THE MPT®

MULTISTATE PERFORMANCE TEST

July 2018 MPTs and Point Sheets

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Preface

The Multistate Performance Test (MPT) is developed by the National Conference of Bar Examiners (NCBE). This publication includes the items and Point Sheets from the July 2018 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.

July 2018
MPT-1 File:
State of Franklin v. Hale

OFFICE OF THE DISTRICT ATTORNEY FOR THE STATE OF FRANKLIN
COUNTY OF JUNEAU

OFFICE MEMORANDUM

To: Examinee
From: Juliet Packard, District Attorney
Date: July 24, 2018
Re: Motion for new trial in *State v. Hale*, Case No. 17 CF 1204

In April, our office prosecuted Henry Hale for attempted murder. The jury convicted him. The evidence at trial demonstrated that Hale shot Bobby Trumbull during an argument in the courtyard of Trumbull's apartment complex. Our only substantive trial witnesses were the investigating detective and Trumbull. The defense did not call any witnesses.

Hale timely filed a motion for a new trial, and the judge recently held a brief evidentiary hearing. I need you to prepare the "Legal Argument" portion of our brief in response to Hale's motion for a new trial, following the office guidelines for drafting persuasive briefs.

Hale's motion raises three issues, two regarding our purported failure to comply with the requirements of *Brady v. Maryland*, 373 U.S. 83 (1963), and one arising under Franklin Rule of Evidence 804. With each of these issues, you need to discuss not only whether there was a violation of law, but also whether any violation entitles Hale to a new trial under Franklin Rule of Criminal Procedure 33. I have attached a copy of the relevant portions of Hale's brief, as well as pertinent pages from the trial transcript and the transcript of the hearing on the motion for a new trial.

OFFICE OF THE DISTRICT ATTORNEY FOR THE STATE OF FRANKLIN
COUNTY OF JUNEAU

OFFICE MEMORANDUM

To: Office staff
From: Juliet Packard, District Attorney
Date: September 5, 2016
Re: Guidelines for drafting persuasive briefs

…

III. Legal Argument

Your legal argument should be brief and to the point. Make your points clearly and succinctly, citing relevant authority when appropriate for each legal proposition.

Do not restate the facts as a whole at the beginning of your legal argument. Instead, integrate the facts into your legal argument in a way that makes the strongest case. The body of each argument should analyze applicable legal authority and persuasively argue how both the facts and the law support the state's position. Be sure to cite both the law and the evidence. Emphasize supporting authority but address contrary authority as well; explain or distinguish contrary authority in the argument.

Use headings to separate the sections of your argument. When drafting your headings, do not state abstract conclusions, but integrate factual detail into legal propositions to make them persuasive. An ineffective heading states only: "The motion to suppress should be denied." An effective heading states: "The motion to suppress should be denied because the officer read the defendant his rights under *Miranda v. Arizona* and the defendant signed a statement waiving those rights."

* * *

STATE OF FRANKLIN
DISTRICT COURT OF JUNEAU COUNTY

STATE OF FRANKLIN, **Plaintiff,** **v.** **HENRY HALE,** **Defendant.**	**Case No. 17 CF 1204**

DEFENDANT'S BRIEF IN SUPPORT OF MOTION FOR A NEW TRIAL

FACTS

On June 20, 2017, an anonymous male called 911 to report the shooting of Bobby Trumbull at the Starwood Apartments. Later that day, Denise Lee, the investigating detective, interviewed Sarah Reed, a resident of the apartment complex. During discovery, the prosecution provided the defense with a video recording of the detective's interview with Reed. In that interview, Reed said that she had been on her balcony watching a video when she looked up and saw defendant Hale arguing with another man in the courtyard. She resumed watching the video and then heard a gunshot. She looked up and saw Hale running from the courtyard. The other man had fallen to the ground.

After trial, defense counsel learned that Reed had made a subsequent statement to police, specifically Detective Mark Jones, that recanted her initial statement. The prosecution never provided information to the defense about the second statement.

In addition, *after trial*, defense counsel learned that the victim, Bobby Trumbull, told the emergency medical technician (EMT) immediately after the incident that he was not certain who had shot him. Trumbull also called Hale a "rat," said that Hale thought that Trumbull owed him money, and said that the shooting was "all [Hale's] fault." This evidence contradicted Trumbull's trial testimony that identified Hale as the shooter. The prosecution, however, failed to disclose this evidence to the defendant.

Reed and Hale were married on August 25, 2017, after the shooting and well before the trial. At trial, Hale asserted the spousal testimonial privilege, preventing Reed from testifying against her husband. The prosecution then sought to admit Reed's initial out-of-court statement given to Detective Lee during her interview, under Franklin Rule of Evidence 804(b)(6), arguing that Hale had wrongfully caused Reed to become unavailable to testify. Hale objected. This court overruled the objection and admitted Reed's highly prejudicial out-of-court statement to Detective Lee, in which Reed identified Hale as the individual in the courtyard with Trumbull. The jury convicted Hale of attempted murder.

ARGUMENT

I. The Prosecution Violated *Brady v. Maryland* by Failing to Disclose the Sole Eyewitness's Recantation and the Victim's Exculpatory Statements.

In *Brady v. Maryland*, 373 U.S. 83 (1963), the United States Supreme Court held that the government cannot suppress evidence that is favorable to the defendant and that is material to either guilt or sentencing. In analyzing whether *Brady* has been violated, this court must make three determinations: (1) whether the evidence in question was favorable to the defendant, (2) whether it was suppressed by the government, and (3) whether it was material. *Strickler v. Greene*, 527 U.S. 263 (1999). A prosecutor's good faith is irrelevant. *Brady.*

Reed's recantation of her prior identification of Hale as the shooter is favorable to the defense. In *Brady*, the Supreme Court defined evidence favorable to the defendant as evidence that would make a neutral fact-finder less likely to believe that the defendant committed the crime with which s/he was charged. Knowing that Reed, the only known eyewitness, had recanted her statement would make a fact-finder less likely to believe that Hale committed the crime. Similarly, Trumbull's statements to the EMT, in which he admitted that he was not certain who had shot him and expressed ill feelings toward Hale, were favorable to the defendant and directly contradicted Trumbull's trial testimony. A neutral fact-finder would be less likely to believe Trumbull's trial testimony if it heard that Trumbull had made these contradictory statements to the EMT.

Information about Reed's recantation was suppressed by the prosecution. The evidence was in the possession of the prosecution because it was held by Detective Jones. Evidence that is in the physical possession of an investigating officer is considered to be in the possession of the government, even if the investigating officer does not disclose the evidence to the prosecutor. *Kyles v. Whitley*, 514 U.S. 419 (1995). Likewise, the information about Trumbull's statements to the EMT was in the government's possession. The ambulance service is an agency of the government of Franklin City. Both pieces of evidence were suppressed because the government did not provide this evidence to the defendant.

The prosecutor's office provided discovery to the defendant through an "open file" policy. The prosecutor gave everything in her file to the defense. Neither of these pieces of evidence was in the prosecutor's file. In *State v. Haddon* (Fr. Sup. Ct. 2012), the court held that the "open file" policy could actually deter a defendant from investigating whether other information might be available. It would be reasonable for a defendant who was the beneficiary of an "open file" policy to assume that all relevant and exculpatory information was in the file and was thus disclosed.

Finally, the evidence at issue is material. Evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Id*. Where the state has suppressed multiple pieces of evidence, the determination of materiality should be made on a cumulative basis. *Id*. Here, if the defendant had been given all of the suppressed evidence, there is more than a reasonable probability that the result of the trial would have been different.

A determination that suppressed evidence is material necessitates a finding that the defendant has been prejudiced. *Kyles*. Therefore, under Franklin Rule of Criminal Procedure 33, the defendant is entitled to a new trial.

II. Hale was Prejudiced by the Admission of Reed's Hearsay Statements; He Did Not Marry Her with the Intention of Causing Her Unavailability for Trial.

Hale's conduct in marrying Reed did not satisfy the requirements of Franklin Rule of Evidence 804(b)(6) for admission of Reed's hearsay statements. To satisfy that Rule, a significant motivation behind the defendant's conduct must have been to cause the unavailability of the declarant. Hale did not marry Reed with the intent of making her unavailable for trial. The facts of this case are much like *State v. Preston* (Fr. Ct. App. 2011), in which the defendant married the witness after the alleged crime. In *Preston*, the court held that the mere act of marriage did not constitute an intention to wrongfully cause the declarant's unavailability. And, as a policy matter, it is inconsistent for the court to uphold a particular marriage through the spousal privilege, thereby preventing a spouse from testifying, and then to undermine this same marriage by finding that the marriage itself served to wrongfully cause the spouse's unavailability in the court proceeding.

An evidentiary rule violation, unlike a *Brady* violation, requires a separate determination of prejudice under Franklin Rule 33 to warrant a new trial. Here Hale was prejudiced by the erroneous introduction of Reed's out-of-court statements. Reed was the only known eyewitness to the events, and the prosecution was allowed to present hearsay that was never subject to cross-examination. But for this error, there is a strong probability that the result of the trial would have been different. *Preston*. This error was made even more prejudicial by the state's *Brady* violation, which hid from the defense those inconsistent statements that could have been used to impeach Reed and Trumbull. The state was in possession of believable statements by Reed and Trumbull that contradicted their statements admitted at trial.

* * *

Excerpts from *State v. Hale* Trial Transcript, April 26, 2018

TESTIMONY OF SARAH REED

Prosecutor: Please state your name for the record.

Defense Att'y: Your Honor, could you please excuse the jury for a few moments? [Whereupon the jury was excused.]

Defense Att'y: The defendant asserts spousal privilege under § 9-707 of the Franklin Statutes.

Court: Ms. Reed, when did you marry the defendant?

Reed: August 25, 2017.

Court: When did he propose?

Reed: July 25, 2017.

Court: When did you start dating?

Reed: We dated four years ago for about seven months, but then we broke up. We got back together in March 2017.

Court: Ms. Reed, did Mr. Hale ever indicate to you that he married you so that you couldn't testify at his trial?

