in the trademark registration would be of any benefit in the current litigation. However, we know from the newspaper article that Mr. Pickens did voluntarily share additional business information with Mr. Dawes, even though that information was unrelated to the trademark registration. Mr. Pickens provided Mr. Dawes with introductions to community leaders and told him how to develop clients. Is this additional business information protected by Rule 1.6, and, if so, does it make the representations substantially related? Even though Rule 1.6 is very broad, this information is not confidential. As stated in *Hooper Manufacturing*, Rule 1.6 only protects information "related" to the representation. Information voluntarily told to a lawyer that is not for the purpose of obtaining legal advice is not "related" to the representation.

Mr. Dawes's prior representation of Roadsprinters does not create a conflict of interest to the Firm's representation of Ace Chemical in its suit against Roadsprinters.

3. Hiring of Ashley Kaplan

Ms. Kaplan currently works for Adams Bailey (Roadsprinters' counsel) and has interviewed for a position with the Firm's Olympia office. In her disclosure to the Firm, she has indicated that, while at Adams Bailey, she has done work for Roadsprinters.

She would be working in the Olympia office, while the Ace litigation will be handled by the Franklin office. The examinee must determine whether, if Ms. Kaplan were to move to the Firm, her conflict of interest would be imputed to other offices of the Firm. To answer this question, the examinee should refer to Ethics Opinion 2015-212, which states that, regardless of the number of attorneys and/or offices, a law firm is one unified whole for purposes of imputation of conflicts of interest. Thus, it does not matter that Ms. Kaplan may be working in a different office than the one representing Ace; if there is a conflict of interest, it is imputed to the entire firm.

The potential conflict of interest should be analyzed under Rule 1.9(b) of the Franklin Rules of Professional Conduct, which states: "A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client: (1) whose interests are materially adverse to that person; and (2) about whom the lawyer had acquired information protected by Rule 1.6."

The interests of the two clients are materially adverse—the Firm's client, Ace, is going to sue the client of Ms. Kaplan's current employer. If Ms. Kaplan is going to come to the Firm, the Firm must determine whether the matters are "substantially related." According to Ethics Opinion 2015-212, a substantial relationship exists when the lawyer *could* have obtained confidential information during the first representation that would be relevant to the subsequent representation.

Rule 1.9(b), related to the work of a former firm, employs a more limited restriction than the "substantial relationship" test used in Rule 1.9(a) for the work by a lawyer for that lawyer's own former client. In order for a conflict to exist under Rule 1.9(b), the lawyer must actually have learned confidential information from the client. We don't know if Ms. Kaplan has actually done so. Rule 1.6 is exceedingly broad and protects all information relating to the representation. Rule 1.6(b)(7) allows lawyers to reveal confidential information to determine conflicts, but only if it does not violate privilege or otherwise compromise the attorney-client relationship. It is very likely that Ms. Kaplan has learned information related to the representation. Moreover, a careful lawyer (which we assume the Firm to be) would not want to violate Rule 1.6 by asking too many questions of Ms. Kaplan about Roadsprinters. The Firm would be cautious to assume that a conflict exists and determine what to do.

Examinees could also reasonably analyze Ms. Kaplan's potential conflict under Rule 1.9(a). Ms. Kaplan identified Roadsprinters as one of the clients for which she had done work while at the Adams Bailey law firm, and so it could be determined that she "formerly represented" Roadsprinters, and her situation falls under Rule 1.9(a). But those examinees must still go on to discuss the application of Rule 1.10 screening procedures that would allow the Firm to take on Ace as a client.

Assuming that Ms. Kaplan comes to work at the Firm and that she has learned information protected by Rule 1.6, the Rules permit her to be screened from the matter. According to Ethics Opinion 2015-212, screening mechanisms must include, at a minimum, denial of access to all physical and digital information regarding the case, notice to all firm members of the disqualification of the attorney and instructions to screen her from any information about the case, and withholding of any compensation to the attorney resulting from representation in the matter from which she is being screened.

Rule 1.10 requires that the disqualified lawyer be timely screened from any participation in the matter and be apportioned no part of the fee from the matter. Further, written notice of the screening must be periodically provided to the former client. This notice must include a description of the screening process, a statement of the firm's and of the screened lawyer's compliance with the Rules, a statement that review may be available before a tribunal, and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures.

C. Conclusion

The Firm can represent Ace Chemical in this litigation. The Firm's representation of the Chamber poses no conflict. Likewise, Mr. Dawes's prior representation of Roadsprinters is not a barrier to the representation. However, the Firm can hire Ashley Kaplan only if she is appropriately screened from this matter.

February 2017
MPT-2 Point Sheet:
In re Guardianship of Henry King

In re Guardianship of Henry King

DRAFTERS' POINT SHEET

This performance test requires the examinee to write proposed findings of fact and conclusions of law in a guardianship case in order to prevent the client's brother from being named guardian.

The File contains a call memo, an office memorandum on how to draft findings of fact and conclusions of law, and excerpts from the hearing transcript containing relevant testimony by the client and the client's brother.

The Library contains three sections from the Franklin Guardianship Code concerning the appointment and removal of guardians. It also contains two cases: *Matter of Selena J.,* concerning the statutory priorities for appointment as guardian; and *In re Guardianship of Martinez*, concerning whether good cause exists to remove a guardian.

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

I. FORMAT AND OVERVIEW

The assigning partner requests that the examinee draft the proposed findings of fact and conclusions of law. The File includes an office memorandum that lays out the office's conventions for drafting such a document. Further, the Library contains a case, *In re Guardianship of Martinez,* in which the appellate court quotes extensively from and approves the findings of fact and conclusions of law created by the lower court. This gives examinees a court-approved sample of findings of fact and conclusions of law.

The memorandum suggests the following guidelines for drafting:

General

- The examinee should state all findings of fact first and then state all conclusions of law.
- The examinee should draft both findings and conclusions in separate, sequentially numbered paragraphs.
- Each paragraph should consist of one or at most two sentences stating a single finding or conclusion. Examinees are referred to the *Martinez* case for an example of findings and conclusions.
- The proposed findings and conclusions, while drafted to favor the client, should not be explicitly argumentative. Instead, the examinee should frame and sequence the findings and conclusions in a way that makes it most likely that the judge will adopt them.

Findings of Fact

- The examinee should set forth only those facts that the testimony and other evidence support. (Citations to the hearing record will be added later as appropriate.)
- The examinee should include all the facts relevant to the legal issues addressed in the conclusions of law. Any facts not relevant to those conclusions should be omitted.
- The examinee should address those facts not favorable to the client's position, framing them in a way that, without misstating them, minimizes their effect.
- The examinee should frame and sequence the findings in a way that supports the proposed conclusions of law. The instructions note that, before drafting, the examinee should consider how best to organize the findings to lead to the legal conclusions the examinee would like the court to reach, in the way that the court is most likely to adopt.

Conclusions of Law

- The examinee should state first the general legal principles that apply to the case. These principles should be stated concisely and include citations to relevant legal authorities.
- After stating general legal principles, the examinee should draft a series of paragraphs that apply the law to the facts so as to reach conclusions that resolve the issues in this case. Again, there should be citations to the supporting legal authorities.

Finally, the memorandum gives an example of a poorly drafted finding of fact and then a redraft that more closely matches the requirements of the memorandum.

II. FACTS

The assigned task requires the examinee to draft proposed findings of fact. This section presents the facts that should be referenced in an examinee's proposed findings without formatting them as required by the problem.

- In 2013, Henry King learned that he suffered from a condition that might lead to his becoming incompetent to manage his own affairs. At that point, Henry King executed a durable financial power of attorney and an advance directive, naming his son, Noah King, as his financial agent and his health-care agent.
- Each document included provisions nominating Noah King as the proposed guardian in the event a later guardianship of Henry King became necessary.
- The parties have stipulated that Henry King was competent at the time he executed both documents and that both documents validly appointed Noah.
- Since the execution of those documents, Henry King's condition has deteriorated to the point where he is no longer competent to manage his own affairs.