Reed: Henry married me because he loves me. He did say that he wanted to marry me quickly, before the trial started.

Court: Did he ever threaten you or tell you that bad things would happen if you did testify against him?

Reed: He did say that it would be hard for us to stay together if I testified against him. I'm not sure if he'd really leave me because of this, but I hope I don't have to find out. I do know that we love each other.

Court: Thank you. The witness will be excused based upon the defendant's exercise of spousal privilege. Bailiff, please ask the jury to come back now.

DIRECT TESTIMONY OF DETECTIVE DENISE LEE

Prosecutor: Please state your name for the record.

Lee: I am Detective Denise Lee of the Franklin City Police Department.

Prosecutor: Did you have occasion to investigate the shooting of Bobby Trumbull at the Starwood Apartments on June 20, 2017?

Lee: Yes. We received an anonymous call stating that a man had been shot in the courtyard of the Starwood Apartments. I arrived after the victim, Mr. Trumbull, had been taken

to the hospital. We could locate only one witness to the shooting, and that was Sarah Reed.

Prosecutor: And what did Ms. Reed tell you?

Defense Att'y: Objection. Hearsay.

Court: I am going to excuse the jury and hear your argument for why this is or is not admissible evidence. [Whereupon the jury was excused from the courtroom.]

Defense Att'y: Your Honor, this is blatant hearsay. The state is attempting to introduce Ms. Reed's out-of-court statements for the truth of the matter asserted.

Prosecutor: Your Honor, Mr. Hale married Ms. Reed after the shooting but before this trial. A significant motivation for the marriage was to prevent Ms. Reed from testifying in this case. We have also heard that he threatened to leave her if she testified. Consequently, the hearsay is admissible because the defendant wrongfully caused the witness's unavailability under Franklin Rule of Evidence 804(b)(6).

Defense Att'y: Your Honor, Ms. Reed and Mr. Hale were married on August 25, 2017. There is no evidence in the record that the marriage was intended to wrongfully cause the unavailability of Ms. Reed. And Ms. Reed herself said that she wasn't sure what the defendant meant when he said that it would be difficult for them to stay together if she testified. She also made clear that she and Mr. Hale loved each other.

Court: The court finds itself bound to respect the marriage as being valid under Franklin law. Thus this court allowed Mr. Hale to assert the spousal testimonial privilege and ruled that Ms. Reed could not be compelled to testify. But the question before this court is a much more nuanced one: whether by virtue of that valid marriage, along with his statements to Ms. Reed, Mr. Hale intended to wrongfully cause, and in fact did wrongfully cause, Ms. Reed to be unavailable as a witness. Based upon the evidence before this court, I am going to overrule the defense's objection and admit the statement. Bailiff, please bring the jury back in. [Whereupon the jury was reseated.]

Prosecutor: Detective Lee, could you tell us what Ms. Reed told you later in the afternoon on June 20, 2017, immediately after the incident?

Lee: She told me that she had been sitting on her balcony above the courtyard in the apartment complex watching a video on her computer. She saw two men yelling at each other in the courtyard. She recognized one of them as her boyfriend, Henry Hale. She couldn't make out what they were saying, but she knew that the two men were

arguing. She went back to watching the video and then heard a shot. She looked up and saw Mr. Hale running out of the courtyard and saw Mr. Trumbull collapsed on the ground.

CROSS-EXAMINATION

Defense Att'y: Did you ever find any forensic evidence linking Mr. Hale to the crime?

Lee: No.

* * *

DIRECT TESTIMONY OF BOBBY TRUMBULL

Prosecutor: Please state your name for the record.

Trumbull: Bobby Trumbull.

Prosecutor: What happened on June 20, 2017, in the courtyard of the Starwood Apartments?

Trumbull: Well, I was arguing with Mr. Hale [witness points to the defendant], and he pulled out a gun and shot me in the shoulder.

Prosecutor: What were you arguing about?

Trumbull: I guess I owed him some money and he wanted it back.

Prosecutor: Did you owe him the money?

Trumbull: Yes.

Prosecutor: Did you in any way provoke him before he shot you?

Trumbull: No.

CROSS-EXAMINATION

Defense Att'y: You did owe Mr. Hale money, didn't you?

Trumbull: Yes.

Defense Att'y: And have you ever paid him back?

Trumbull: No.

Defense Att'y: And, in 2014, you were convicted in Franklin of the felony of fraudulently obtaining money, weren't you?

Trumbull: Yes.

* * *

Excerpts from Hearing on Defendant's Motion for a New Trial, July 17, 2018

DIRECT TESTIMONY OF DETECTIVE MARK JONES

Defense Att'y: Detective, does your file contain notes about Ms. Reed's recantation in this case?

Jones: I'm not sure I would characterize it as a recantation. But as my notes indicate, she did come to the police station on August 26, 2017, about two months after the incident. I met with her, and she told me that Mr. Hale was not the shooter at the Starwood Apartments on June 20, 2017. I asked her who was in the courtyard with the victim and she said she didn't know. I asked her why she lied to Detective Lee on the day of the crime and she just shrugged. I asked for more details and she shrugged and said, "He just told me to tell you that he didn't do it." I asked her who the "he" was who told her to recant her statement and she just shrugged. She never made eye contact with me, and she appeared to be nervous. I asked her if she was afraid of her husband and she shrugged.

CROSS-EXAMINATION

Prosecutor: Detective Jones, were you involved in the investigation of the shooting of Bobby Trumbull?

Jones: Yes, I was part of the team that worked on this case.

Prosecutor: Do you happen to know whether Ms. Reed was married to the defendant at the time she came to your precinct?

Jones: Yes, she told me that they had just been married the day before. She also told me that her husband had told her that she would not have to testify in court because they were now married and that he was going to tell the court to keep out her testimony.

Prosecutor: Did you place notes about Ms. Reed's August 26, 2017, statement in the case file?

Jones: Yes, I did.

Prosecutor: Did you provide information about this second statement to the prosecutor's office?

Jones: I was out on medical leave when the prosecutor's office requested information from our file. I don't know who processed the request. I assumed that all information was given to the prosecutor.

DIRECT TESTIMONY OF ASSISTANT DISTRICT ATTORNEY LUCY BEALE

Defense Att'y: Ms. Beale, you were the chief prosecutor in this case, correct?

Beale: Yes.

Defense Att'y: Did you give the defense information about Ms. Reed's August 26th statement to Detective Jones?

Beale: No, I didn't. But I didn't know about it until after the trial.

Defense Att'y: Were you provided with information about the August 26th statement?

Beale: No. I asked the police department for their file. I received what I thought was a complete record, but there was no information about a statement on August 26, 2017, or any information suggesting that Ms. Reed had made a second statement.

Defense Att'y: Before trial, did you give the defendant access to everything in your office's file?

Beale: Yes, our office follows an "open file" policy.

DIRECT TESTIMONY OF GIL WOMACK

Defense Att'y: You are an emergency medical technician for the Franklin City ambulance service?

Womack: Yes.

Defense Att'y: Is the ambulance service part of the City government?

Womack: Yes.

Defense Att'y: Did you help transport Mr. Trumbull to Franklin City Hospital on June 20, 2017?

Womack: Yes.

Defense Att'y: Did Mr. Trumbull say anything to you?

Womack: He blurted out, "I don't know exactly what happened or who shot me, but that rat Henry Hale thinks I owe him money. This is all his fault."

Defense Att'y: And what happened?

Womack: After that he went to sleep—we were giving him heavy narcotics intravenously….

CROSS-EXAMINATION

Prosecutor: Mr. Womack, other than transporting Mr. Trumbull, were you in any way involved in the prosecution or investigation of the attempted murder of Mr. Trumbull?

Womack: No, I wasn't even called as a witness.

Prosecutor: If Mr. Hale's attorney had asked to speak to you before trial, would you have voluntarily spoken to him?

Womack: Yes.

Prosecutor: And would you have told him everything you just testified to today?

Womack: Yes, I would have told him exactly what I just testified to.

July 2018
MPT-1 Library:
State of Franklin v. Hale

Relevant Franklin Statutes and Rules

Franklin Rule of Evidence 804. Hearsay Exceptions; Declarant Unavailable

(a) Criteria for Being Unavailable. A declarant is considered to be unavailable as a witness if the declarant:

> (1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies; . . .

(b) The Exceptions. The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness: . . .

> (6) **Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability.** A statement offered against a party that wrongfully caused—or acquiesced in wrongfully causing—the declarant's unavailability as a witness, and did so intending that result.

Franklin Criminal Statute § 9-707. Spouse's Privilege Not to Testify Against Spouse

One spouse cannot be compelled to give testimony against his or her spouse who is a defendant in a criminal trial. Only the accused may claim the privilege. The spouses must be married at the time that the privilege is asserted; so an ex-spouse can be compelled to give testimony about a defendant to whom he or she was previously, but is no longer, married.

Franklin Rule of Criminal Procedure 33

Upon the defendant's motion, the court may vacate any judgment and grant a new trial if an error during or prior to trial violated a state or federal constitutional provision, statute, or rule, and if the defendant was prejudiced by that error. In appropriate circumstances, the court may take additional testimony on the issues raised in the motion. No issue may be raised on appeal unless it has first been raised in a motion for new trial.

Haddon v. State
Franklin Supreme Court (2012)

Defendant Miriam Haddon appeals her conviction of robbery on the ground that the prosecution failed to satisfy its obligations under *Brady v. Maryland*, 373 U.S. 83 (1963). The Franklin Court of Appeal affirmed the conviction. We reverse and remand.

Haddon was working as a prostitute, and she was accused of taking money from one of her customers while threatening to harm him. At trial, the customer, Tim Morgan, testified that Haddon took $1,000 from his wallet and threatened to "cut him in little pieces" if he tried to stop her. The robbery occurred while they were in a motel room; there were no other witnesses to the incident. The motel owner testified that he had seen Morgan and Haddon when they checked in and that Morgan's wallet "was full of money—all sorts of bills." In addition, a clerk from a nearby convenience store testified that Haddon entered the store shortly after the time of the alleged robbery and had "a purse full of money."