- The client, Ruth King Maxwell, is Henry King's adult daughter. She lived in a different state at the time the documents were executed and during the early period of her father's current mental deterioration. About six months ago, she moved to a location closer to her father and started to visit him two to three times per week.
- Eighteen months ago, before she moved back to Dry Creek, Franklin, Ruth found out that her father had suffered a fall that caused severe bruising to one of his arms. Her brother, Noah, stated that he knew about the bruises but that he did not think that they were that serious. The two of them took Henry King to the doctor. Henry had severe bruising, but no broken bones.
- In June 2016, still before Ruth moved, Henry broke a bone in his wrist. Noah learned about the injury first by noticing that his father complained of being "a little stiff." He heard from a neighbor the next day that Henry's wrist was swollen. Noah arrived at his father's home and discovered that the neighbor was correct. He took his father to the emergency room, where the doctor put the wrist in a cast. It has since healed.
- Ruth did not learn about the broken wrist until after she had moved back to Dry Creek.
- In August 2016, after Ruth moved back, she noticed that her brother was not buying enough food for her father. She started to buy food and eventually hired a person to shop and cook for him.
- Within the last six months, Ruth found an overdue notice from the electric company at her father's house. She spoke with Noah, who said that he had missed a few months' payments on the electric bill but that she should not worry about it.
- She reviewed her father's bank statements, which were kept at his home, and found that he had been spending large amounts of money on gifts for other people. She reviewed a two-month period in which her father had spent a total of $2,200 online; Henry King has a fixed monthly income of $2,515 from his pension and Social Security. Ruth spoke with Noah again, and he acknowledged that he knew about these purchases and that they made it hard for him to keep up with his father's bills. Noah stated the same thing in his testimony and indicated that he "didn't think it was [his] place to keep [Henry] from spending his money the way he wanted."
- After she learned this, Ruth contacted the examinee's law firm and initiated a guardianship proceeding. Noah has responded, asking the court to honor his father's nomination of Noah as prospective guardian.
- The court held an evidentiary hearing and made several findings that the parties did not contest:
    - Henry King's nomination of Noah King as prospective guardian was valid at the time it was made.
    - At the time of the hearing, Henry King is incompetent, cannot manage his affairs, and requires a guardian.

- The court has asked all counsel (Ruth's attorney, Noah's attorney, and Henry's court-appointed attorney) for proposed findings of fact and conclusions of law.
- The examinee's work product should persuade the court that
  1) it has the legal authority to override the nomination of Noah as guardian; and
  2) good cause exists to override the nomination, and Ruth should be appointed guardian of Henry.

III. LEGAL ISSUES

The Library presents two potential legal issues for the examinee to address in the conclusions of law: 1) whether and in what circumstances the trial court has the legal authority to override a prior nomination of a proposed guardian, and 2) whether Ruth King should be appointed guardian because Noah King's conduct as health-care agent and holder of the financial power establishes good cause to override the nomination.

The task requires examinees to address these legal issues by drafting findings of fact and conclusions of law. This section discusses the legal issues that should be referenced in an examinee's proposed conclusions but does not format them as required by the problem.

A. Trial Court Authority to Override the Nomination of a Guardian

Franklin law permits a trial court to override such a nomination, but only if good cause exists to do so. To reach this conclusion of law, a thorough examinee will have to cover several preliminary points, as follows.

First, Franklin law states several priorities for a court to consider in deciding who to appoint as guardian, including two that are relevant here: the preference for a person previously nominated by the proposed ward, and the preference for the adult child of the proposed ward. Franklin Guardianship Code § 401(b). The nominated individual has priority over any other category of person. In this case, Noah satisfies both of these preferences; Ruth satisfies only one.

Second, the same statute makes clear that the court "may disregard an individual who has preference and appoint an individual who has a lower preference or no preference." *Id.* § 401(a). However, the same sentence goes on to say that the court may refuse to appoint a person previously nominated by the proposed ward "*only upon good cause shown*." *Id*. (emphasis added). In *Matter of Selena J.*, the Franklin Court of Appeal described this language as creating a preference for the previously nominated person, but stated that the preference could be overcome with a sufficient factual showing of good cause.

In the same case, the court reversed a trial court's grant of summary judgment because the trial court failed to consider facts which might have established the good cause required to override an earlier nomination of a guardian. The court remanded. In doing so, it provided guidance on the "good cause" standard, stating that the decision to *override* a nomination was governed by the same principles that apply to a decision to *remove* a guardian for breach of

fiduciary duty. The court stated that this was especially true where the nominated person had served as a fiduciary under a power of attorney or an advance health-care directive.

In this case, Noah has served as a fiduciary under a power of attorney and an advance directive. Thus, despite the prior nomination, the trial court may refuse to nominate him if it finds that his conduct amounts to a breach of his fiduciary duties. The examinee has the task of drafting conclusions of law that state these general principles in a sequence of single-sentence paragraphs.

B. Good Cause to Override Henry King's Nomination of Noah King and Appoint Ruth as Guardian

To lay the groundwork to persuade the court that Ruth should be appointed guardian for her father, examinees should set forth those facts that demonstrate why there is good cause to remove Noah as the nominated guardian. Franklin law recognizes several different ways that a fiduciary can breach his fiduciary duties. In *In re Guardianship of Martinez*, the Franklin Court of Appeal summarizes the ways in which this may occur. "A guardian can breach this duty by action or neglect, if the action or neglect harms the ward. A fiduciary can harm the ward through mismanagement of finances, neglect of the ward's physical well-being, or similar actions." In *Martinez*, the court affirmed the removal of a guardian who had spent the ward's money in a way that benefitted the guardian alone—in other words, for self-dealing.

While the court in *Martinez* noted that action or neglect can constitute a breach of fiduciary duty, the facts of that case involved only self-dealing. The previous case, *Matter of Selena J.,* presented a situation in which the opponent of the proposed guardian alleged neglect. The specific allegations included both a failure to manage the proposed ward's finances after she became incompetent and a failure to seek medical care for various illnesses that she had suffered. The court did not comment on the persuasive effect of those allegations, but it did indicate that, if proven, neglect of finances and neglect in seeking medical care could constitute good cause to refuse to appoint a previously nominated person as guardian.

In this case, the examinee will need to draft findings of fact that lay out in sequence the different events that support a finding of good cause not to appoint Noah King:

1) the fall that bruised Henry King's arm, for which Noah failed to seek treatment until Ruth prompted him to do so

2) the broken wrist, which Noah failed to take seriously until after swelling had occurred and a neighbor prompted him to take action

3) Noah's failure to purchase adequate and varied food for his father

4) Noah's failure to rein in his father's spending on gifts

5) Noah's failure to keep up with his father's bills, resulting in an overdue notice from a utility and the threat to put Henry's debts to his doctor into collection

The examinee will also need to draft conclusions of law that state explicitly that neglect of financial and medical care can constitute good cause to refuse to appoint a previously nominated person. Moreover, the examinee will need to draft conclusions of law that frame the facts above as neglect and a breach of Noah's fiduciary duties as health-care agent and holder of a durable power of attorney.

The examinee's task is to apply the general principles of Franklin law to these facts in a way that leads to persuasive proposed conclusions of law establishing Noah's breach of fiduciary duty. The task does not ask the examinee to articulate counterarguments. So, for example, an examinee who articulates that Henry King should have the right to spend money as he sees fit (as Noah King stated in his testimony) will have failed to understand the persuasive purpose of the task.

IV. DRAFTING OF FINDINGS OF FACT AND CONCLUSIONS OF LAW

This performance test requires examinees to draft a document that may not be familiar to them from their previous training. They are asked to rely on the instructions given in the office memorandum and on the exemplar of findings of fact and conclusions of law reproduced in the *Martinez* case. The drafters intend these instructions and this exemplar to include all the points on which graders might rely in grading an examinee's performance. These grading points include the following:

1) Overall organization:

- The examinee should state all Findings of Fact first and then all Conclusions of Law.
- The examinee should draft both findings and conclusions in separate, sequentially numbered paragraphs.
- Each paragraph should consist of one or at most two sentences stating a single finding or conclusion. Examinees are referred to *Martinez* for an example of findings and conclusions. An examinee need not use only simple declarative sentences with a single subject, verb, and object. Both the office memorandum and *Martinez* include findings of fact that have more complex sentences with dependent clauses.
- The proposed findings and conclusions, while drafted to favor the client, should not be explicitly argumentative. Instead, the examinee should frame and sequence the findings and conclusions in a way that makes it most likely that the judge will adopt them.

2) Findings of fact:

- The examinee should set forth only those facts that the testimony and other evidence support. (A paralegal will add citations to the hearing record as appropriate.)
- The examinee should include only those facts relevant to the legal issues addressed in the conclusions of law. An examinee who includes irrelevant facts should not receive full credit.

- The examinee should address those facts not favorable to Ruth's position, framing them in a way that, without misstating them, minimizes their effect. For example, although it appears that Noah has in fact caught up with his father's bills, an examinee could state that Noah left the power bill unpaid for several months. An examinee who omits relevant and helpful facts should not receive full credit.

- The examinee should frame and sequence the findings in a way that supports the proposed conclusions of law. Before drafting, the examinee should consider how best to organize the findings to lead to the legal conclusions the examinee would like the court to reach. An examinee might plausibly organize the facts in a series of paragraphs grouped by the related legal issues.

3) Conclusions of law:

- The examinee should first concisely state the general legal principles that apply to the case, including citations to relevant legal authorities.

- After stating general legal principles, the examinee should draft a series of paragraphs that apply the law to the facts so as to reach conclusions that resolve the issues in this case. Again, there should be citations to the supporting legal authorities.

The memorandum strongly encourages examinees to take time to sequence the findings and conclusions in the most persuasive way, without being explicitly argumentative. Examinees should draft in such a way as to persuade a judge to adopt these findings of fact and conclusions of law.

Finally, the office memorandum gives an example of a poorly drafted finding of fact and then a redraft that more closely matches the requirements of the memorandum. Examinees are also directed to *Martinez* as an exemplar of properly drafted findings and conclusions.

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