Haddon argues that the prosecution suppressed two pieces of evidence: (1) inconsistent statements Morgan made to police on various occasions and (2) forensic tests that found none of Haddon's fingerprints on Morgan's wallet. Defense counsel learned of this evidence after trial from the investigating detective. The evidence was not given to the defense before trial.

Brady established the requirement, under the due process clause of the Fifth and Fourteenth Amendments, that the prosecution not suppress any exculpatory evidence. Later opinions established that the government's burden is to provide the defendant with all material exculpatory evidence, regardless of whether the defendant requests it. There are three components of a *Brady* violation: (1) The evidence must be favorable to the defendant; (2) the government must have suppressed the evidence, either willfully or unintentionally; and (3) the evidence must be material. *Strickler v. Greene*, 527 U.S. 263 (1999).

Thus, first, we must determine whether the evidence was favorable to the defendant. Evidence which will serve to impeach a prosecution witness is "favorable" evidence. *Giglio v. United States*, 405 U.S. 150 (1972). Here, the evidence consisted of police interviews with Morgan in which he gave conflicting accounts of the alleged robbery. In one account, he claimed that nothing happened. In another, he claimed that he voluntarily gave Haddon the money. This evidence would serve to impeach Morgan and is therefore favorable to Haddon. It would have benefitted her case had the defense been able to cross-examine Morgan about the conflicting

statements that he made to police officers. Likewise, the forensic evidence is favorable. A neutral fact-finder who learned that Haddon's fingerprints were not found on Morgan's wallet would be less likely to believe that Haddon had committed the crime.

Next, we must determine whether the government suppressed the evidence. The government claims that it did not intentionally suppress evidence. Indeed, this prosecutor's office has an "open file" policy—it provides everything in its file to defense counsel, even if providing such information is not required by the Rules of Criminal Procedure. But under *Brady*, it does not matter whether the suppression was intentional. The investigating officers possessed exculpatory information that the government failed to provide to the defense before trial. *Brady* violations occur whether the suppression was intentional or inadvertent. When the prosecution has adopted an open-file policy, "it is especially unlikely that counsel would have suspected that additional impeaching evidence was being withheld." *Strickler*. Because the prosecution here had an open-file policy, the defense would have had no reason to believe that there were conflicting statements to police that were not in the prosecution's file.

Finally, we must determine whether the evidence was material—that is, whether, had the jury been provided with the evidence, there is a reasonable probability that the result would have been different. When the state suppresses evidence favorable to the defendant, the only fair determination of materiality is a collective one. The state's obligation is not a piece-by-piece obligation. Rather, it is a cumulative obligation to divulge all favorable evidence. Any other result would tempt the state to withhold evidence, in the hope that, individually, each piece of evidence would not make a difference.

We have concluded that the evidence in question was favorable to Haddon and was suppressed by the state. We further conclude that, had the state timely disclosed the evidence to the defendant, there is a reasonable probability that the result of the trial would have been different. There is a paucity of evidence of Haddon's guilt. Morgan's testimony is critical to establishing that Haddon committed robbery. Morgan's prior inconsistent statements to the police were believable. Had the jury heard those statements, it would likely have been more hesitant to convict Haddon. Disclosure of the evidence would probably have affected the outcome of the case. Having found that the evidence was material, we necessarily find that Haddon was prejudiced by its suppression.

Reversed and remanded to the trial court for further proceedings consistent with this ruling.

State v. Capp
Franklin Court of Appeal (2014)

In this interlocutory appeal, defendant Vincent Capp challenges the trial court's decision denying his motion to dismiss a pending murder charge. We affirm.

Capp is charged with murdering his wife. The state's theory is that Capp injected her with a lethal dose of narcotics. The defense claims that the cause of death was suicide. The couple had a history of domestic violence: Capp was charged four times for assaulting his wife.

Capp claims that the state failed to comply with its responsibilities under *Brady v. Maryland*, 373 U.S. 83 (1963). The basis of this claim is that the state suppressed his deceased wife's medical records, made many months prior to her death, that show that she was at risk of harming herself. The records are in the possession of a county hospital.

We first determine whether the government "suppressed" the evidence. The first question raised by "suppression" is whether the evidence at issue was in the "possession" of the government. Evidence can be in the "possession" of the government even if the evidence is unknown to the prosecutor. If the evidence is in the possession of the investigating police department or another government entity involved in the investigation or prosecution, the evidence will be deemed to be in the possession of the government. *Kyles v. Whitley,* 514 U.S. 419 (1995). However, it would stretch the law too far to charge the government with possession of all records of all government agencies regardless of whether those agencies had any part in the prosecution of the case. If a government agency was not involved in the investigation or prosecution of the defendant, its records are not subject to disclosure under *Brady*. The role of a hospital is to treat patients, not to investigate crime. Thus we hold that, here, the government did not "possess" the records housed at the county hospital and therefore did not suppress them.

Although not essential to the determination of this case, we further hold that a prosecutor is not required to furnish a defendant with *Brady* material if that material is fully available to the defense through the exercise of due diligence. Capp's defense and the prosecution had equal access to the wife's medical records. Defense counsel could have subpoenaed the records as easily as the government might have. The records were not solely within the control of the prosecution and thus were not subject to *Brady* disclosure.

Affirmed.

State v. Preston
Franklin Court of Appeal (2011)

Defendant Reginald Preston appeals his conviction for theft over $1,000. He alleges that the trial court erroneously allowed the government to introduce the out-of-court statements of his wife. We reverse and remand.

Preston was convicted of having stolen artwork from the local library. There was no forensic or other physical evidence linking him to the crime. The only witness who could connect Preston to the theft was his wife, Felicity Carr. At the time of the theft, Preston and Carr were not married. Carr was questioned by police and stated that she saw Preston steal the artwork.

Preston and Carr were engaged, with a wedding date arranged, at the time of the theft and the time she made her statement to the police. They were married before the date of the trial. At the trial, Preston successfully asserted spousal privilege to prevent Carr from testifying.

When Carr did not testify due to the spousal privilege, the government sought to introduce her pretrial statement to the police in lieu of her in-court testimony. Preston objected that Carr's out-of-court statement was inadmissible hearsay. The government successfully countered that, by making Carr unavailable as a witness through marriage, Preston had forfeited the right to challenge admission of her hearsay statements.

Rule 804 of the Franklin Rules of Evidence provides that certain hearsay evidence may be admissible if the witness is unavailable. A witness who claims spousal privilege is considered to be unavailable. Franklin Rule of Evidence 804(a)(1). The issue, then, is whether the hearsay statements meet any of the exceptions defined in Rule 804(b). Franklin Rule of Evidence 804(b)(6) allows for the admission of a hearsay statement which is "offered against a party that wrongfully caused—or acquiesced in wrongfully causing—the declarant's unavailability as a witness, and did so intending that result." Importantly, the Rule requires that the conduct causing the unavailability be wrongful; it does not require that the conduct be criminal.

Under Rule 804, then, the question is whether Preston engaged in conduct designed to prevent the witness from testifying. The trial judge found that the defendant married the witness with the intent to enable him to claim spousal privilege and thereby prevent his wife from testifying against him. *See* Franklin Criminal Statute § 9-707. We conclude that this finding was erroneous. The defendant and his wife were engaged to be married when the theft occurred and had set a date for the wedding. Their marriage appears to have occurred in the normal course of

events. A court's finding of wrongful causation must be rooted in facts establishing that a significant motivation for the defendant's entering into the marriage was to prevent his or her spouse from testifying. In this case, there is no evidence that the defendant's purpose in marrying was to prevent his wife from testifying. All of the proof establishes that the couple had intended to marry even before the crime occurred.

The trial court erred in admitting Carr's out-of-court statement. We also find that Preston was prejudiced by the introduction of the hearsay testimony. But for the error, there is a strong probability that the result of the trial would have been different. Felicity Carr was the only witness who connected Preston to the theft. By erroneously admitting Carr's statement, the trial court allowed the prosecution to convict the defendant with blatant hearsay that was never subject to cross-examination. Preston was clearly prejudiced by that error. *See* Franklin Rule of Criminal Procedure 33.

The defendant's conviction is hereby reversed, and the case is remanded to the trial court for a new trial.

July 2018
MPT-2 File:
Rugby Owners &
Players Association

Sorborg, Kaminstein & Ringer LLP
Counselors-at-Law
One Madison Plaza
Franklin City, Franklin 33705

MEMORANDUM

TO: Examinee
FROM: Abraham Ringer
DATE: July 24, 2018
RE: Rugby Owners & Players Association

The Rugby League of America ("the League") and the Professional Rugby Players Association ("the Players") have retained our firm to form an unincorporated membership association under the Franklin General Associations Law. The Rugby League of America consists of the owners of all eight teams in the professional rugby league, and the Professional Rugby Players Association is the labor union representing all 176 players on those teams.

The Rugby Owners & Players Association (ROPA) will be a joint venture of both the League and the Players, formed for the purpose of holding and exploiting certain properties (both tangible and intangible) on behalf of the League and the Players. While ROPA will not itself operate on a profit-making basis, the revenues it earns (after the deduction of expenses) will be distributed to the League and the Players.

The principal governing document of ROPA will be its Articles of Association. Formation of ROPA presents an interesting legal challenge, in that the League and the Players are normally on opposite sides of the bargaining table in many respects. Hence, neither side will allow the other to control the governance of ROPA.

I have communicated separately with both parties, and they have consented to our joint representation. We have received informed written consent from both parties in conformity with the Rules of Professional Conduct.

Given the many legal issues to be dealt with in forming ROPA, others in the firm will deal with the liability, tax, intellectual property, real property, and antitrust aspects of the task.

Please draft the relevant portions of the Articles of Association that deal with ROPA's governance, as set forth in more detail in the attached materials. I have included an initial draft of those governance provisions of the Articles, indicating the issues that you should address in your draft. The initial draft will also provide an example of the type of language used in such documents.

In drafting the relevant portions, please use the following format, as illustrated below:

- State the article number.
- Draft the recommended language.
- Provide an explanation for why you drafted each the way you did (including, if appropriate, brief citations). In each of your explanations, you should take into account the clients' goals, the governing law, and the advantages and disadvantages of your recommendations.

Your explanations are important, as I will use them as a basis for advising the clients as to the choices made. Address only those articles that indicate that the language and explanation are to be completed. Do not restate or address any articles that have already been completed.

EXAMPLE

ARTICLE II – DURATION OF THE ASSOCIATION

Language: The Association shall exist for a renewable duration of 99 years.

Explanation: As set forth in the client interview, the two entities plan for a long-term, mutually profitable project. Because the parties want the duration to be as long as possible and because Franklin law limits unincorporated associations to a renewable duration of 99 years (*see Walker on Corporations and Other Business Entities* § 10.2), I recommend the maximum duration.

Transcript of Attorney Ringer's Client Interview with
Marybeth Fischer, Representative of the League, and
Ralph Peters, Representative of the Players
July 16, 2018

Abraham Ringer (Attorney): It's a pleasure to see you both. Thanks for retaining us to form your new venture. Tell me about it.

Marybeth Fischer: As you probably know, we operate the Rugby League of America—a professional rugby league. Our hope is that we can transform rugby into a significant sport in this country—it has all the attractions of football and soccer, and we think our players are much more accessible to the public. From the team owners' standpoint, we think we can create sufficient fan interest to turn our league into a highly profitable, long-term venture for the benefit of current and future owners and players.

Ralph Peters: Our players see this as a great opportunity. All have played rugby in college or at an amateur level, and many have played professionally in other sports like soccer. We've negotiated a collective bargaining agreement with the owners—not without a lot of give and take, some of it pretty hard-fought—and we're ready to move forward now.

Attorney: Tell me about the structure of the league.

Fischer: The league itself is an association of the owners of the eight teams. And who knows, maybe in the future, if we really catch on, we can expand to more teams. We've modeled ourselves on the existing professional sports leagues. There are 22 players on a rugby team, and, as Ralph noted, we've got a collective bargaining agreement with the Professional Rugby Players Association, which is their union.

But we know that, as we try to get the league going and interest sparked in the game, we as owners are going to have to bear considerable start-up expense until

the sport turns profitable for us. So we want to maximize every revenue opportunity we can. Obviously, we will have revenues from attendance at the games, concessions, and broadcast and cable rights. But there are other sources of income we want to mine.

Attorney: Such as?

Fischer: For example, we see merchandising as a major possible income source. Each team has a logo that it owns, as does the league. Fans want merchandise with those logos.

Peters: And fans want items with the names and images of their favorite players, which only the players have rights to. And there are physical items like game-worn jerseys that can fetch considerable income. Then there are endorsement deals . . . .

Fischer: Yes, like the "official luxury car of the League." We've all agreed to pool all the properties of this sort that we own and market them for our mutual benefit.

Attorney: By "we all," you mean the owners and the players?

Fischer: Yes indeed. To speak candidly, in our negotiations with the players over the collective bargaining agreement, our owners wanted to get all the necessary property rights and control this marketing, but the players refused.

Peters: That's right—the owners aren't exactly paying our players huge sums of money, and we weren't about to give them even more without our fair share. Because of our distrust, equal voting power is what both sides want, but we'd like to know from you what the pros and cons are of that choice.

Fischer: Well, the owners think they're paying a fair price for the players' services. The fact is that it is better if we are in the lifeboat together. But be that as it may, we agreed to form a new entity, an association of both the owners and the players, which would exploit all these tangible and intangible properties and market them for our mutual benefit. We're calling it the Rugby Owners & Players Association, or ROPA.

Peters: We figured that the owners' properties, such as the team logos and trademarks, and the players' properties, such as their likenesses, were about equal in value, and by sharing the revenue from all the properties in a unified marketing scheme, we'd all do better.

Attorney: Is each side sure that it wants to share revenue from all these sources equally?

Fischer: Yes, we've been over that. We're just starting out, and we need any source of income that we can get. We know that we need to cooperate to make this profitable.

Attorney: How is it going to work?

Peters: That's what we need you for. We would never agree to allow the league's counsel to set this up, and the owners would never agree to allow the players' counsel to do so, so we've come to you to represent us both in forming this venture.

Attorney: Now I understand. Just off the top of my head, I can see many legal aspects to getting this done, involving questions of governance, liability, tax, and more. Let's start with governance. As a general matter, how did you envision ROPA to be structured?

Fischer: Well, we agreed that, like the league, it would be a membership association.

Attorney: The governing document of an unincorporated membership association in Franklin is its Articles of Association, so our first task is to draft that document for you. Let me ask you some questions that will help us draft it. As this will be a membership association, who would be the members?

Fischer: From the owners' side, the members of ROPA would be each of the eight teams.

Peters: And from the players' side, it would be each of the 176 players.

Attorney: So the owners—that is, the teams—and the players would be separate classes of members. And the governance of ROPA? How would the board of directors work?

Peters: Let's get something clear at the outset. Marybeth and I are friends. But professionally, they are management and we are labor: we don't trust each other. So however ROPA is structured, we can't have a leg up on them, or they on us. Simply put, neither side can control the organization. We have to structure ROPA so that we're required to cooperate, or it won't work. We both will need guarantees, for example, that neither side can force something through the board of directors without the other side's consent. So you have to keep that in mind, however ROPA is set up.

Fischer: I think that Ralph is right. I mean, we can never require unanimity, because then just one team or one team's players could veto something that everybody else on both sides wants. Certainly, there are some items that will come to the board's attention that are just pro forma. But for serious matters, we'd have to protect each side against unilateral action by the other. So I'll answer your questions from the owners' perspective, and he can do so from the players'. We figured that each of the teams would have a seat on the board. Each team would name its own person to sit on the board.

Peters: And that would mean that the players would need to have the same number of seats on the board as the owners. Each team's players already elect a representative to act as a liaison with the union, and that representative would sit on ROPA's board as that team's players' representative.

Attorney: I see. To protect each side against unilateral action, you probably want to require some minimum number of directors from each side as a quorum, and perhaps specify that board actions require the support of both sides. How long will directors serve, and how will any vacancies on the board be filled?

Fischer: We thought that each team's owner would name its director. We figured that the director filling each owner's seat would continue in office until the ownership of the team changed or the individual named was no longer named to that position by the team.

Peters: And basically it would be the same for the players if the specific team's players' representative to the union changed.

Attorney: The sort of structure you're suggesting poses interesting points about deadlock, presiding officers, and the like. We'll look into possible solutions for you. We'll need to provide you a caution about the implications of a 50–50 arrangement when we explain our draft proposal. To avoid deadlock, you could appoint a disinterested director.

Fischer: I see your point, but it's much more important for us to have equal representation.

Attorney: I understand. Many organizations that choose equal representation find a way to work together because they want to take advantage of opportunities for profit.

Peters: We do have a significant disagreement on one of the points you mentioned, and we're looking to you for guidance. We know there must be a chair of the board of directors to preside at board meetings. To avoid any favoritism to one side or the other, we think the chair should be the CEO as a nonvoting director.

Fischer: We, on the other hand, don't want any other directors sitting in the board meeting, whether voting or not, so we think the chair should rotate between both sides. And you should know that neither of us wants an independent director in any capacity, including as a chair.

Attorney: We'll look at that, give you the advantages and disadvantages of each approach, and make a recommendation. Now, how would the rights and properties be transferred to and owned by ROPA?

Fischer: We'd need your advice.

Attorney: I would suggest a membership agreement that each member would have to sign.

Peters: Sure, but it's important to us that the owners and players be equal, that each would have the same rights and obligations in ROPA under that sort of membership agreement.

Attorney: Okay, we can deal with that. Now let's get to the money. How do you envision any income being handled?

Fischer: We are expecting that the costs of running ROPA will be covered by the income it receives. So the question is what to do with the amount remaining after expenses are paid. We've agreed that it will be divided 50–50 between, and paid to, the league and the players' association. Then each side will, on its own and outside of ROPA, figure out how to apportion the amount paid among its constituents.

Peters: But we want to make sure that our 50–50 arrangement can't be changed by a simple majority.

Attorney: Who is going to run ROPA? I mean, you can't expect the board of directors to take charge of the day-to-day running of the organization, with all that would entail.

Peters: Certainly. We expect to hire a chief executive officer, who will then hire employees and run the place. The CEO would be named by and report to the board. And of course, it's important that he or she wouldn't be beholden to either the league or the players alone—he or she would have to be entirely neutral between us.

Attorney: I really want to thank you for bringing this matter to us. I'll get back to you after we've written a draft of the Articles of Association and analyses of all the other issues that can serve as the basis for further discussions.

INITIAL DRAFT OF
ARTICLES OF ASSOCIATION
OF THE
RUGBY OWNERS & PLAYERS ASSOCIATION

ARTICLE I — OBJECTIVES

SECTION 1. We constitute ourselves a voluntary membership association under the name "Rugby Owners & Players Association" (the Association) for the following purposes, to wit:

a. To exploit certain properties and rights, both tangible and intangible, which the Association's members may from time to time grant to the Association

b. To acquire, own, and sell real, personal, and intellectual property, and to accumulate and maintain a reserve fund to be used in carrying out any of the objectives of the Association

c. To distribute all revenues earned by the Association, after deduction of expenses and reserves, as further set forth in these Articles

d. To do any and all other acts which may be found necessary or convenient in carrying out any of the objectives of the Association or in protecting or furthering its interests or the interests of its members

SECTION 2. The principal office of the Association is to be located in Franklin City, Franklin.

ARTICLE II — DURATION OF THE ASSOCIATION

The Association shall exist for a renewable duration of 99 years.

ARTICLE III — MEMBERSHIP

SECTION 1. CLASSES OF MEMBERSHIP. There shall be two classes of members: (1) each of the teams in the League and (2) each of the players on each of the teams in the League.

SECTION 2. MEMBERSHIP AGREEMENT. Each member shall execute a membership agreement, which shall be uniform in form for all members, as shall be prescribed by the Board of Directors.

ARTICLE IV — BOARD OF DIRECTORS

SECTION 1. GOVERNMENT. The government of the Association shall be vested in, and its affairs shall be managed by, a Board of Directors, consisting of **[number of directors or other language to be inserted],** who shall represent each class of members as follows: **[Language to be completed]**.

[Explanation]

SECTION 2. ENUMERATED POWERS OF THE BOARD. The Board shall have power to manage the affairs of the Association for the common benefit of the members, and to do and take all actions that are lawful.

SECTION 3. ELECTION OF DIRECTORS. Each of the Directors representing each team in the Rugby League of America shall be elected by the owner of that team; each of the Directors representing the roster of players of each such team shall be that team's players' representative to the Professional Rugby Players Association.

SECTION 4. TERM IN OFFICE OF DIRECTORS. Each Director representing a team in the Rugby League of America shall serve until replaced by the owner of such team; each Director representing the roster of players of a team shall serve until replaced as the players' representative of that team to the Professional Rugby Players Association.

SECTION 5. VACANCY IN BOARD OF DIRECTORS. **[Language to be completed]**

[Explanation]

SECTION 6. MEETINGS OF THE BOARD.

a. Frequency of meetings: The Board shall meet at least twice each calendar year.

b. Quorum: **[Language to be completed]**
[Explanation]

c. Voting: **[Language to be completed]**
[Explanation]

ARTICLE V — OFFICERS

The Board of Directors shall appoint the following officers: a Chair, a Secretary, and a Treasurer. The Chair shall be **[Language to be completed]**
[Explanation]

ARTICLE VI — MANAGEMENT OF THE ASSOCIATION

The management of the Association shall be conducted by a Chief Executive Officer, who shall be named by the Board of Directors. The Chief Executive Officer shall report solely to the Board of Directors.

ARTICLE VII — APPORTIONMENT & DISTRIBUTION OF REVENUES

[Language to be completed]
[Explanation]

ARTICLE VIII—AMENDMENT OF ARTICLES

These Articles may be amended by **[Language to be completed]**
[Explanation]

July 2018

MPT-2 Library: Rugby Owners & Players Association

Excerpts from Walker's Treatise on Corporations and Other Business Entities

Section 10.0 – Unincorporated Membership Associations Generally

10.1 Franklin Membership Associations Generally: Franklin law allows for the formation of unincorporated membership associations—a form of legal entity that is not a corporation, but rather allows individuals and other juridical entities to join together for common purposes. Examples are veterans and fraternal organizations, musical performing rights organizations, and sports leagues. Franklin law requires such organizations to adopt Articles of Association, which may include the items one would find in a certificate of incorporation, but also contain far more detail as to the governance and functioning of the association (e.g., dealing with matters of structure and the election of the board of directors, obligations of members, and the classes of members). That said, matters of corporate governance for membership associations are generally comparable to those for corporations. This portion of the treatise will analyze issues for such associations as compared to those for corporations, and will highlight differences only where they exist.

10.2 Duration: Under Franklin law, unincorporated membership associations are limited to a renewable duration of 99 years.

10.3 Classes of Members: Membership associations frequently have more than one class of members (e.g., musical performing rights organizations have classes of composers, lyricists, and music publishers). Whether those classes have differing rights and obligations is a matter for the association to determine. The issue is invariably dealt with in the Articles of Association of the organization. What those rights and obligations are can be dealt with either in the Articles or in a membership agreement.

10.4 Number of Directors: Franklin law requires a minimum of three directors for the association's board of directors. Boards usually have an odd number of directors, to prevent a voting deadlock. However, when more than one class of members is represented on a board, an even number of directors for each class may be named. Although this might lead to a deadlock in voting, it also may encourage cooperation among the various classes, as the board would not otherwise be able to take action. *See also* section 10.10.

. . .

10.8 Vacancy in Board: Vacancies in the board of directors (e.g., by resignation or death) may be filled in a variety of ways (e.g., by holding a special election of members; allowing the remaining directors to fill the vacancy for the remainder of the term of the resigned/departed director; or specifying in the Articles of Association an alternative method, such as allowing each class of members or directors to fill vacancies in that class).

10.9 Conduct of Board Meetings: Franklin law provides that a quorum of a majority of board members is necessary to take any action. In the case of boards that have members from different classes, there may be additional requirements of attendance to ensure class representation in the quorum. Boards may, by resolution or provisions in their Articles of Association, require that certain matters of great importance (e.g., amendment of their articles, hiring key employees, or allocation of revenues and expenses) be passed by a supermajority of two-thirds of those present and voting, or even of the entire board.

10.10 Officers: Franklin law requires that boards name, at the very least, a chair, a secretary, and a treasurer. In cases where the board is made of different classes of members, a disinterested, independent, nonvoting chair (e.g., an outside director or the corporation's chief executive officer) may be named to preside instead of naming a chair from one of the classes. In such a case, that person would constitute his or her own class of directors. Typically, an independent director will be elected by a supermajority of the entire board. Even though the chair might be seen as a merely administrative office, simply presiding at meetings, the chair's rulings could run counter to the position of a particular class. This could pose a problem for a chief executive officer named to be chair, for the chief executive officer, as an employee of the board, would be expected to be neutral as between such positions. As an alternative, when there are different classes of members, the chair may rotate among directors from the different classes.

10.11 Operations: The chair has the power to preside at board meetings. The day-to-day running of the association is usually delegated to an employee such as a chief executive officer.

Schraeder v. Recording Arts Guild
Franklin Court of Appeal (1999)

Dorothy Schraeder and 11 other members of the board of directors (collectively, "Schraeder") of the Franklin Recording Arts Guild ("the Guild") sued to enjoin the Guild from effectuating a resolution allegedly adopted by the Guild's board of directors. The trial court granted the injunction, and the Guild has appealed.

The Guild is an unincorporated membership association, formed under the laws of Franklin. The Guild's purpose is to market and license various properties created by musical performing artists and owned by record companies, for their mutual benefit. The Guild is controlled by a board of directors of 12 performing artists and 12 record company representatives. The position of chair alternates every six months between a performing artist director and a record company director. Although they have joined together for a common purpose in creating and operating the Guild, it is fair to say that the two sides do not have the highest degree of trust in each other. The governance structure of the Guild therefore contains various safeguards against one side or the other gaining an unfair advantage in the operation of the Guild.

The Articles of Association of the Guild provide that a quorum of 13 of the total 24 directors must be present for the conduct of business (a majority, as Franklin law requires), but in addition (1) that at least two representatives of each class of members be present for that quorum, and (2) that a majority of directors present and voting from each class vote in favor of any proposed resolution for it to be adopted.

In December 1998, the Guild's board met to conduct a regular meeting. The meeting was attended by all 12 record company directors and 9 performing artist directors. Quoting verbatim from the minutes of the meeting best conveys what occurred at the meeting:

> Mr. Carson [a record company director] proposed that the allocation of revenues of the Guild be changed from the present even division between record company members and performing artist members to a 60%–40% division in favor of record company members. His proposed resolution was seconded by Ms. Aguero [a record company director]. After discussion, [eight performing artist directors] left the meeting [in protest]. Ms. Schraeder, the sole remaining performing artist director present, raised a Point of Order and demanded a quorum call. Mr. Ray [a record company director], Chairman, ruled the

demand out of order. The board then voted, 12–1, in favor of the resolution. [The minutes then identify how each director cast his or her vote: the 12 affirmative votes were cast by record company directors, while the sole negative vote was cast by Ms. Schraeder, the only performing artist director present and voting.]

Ms. Schraeder and her fellow performing artist directors have brought this action to enjoin the Guild from putting the proposed resolution into effect. The trial court granted the injunction, and we affirm, for the following reasons:

The voting provisions of the Guild's Articles of Association were designed to prevent either side from gaining a material advantage over the other in the conduct of the Guild's operations, such as by changing the allocation of revenues to advantage one side, as was attempted here. By requiring that a quorum include at least two directors from each side, the Articles effectively prevent either side from gaining such an advantage should the other side not be present to vote. Further, once a quorum is present, the Articles require that a majority of directors from each side who are present and voting vote in favor of any action.

That there was only one performing artist director present when the vote was taken does not invalidate the vote for lack of a quorum. Franklin law provides that, once a quorum (in this case, 13 directors, including 2 directors from each class) is present for a board meeting, it continues to exist for the duration of the meeting.

However, Schraeder argues that the board action was ineffective because a majority of one class of directors—Ms. Schraeder, the sole performing artist director present and voting—voted against the resolution.

To adopt any resolution, the Guild's Articles of Association require that a majority of each class of directors present and voting vote in favor of that resolution. That requirement was not met. Hence, the disputed resolution could not take effect.

Judgment affirmed.

July 2018
MPT-1 Point Sheet:
State of Franklin v. Hale

State of Franklin v. Hale

DRAFTERS' POINT SHEET

In this performance test, the examinee is an assistant district attorney who is asked to draft the "Legal Argument" portion of a brief in response to the motion for a new trial filed by Henry Hale, who has been convicted of the attempted murder of Bobby Trumbull. The state's proof showed that Hale shot Trumbull in the courtyard of the Starwood Apartments on June 20, 2017. At trial, the prosecution called three witnesses. The first witness was Sarah Reed, the only known eyewitness to the incident. At the time of the shooting, Reed was Hale's girlfriend. By the time of trial, they were married. As soon as Reed was called to the stand, Hale asserted spousal privilege to prevent her from testifying. Based on this assertion, the trial court excused Reed as a witness. The second witness for the state was Detective Denise Lee, who testified that she interviewed Sarah Reed on the day of the shooting. The defendant objected to Lee's repetition of the out-of-court statements made by Reed, claiming that they were hearsay. The trial court allowed the testimony, finding that Hale had wrongfully caused Reed to be unavailable as a witness because he had married her in part to prevent her testimony. Detective Lee then testified that Reed had stated that she was on her balcony watching a video on her computer and had seen her then boyfriend Hale arguing with another man. She heard a shot, saw Hale running away, and saw Trumbull on the ground. The final state's witness was the victim, Bobby Trumbull, who testified that Hale had shot him during an argument over a debt.

In his motion for a new trial, Hale raises three issues. In the first two issues, he asserts that the prosecution suppressed exculpatory evidence that should have been disclosed to the defense prior to trial under *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. These two pieces of evidence are (1) Reed's subsequent recantation of her identification of Hale as the shooter during statements made to Detective Jones, and (2) evidence of contrary statements made by Trumbull to the emergency medical technician (EMT) who was in the ambulance that transported Trumbull to the hospital. According to Hale, the suppression of these two pieces of information violated the mandate of *Brady*.

In his third and final claim, Hale asserts that the trial court erred in allowing the state to introduce Reed's out-of-court pretrial statements made to Detective Lee. The court allowed the introduction of this hearsay evidence on the theory that Hale had wrongfully caused Reed to be unavailable as a witness. The court found that Hale had married Reed, at least in part, to prevent her testimony at his criminal trial.

The trial court held a hearing on the factual issues raised in Hale's motion for a new trial. After the hearing, Hale submitted his brief in support of the motion. The examinee's task is to prepare a portion of the responsive brief for the prosecution.

The File includes the instructional memorandum, an office memorandum on drafting persuasive briefs, the defendant's brief in support of motion for a new trial, excerpts from the trial testimony, and excerpts from hearing testimony on the motion for a new trial. The Library

contains Franklin Rule of Evidence 804, Franklin Criminal Statute § 9-707, and Franklin Rule of Criminal Procedure 33, as well as three Franklin cases: *Haddon v. State*, *State v. Capp*, and *State v. Preston*.

I. FORMAT AND OVERVIEW

This assignment requires examinees to analyze the facts and law and argue a position to the court in response to the defendant's motion for a new trial. The File contents are intended to mirror the types of materials a lawyer would use in preparing a post-trial brief for the court.

The argument is to be organized and written consistent with the office's guidelines on writing persuasive briefs. This includes following the guidelines regarding argument headings and incorporating the relevant facts into the argument instead of drafting a separate statement of facts.

II. FACTS

On June 20, 2017, an anonymous caller reported a shooting in the courtyard of the Starwood Apartments. The investigating detective was Denise Lee. By the time Detective Lee arrived at the scene, the victim, Bobby Trumbull, had already been transported to a hospital by an ambulance.

While at the Starwood Apartments that afternoon, Detective Lee spoke with Sarah Reed, who identified the shooter as her boyfriend, Henry Hale. Reed stated that she was sitting on her balcony above the courtyard in the apartment complex watching a video. She saw two men yelling at each other in the courtyard. She recognized one of them as Henry Hale. She couldn't hear what they were saying, but she knew that they were arguing. She went back to watching the video and then heard a shot. She then saw Hale running out of the courtyard and saw Trumbull collapsed on the ground.

There is no forensic or other physical evidence linking Hale to the shooting.

At trial, the state's first witness was Sarah Reed. Hale immediately asserted spousal privilege to prevent her from testifying. Reed did testify that she had dated Hale about four years ago and that they had dated for about seven months before breaking up. They got back together in March of 2017, he proposed on July 25, 2017, and they married on August 25, 2017. Reed was asked whether Hale had ever indicated that he married her so that she couldn't testify at trial. Reed responded that "[he] married me because he loves me. He did say that he wanted to marry me quickly, before the trial started." She also testified that Hale had said that "it would be hard for us to stay together if I testified against him." She was not sure whether Hale would leave her if she testified, but she hoped not to find out. Based on this information, the trial judge excused Reed as a witness.

The prosecution then called Detective Lee, who testified about her interview of Reed on June 20, 2017, shortly after the shooting. The defense objected that Reed's out-of-court statements

being repeated on the stand by Detective Lee were inadmissible hearsay. The prosecution countered that Hale had caused the unavailability of the witness and that therefore the statements were admissible under Franklin Rule of Evidence 804(b)(6). The trial judge agreed with the prosecution and determined that, by marrying Reed, Hale had wrongfully made her unavailable as a witness. The court therefore admitted Detective Lee's testimony repeating the statements made to her by Reed on June 20, 2017.

The state's final witness was the victim, Bobby Trumbull, who testified that Hale had shot him after they got into an argument about a debt that he owed to Hale. The defense impeached Trumbull with a prior felony conviction for obtaining money by fraud.

The defense did not present any witnesses at trial.

The jury convicted Hale of attempted murder. He subsequently filed a Rule 33 motion for a new trial.

At the hearing on the motion for a new trial, the court heard testimony regarding the alleged *Brady* violations. The defense first called Detective Mark Jones, who testified that Reed made a statement to him on August 26, 2017, the day after Reed's marriage to Hale. Reed appeared at Detective Jones's office and stated that Hale was not the shooter. When asked who had committed the shooting, Reed said that she didn't know. Detective Jones questioned Reed as to why she had initially lied to Detective Lee, and Reed responded by shrugging. Reed also shrugged in response to requests for additional details. Reed stated that "[h]e just told me to tell you that he didn't do it." When Detective Jones asked Reed who the "he" was who told her to recant her statement, Reed just shrugged. According to the detective, Reed never made eye contact and appeared to be nervous. Reed shrugged when asked if she was afraid of her husband.

On cross-examination by the prosecution, Detective Jones stated that he was on medical leave when the prosecutor's office requested the file. When he returned from leave, he assumed that the statement of August 26, 2017, had been included in the material provided to the prosecutor.

The defendant's second witness at the hearing was Assistant District Attorney Lucy Beale, who testified that she was not aware of Reed's August 26 statement until after the trial. She also testified that the prosecutor's office has an "open file" policy, pursuant to which it provides all the information in its file, not only that required by the rules and case law, to the defense. In this case, the prosecution provided everything in its file to the defense.

The final witness was Gil Womack, an EMT who was in the ambulance transporting Trumbull to the hospital after the shooting. The ambulance service is part of the city government. Womack testified that, in the ambulance ride, Trumbull blurted out that he didn't know what happened or who shot him but said "that rat Henry Hale thinks I owe him money. This is all his fault." On cross-examination, Womack testified that he would have provided this information to defense counsel at any time if he had been asked.

III. LEGAL ISSUES

A. The Two *Brady* Issues

Under *Brady v. Maryland*, 373 U.S. 83 (1963), it is a constitutional violation for the prosecution to suppress evidence that is exculpatory to the defendant. In other words, the government must provide exculpatory evidence to the defense prior to trial.

In this case, the state is alleged to have suppressed two pieces of evidence. The first piece of allegedly suppressed evidence is the statement that Reed made to Detective Jones on August 26, 2017. This statement contradicted Reed's earlier statement, made on the day of the shooting to Detective Lee, in which Reed named Hale as the shooter. Detective Jones placed notes about the August 26 statement in the case file. However, when the prosecutor's office requested the file from the police department, Detective Jones was on medical leave, and thus he did not participate in transferring the file to the prosecutor. The notes of the August 26 statement were not in the file that was received by the prosecutor. The second piece of allegedly suppressed evidence is a statement that the victim, Bobby Trumbull, made to the EMT. In the ambulance, Trumbull told the EMT that he didn't know what had happened or who had shot him, but that Henry Hale thought that Trumbull owed him money and so, "This is all his fault." This statement was exculpatory and contradicted Trumbull's in-court testimony naming Hale as the shooter.

Examinees should organize their arguments according to the three-part analysis utilized by the Supreme Court in *Strickler v. Greene*, 527 U.S. 263 (1999), cited in *Haddon v. State* (Fr. Sup. Ct. 2012). The analysis requires a determination of whether the allegedly suppressed evidence was (1) favorable to the defendant, (2) suppressed by the government, and (3) material. The examinees will likely discuss each piece of evidence separately, but should use the three-part *Brady* analysis for both items.

Evidence is favorable to the defendant if it would make a neutral fact-finder less likely to believe that the defendant committed the crime. Evidence that would serve to impeach a government witness is also considered to be favorable to the defendant. *Giglio v. United States*, 405 U.S. 150 (1972), cited in *Haddon*. Evidence that indicates that a government witness was lying is impeaching evidence and should be considered favorable. Sarah Reed's August 26, 2017, statement appears to be impeaching evidence, as it contradicts Reed's initial statement declaring Hale to be the shooter. In addition, examinees might argue that the recantation is also favorable to the defendant because it suggests that Hale was not necessarily the shooter. Nevertheless, examinees may reach the conclusion that Reed's statement is not favorable given her body language and the full extent of her statement ("He just told me to tell you that he didn't do it."), which suggest that Reed was coerced by Hale into recanting to the police. Examinees who reach this conclusion should marshal the facts to show the full context of her statement.

Under the same analysis, the statement that Trumbull made to the EMT is clearly favorable, as it would serve to impeach his trial testimony that identified Hale as the shooter. In addition, examinees may argue that the statement made to the EMT is favorable to the defendant because it suggests that Hale was not the shooter.

Examinees must next consider whether each piece of evidence was suppressed by the government. To be suppressed, the evidence must first be in the possession of the government. Notes regarding Reed's second statement were in Detective Jones's file. When Detective Jones was on medical leave, someone transmitted the investigative file to the prosecutor, but the notes of the August 26 conversation between Reed and the detective were not included. The prosecutor never knew that Reed had made the second statement. Information in the possession of investigators, even if not disclosed to the prosecutor, is in the possession of the government. *Kyles v. Whitley*, 514 U.S. 419 (1995), cited in *State v. Capp* (Fr. Ct. App. 2014). Likewise, *Brady* made clear that the good faith of the prosecutor is immaterial to a determination of whether evidence was suppressed. Thus even though the prosecutor, in good faith, turned over her entire file to the defense and had no knowledge of Reed's August 26 statement, most examinees will conclude that the statement was "suppressed." Examinees should receive credit for conceding that point. Nonetheless, an excellent examinee might point out that Hale had equal access to Reed's recantation. Likely, he was the one that caused it. Consequently, under *State v. Capp*, the government would not be seen to have suppressed the evidence.

The statement made by Trumbull to the EMT was in the possession of a city government agency, but that agency was in no way involved in the investigation or prosecution of the case against Henry Hale. Examinees should argue that prosecutors cannot be charged with the possession of evidence that is not in the pipeline of the investigation or prosecution. *Capp.* Also, if evidence is as easily obtainable by the defendant as by the prosecutor, it is not deemed suppressed by the government. *Id.* In this case, the EMT testified at the motion hearing that he would have provided this information to the defense before trial if he had been asked. Thus examinees should argue that there was no suppression.

Finally, examinees should analyze whether the evidence is material—that is, whether there is a reasonable probability that, had the evidence timely been provided to the defense, the result of the trial would have been different. If there is more than one instance of suppression of evidence, materiality is judged collectively. The court does not determine the materiality of each piece of evidence individually but rather determines the materiality of the totality of the evidence. *Haddon v. State*. Examinees may thus look at the materiality of the two pieces of evidence together. However, a more perceptive answer would argue that the state did not suppress the statement to the EMT, and therefore the court should only consider the materiality of Reed's recantation. Her August 26 statement appears to contradict the June 20 statement she made after the shooting. However, in determining materiality, the court may look at the credibility of the statement. If the recantation is not credible, it would likely not lead to a different result at trial. A strong answer would discuss the lack of credibility of Reed's second statement: it occurred one day after she married Hale; she appeared to indicate that Hale told her to recant; and she shrugged in answer to many questions. If her statement is not credible, then its introduction would be less likely to create a different outcome.

Examinees who conclude that the recantation would likely have created a different result at trial may acknowledge the obligation of the state to disclose Reed's August 26 exculpatory statement. Examinees need not further examine whether the failure to disclose the statement

"prejudiced" the defense. The *Haddon* case holds (consistent with federal law) that a finding of materiality necessitates a conclusion that the defendant was prejudiced by the suppression of the evidence.

Those examinees who go on to discuss whether Trumbull's statement to the EMT is material for *Brady* purposes could reasonably conclude that the statement is material and its admission could have led to a different result at trial. In support of materiality, examinees could note that the statement was made very close in time to the shooting and that Trumbull flatly denied knowing who had shot him. On the other hand, the statement was made when Trumbull was in great pain and distress and receiving heavy narcotics; in fact, he fell asleep right after making the statement. This context could lead a jury to give the statement less weight. In any event, there was no *Brady* violation regarding Trumbull's statement because it was never in the state's possession.

B. Franklin Rule of Evidence 804

Like a constitutional violation under *Brady*, a violation of an evidentiary rule can warrant a new trial if prejudicial. In other words, Franklin Rule of Criminal Procedure 33 applies to rule violations as well as violations of constitutional law.

Hale has challenged the trial court's decision to admit Reed's pretrial statements to the police under Franklin Rule of Evidence 804. The Rule states that someone who wrongfully causes the unavailability of a witness may not then prevent the witness's hearsay statements from being admitted.

Under Rule 804(a), the government must first show that the witness is unavailable. In this case, Hale asserted spousal testimonial privilege in order to make his wife unavailable as a witness. Rule 804(a)(1) provides that a witness is unavailable if the witness is "exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies." Reed is therefore unavailable as a witness.

Rule 804(b)(6) provides for the admission of the out-of-court statement by an unavailable witness whose unavailability was caused by the wrongdoing of the party opposing the statement's introduction. The defendant must have acted with the intent of causing the witness's unavailability. However, the intent to prevent the witness from testifying does not need to be the only purpose for the defendant's actions. As explained in *State v. Preston*, "A court's finding of wrongful causation must be rooted in facts establishing that a significant motivation for the defendant's entering into the marriage was to prevent [the] spouse from testifying."

Hale asserted spousal privilege at trial, thereby preventing Reed from testifying. The trial court held that Hale had entered into the marriage with the intent of wrongfully causing Reed's unavailability as a witness. Hale relies on the *Preston* case to argue that the trial court abused its discretion. In *Preston*, the court held that the defendant had not wrongfully caused the witness's unavailability simply because he married her between the time of the offense and the time of trial; the individuals were already engaged at the time of the offense.

Examinees should utilize the standard in *Preston*. According to that decision, the hearsay statements are admissible only if a significant motivation for the defendant's entering into the marriage is to prevent the spouse from testifying. While relying on *Preston*, examinees should distinguish its facts from those of the current case. Hale and Reed were not engaged at the time of the shooting. Unlike in *Preston,* here there was no pre-existing intent to marry at the time of the offense. Hale and Reed were dating at the time of the offense, but they did not become engaged until after the June 20, 2017, shooting. This timing suggests that a significant motivation for the marriage was to prevent Reed from testifying.

More important is Reed's admission that Hale told her he wanted to marry her quickly, before the trial started. She also admitted that he said it would be hard for them to stay together if she testified against him. Although she was not sure that he would leave her, she hoped she didn't have to find out.

The conclusion that a significant motivation for Hale's marriage was to prevent his wife from testifying is bolstered by Reed's "recantation" of August 26, 2017—one day after their marriage. The timing of Reed's attempt to withdraw her earlier inculpatory statements underscores that a significant motivation for the marriage was to prevent the testimony. Detective Jones testified that Reed told him that Hale would not let Reed testify, indicating that a significant motivation for the marriage was Hale's desire to prevent Reed from testifying.

A strong answer would link the timing of the marriage and Hale's stated intent to prevent Reed's testimony to argue that the trial court did not abuse its discretion in admitting the out-of-court statements.

An excellent answer might question whether Hale's actions in causing the unavailability were "wrongful" as is required by the Rule. The *Preston* decision indicates that "wrongful" is not synonymous with "criminal"—but can marriage ever be considered wrongful? The astute answer might then focus on the threats made by Hale that take the "wrongful conduct" beyond the marriage itself.

July 2018
MPT-2 Point Sheet:
Rugby Owners &
Players Association

Rugby Owners & Players Association

DRAFTERS' POINT SHEET

In this performance test, the examinee is an associate in a private law firm. The Rugby League of America (the League) and the Professional Rugby Players Association (the Players) want the firm to assist them in the creation of an unincorporated membership association, the Rugby Owners & Players Association (ROPA). ROPA will be a joint venture of the League and the Players. It will own certain tangible and intangible properties, which it will exploit commercially. The resulting net revenues will be evenly divided between the League and the Players. Although the League and the Players each have their own counsel, they need a neutral counsel to assist them in the creation of ROPA.

The creation of ROPA poses many legal issues, including issues in the areas of liability, tax, intellectual property, real property, and antitrust. However, the examinee is asked to assist only in the drafting of provisions of ROPA's Articles of Association that deal with the association's governance.

The examinee is asked to draft those provisions and to offer a brief explanation of each of his or her recommendations. The task involves application of the law, as set forth in treatise provisions and a single case in the Library, to the facts, as revealed in the File, for the drafting of the provisions and the explanation of each.

The File contains (1) the memorandum from the supervising partner, which includes specific instructions for the format of the examinee's drafts, with an example; (2) an extended interview with the representatives of the League and the Players; and (3) an initial draft of selected provisions of the ROPA Articles of Association, with blanks to be filled in for both substantive language and explanation for those provisions the examinee is to draft. The Library contains (1) selected excerpts from *Walker's Treatise on Corporations and Other Business Entities*, which deals with Franklin corporate law and is also applicable to unincorporated membership associations under Franklin law; and (2) *Schraeder v. Recording Arts Guild*, a case decided by the Franklin Court of Appeal dealing with quorum and voting requirements.

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

I. FORMAT AND OVERVIEW

The examinee must, first, master the facts as revealed by the items in the File, specifically identifying the clients' needs and desires; second, master the law as set forth by *Walker's Treatise* and the case; third, match the clients' needs and desires to the law and the open provisions of the draft Articles of Association; fourth, draft those provisions indicated in the provided initial draft of the Articles of Association; and fifth, explain the basis for each recommended draft provision in terms of the law and the clients' needs and desires.

II. DISCUSSION

A. Facts

The League consists of eight teams. Each team has 22 players, and all 176 players are represented by their union, the Professional Rugby Players Association. As part of their recently concluded collective bargaining agreement, the League and the Players have agreed to form ROPA, to which they will transfer certain tangible and intangible property, as a means of generating revenues. They have agreed that all net revenues from the sale or licensing of those properties will be evenly divided between the League and the Players.

An overriding aspect of the matter is that, although they are committed to working together in ROPA, neither the League nor the Players will yield any aspect of ROPA's control to the other. (This explains why, although each has its own legal counsel, they needed a neutral counsel to assist in the creation of ROPA.) Hence, all matters that deal with control, from seats and voting on the board to allocation of revenues, must be on an equal basis. This poses interesting legal challenges in many areas.

Based on the principles of governance as identified in the treatise in the Library, the points raised in the extended interview in the File, and the provisions in the provided initial draft which the examinee must draft and explain, the questions the examinee must address are as follows:

1. How many directors should constitute the board of directors? Who should they be?

2. What procedure should be followed if there is a vacancy on the board?

3. How many members of the board should constitute a quorum? What are the voting rules for the board?

4. How should the chair be named?

5. How should revenues be apportioned and distributed?

6. What vote of the board should be necessary to amend the Articles?

B. The law

Walker's Treatise is provided in the Library to inform examinees of the law and characteristics of membership associations. After the general introduction in Section 10.1, the various sections provide information directly applicable to the concerns raised by the League and the Players in the client interview.

Examples of unincorporated membership associations are fraternal organizations, musical performing rights organizations, and sports leagues. Under Franklin law, unincorporated membership associations must adopt Articles of Association, which contain details regarding the association's governance and operation such as election of the board of directors, members' obligations, and the classes of members.

Membership associations often have more than one class of members. If an association does have more than one membership class, it is left to the association to decide whether the classes have different rights and obligations and to explain them either in the articles of association or in a membership agreement. *Walker's Treatise* § 10.3.

An association's board of directors must have at least three directors: a chair, a secretary, and a treasurer. *Id*. §§ 10.4 & 10.10 (Officers). An odd number of directors is generally desirable, as it avoids a voting deadlock. On the other hand, as is the case with ROPA's expected classes of League (the team owners) and Players, having each class represented by an equal number of directors can facilitate cooperation.

Section 10.8 addresses vacancies on the board of directors. In the interview, the League's attorney raised the possibility that a team's ownership could change. Likewise, the union representative for a team's players may not remain static. According to the treatise, there are several ways to handle such changes: holding a special election of members, allowing the remaining directors to fill the position for the remainder of the director's term, or specifying in the association's articles that each class has the right to fill any vacancies of its directors.

Under Franklin law, a quorum of a majority of directors is necessary for a board to take any action. *Id*. § 10.9. When there is more than one class of members represented on a board, it is advisable for the articles to have additional requirements that will ensure class representation in the quorum. When taking action on matters of great importance to the association, the articles may require that certain matters pass by a supermajority (two-thirds) or that the vote be unanimous.

As noted, a board must have a chair, a secretary, and a treasurer. *Id*. § 10.10. Associations having different classes of members may prefer to have a disinterested, independent, nonvoting chair, such as the chief executive officer, to be elected by a supermajority of the entire board. Or the position of chair could rotate among the different classes. There are advantages and disadvantages to each approach. The treatise notes that, if the chief executive officer were to act as chair, it could put him or her in a difficult position in having to rule in favor of the position of one side or the other, as the chief executive officer should be neutral on such matters. While the chair has the authority to preside at board meetings, *id*. § 10.11, the day-to-day management of the association is often left to an employee, such as a chief executive officer.

The sole case in the Library, *Schraeder v. Recording Arts Guild* (Fr. Ct. App. 1999), addresses the issue of quorum requirements. In *Schraeder*, the board comprised 12 performing artists and 12 record company representatives. Under the Guild's articles of association, a quorum of 13 directors (including at least two directors from each class) was necessary to conduct business. At one board meeting, eight performing artist directors walked out in protest of a vote to reallocate revenue in favor of the recording companies. The board then voted 12–1 in favor of the resolution (the lone opposition being the single remaining performing artist director in attendance). The performing artist directors sued to stop the proposed resolution from going into effect. The court noted that the Guild's articles of association were intended to ensure

that neither side gained an advantage. Under Franklin law, once a quorum was present (here, a minimum of 13 of the 24 directors, including at least two directors from each side), the fact that several directors had left the meeting did not destroy the quorum. However, the court held that the vote was ineffective because a majority of one class of directors (the performing artists) was present and voted against the resolution. In effect, the 12–1 vote was a tie and so the resolution was not approved.

C. Analysis

The examinee should address each question presented by drafting the appropriate provision of the Articles and explaining his or her choices. Each provision is set forth below with a suggested draft and explanation in **boldface**. The draft language, and in some cases (as indicated) the choice of answer, need not follow those set forth below for the examinee to receive a good grade.

ARTICLE IV — BOARD OF DIRECTORS

Satisfactory Proposed Language:

SECTION 1. GOVERNMENT. The government of the Association shall be vested in, and its affairs shall be managed by, a Board of Directors, consisting of **sixteen (16) Directors,** who shall represent each class of members as follows: (**1) eight Directors, each of whom represents one of the eight teams in the Rugby League of America, and (2) eight Directors, each of whom represents the roster of players on one such team.**

Better Proposed Language:

SECTION 1. GOVERNMENT. The government of the Association shall be vested in, and its affairs shall be managed by, a Board of Directors, consisting of **twice the number of Directors as there are teams in the Rugby League of America,** who shall represent each class of members as follows: **(1) one Director representing each team in the Rugby League of America, and (2) one Director representing the roster of players on each such team. [ADDITIONAL LANGUAGE IF INDEPENDENT DIRECTOR OR CEO PROVIDED FOR AS CHAIR: and (3) one independent Director elected by a two-thirds majority of the entire Board.]**

Explanation:

Although an odd number of directors would prevent deadlock, Treatise § 10.4, the League and the Players insist that they each must have equal representation on the board. Interview, p. 6. Hence, an equal number of directors from each side is required. Perceptive examinees will use the better version, to allow for expansion or contraction of the number of teams in the league, a possibility noted in the interview, p. 3. If the examinee chooses to include an independent director or chief executive officer to be Chair (see Article V, as discussed below), that class of directors should be provided for, as well as his or her method of election. Treatise § 10.10.

Proposed Language:

SECTION 5. VACANCY IN BOARD OF DIRECTORS. **In the event of a vacancy on the Board of a Director representing a team in the Rugby League of America, the owner of such team shall name a successor; in the event of a vacancy on the Board of a Director representing the roster of players of a team in the Rugby League of America, the new or acting players' representative of that team shall serve as successor.**

Explanation:

Vacancies on a board may be filled in a variety of ways. Treatise § 10.8. As noted in the previous section, the right to name a director for each team falls to the owner of that team, and for the players, falls to the players on the team who name their players' representative. Interview, pp. 6–7. Hence, this arrangement should be set forth in the Articles.

Satisfactory Proposed Language:

SECTION 6. MEETINGS OF THE BOARD.
(b) Quorum: **A majority of the members of the Board shall constitute a quorum**. **At least [INSERT NUMBER] Directors from each class of Directors shall be necessary to be present for such quorum.**

Better Proposed Language:

SECTION 6. MEETINGS OF THE BOARD.
(b) Quorum: **A majority of the members of the Board shall constitute a quorum**. **At least <u>two</u> Directors from each class of Directors shall be necessary to be present for such quorum.**

Explanation:

Franklin law contains a majority quorum requirement, i.e., half plus one of the total number of directors. Treatise § 10.9. Because each side is concerned about the possibility that the other side could control actions of the board, voting rules that preclude that possibility are necessary. Interview, pp. 6–7. Thus, at least one director from each class should be present to make a quorum. Such quorum (and voting) rules are legal. Treatise § 10.9; *Schraeder v. Recording Arts Guild*.

Satisfactory Proposed Language:

(c) Voting: **The Board shall take action by majority vote, but the affirmative vote of a majority of the Directors from each class of Directors present and voting shall be necessary to take any Board action. The Board may, by resolution, require that certain actions be taken by supermajority vote, in a proportion as deemed necessary.**

Alternative Satisfactory Proposed Language: As an alternative to the above language referring to "a majority of the Directors from each class," the examinee could specify a certain number

of directors as a minimum needed for board action, as shown below. The version below also illustrates how an examinee could provide language in this section on voting that specifies that matters such as the appointment of a CEO and amendment of the articles require a supermajority vote to be effective.

(c) Voting: **The Board shall take action by majority vote, but the affirmative vote of at least [SPECIFY NUMBER] of the Directors from each class of Directors present and voting shall be necessary to take any Board action. The Board may, by resolution, require that certain actions be taken by supermajority vote, in a proportion as deemed necessary [ALTERNATIVE ADDITION; provided, however, that the appointment of a Chief Executive Officer under Article V, Section 1, and any amendment to these Articles, including but not limited to an amendment dealing with the apportionment and distribution of revenues under Article VII, shall require an affirmative vote of two-thirds of the entire Board of Directors, as set forth in Article VIII].**

Better Proposed Language:

(c) Voting: **The Board shall take action by majority vote, but the affirmative vote of a majority of the Directors from each class of Directors present and voting shall be necessary to take any Board action. The Board may, by resolution, require that certain actions be taken by supermajority vote, in a proportion as deemed necessary; provided, however, that the appointment of a Chief Executive Officer under Article V, Section 1, and any amendment to these Articles, including but not limited to an amendment dealing with the apportionment and distribution of revenues under Article VII, shall require an affirmative vote of two-thirds of the entire Board of Directors, as set forth in Article VIII.**

Explanation:

A minimum number from each side as a quorum requirement, and a majority vote of each side present and voting, meets the clients' needs and will prevent one side from forcing a decision on the other. Interview, p. 6. *Schraeder* also illustrates a possible voting regime that meets the clients' needs. The possibility of requiring supermajority votes for highly significant actions should be allowed. Treatise § 10.9. Perceptive examinees may specify that supermajorities are needed for naming the chief executive officer or any amendment of the Articles, including specifically the rules for apportionment and distribution of revenues. Treatise § 10.9. *See* Article VIII.

ARTICLE V — OFFICERS

Unsatisfactory Proposed Language:

The Board of Directors shall appoint the following officers: a Chair, a Secretary, and a Treasurer. The Chair shall be **the Chief Executive Officer named in Article VI, who shall not have a vote.**

Satisfactory Proposed Language:

The Board of Directors shall appoint the following officers: a Chair, a Secretary, and a Treasurer. The Chair shall be **elected alternatively every six months from the class of Directors representing the Rugby League of America and the class of Directors representing the roster of players of each team in the Rugby League of America, respectively.**

Explanation:

Neither side would agree to a permanent chair from the other side. Possible alternatives are the neutral CEO as chair (without a vote), or a rotating chairmanship. Treatise § 10.10. The two sides disagree on the question of naming the chair. The Players want the CEO to preside (albeit without a vote). The League wants the office to rotate between the two sides. Interview, p. 7. As the Treatise notes, having a putatively neutral CEO preside could imperil the CEO's neutrality as an employee of the board. Treatise § 10.10. Hence, the better alternative is to rotate the office between the two classes of directors, as in *Schraeder*.

ARTICLE VII — APPORTIONMENT & DISTRIBUTION OF REVENUES

Satisfactory Proposed Language:

After the deduction of expenses and reserves, all revenues shall be divided equally and paid as follows: (1) one-half to the Rugby League of America and (2) one-half to the Professional Rugby Players Association.

Explanation:

This is the apportionment and distribution scheme specified by the clients. Interview, p. 8.

ARTICLE VIII – AMENDMENT OF THE ARTICLES

Satisfactory Proposed Language:

These Articles may be amended by a vote of two-thirds of the entire Board of Directors.

Explanation:

As previously noted, the possibility of requiring supermajority votes should be allowed, especially for the most important provisions of the Articles, such as those concerning finances. Treatise § 10.9; *Schraeder v. Recording Arts Guild*. The clients want such a provision. Interview, p. 8.

NOTES

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