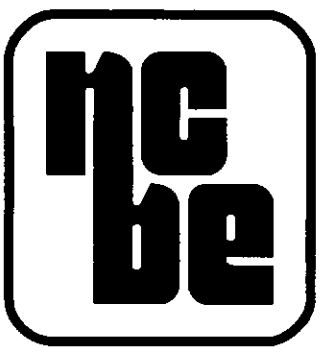
THE MPT

MULTISTATE PERFORMANCE TEST

February 2000 MPTs and Point Sheets

In re Application Specialists, Inc.
Proffet v. Dinsdale Instruments, Inc.
In re Lewis T. Travin



The National Conference of Bar Examiners inaugurated the Multistate Performance Test (MPT) in 1997. This publication is a reprint of the three MPTs that were administered in February 2000 in fifteen jurisdictions: Colorado, District of Columbia, Georgia, Hawaii, Illinois, Iowa, Maine, Mississippi, Missouri, New Jersey, New Mexico, Oregon, South Dakota, Texas, and West Virginia.

The MPT point sheets describe the factual and legal points encompassed within the lawyering task to be completed by the applicants. They outline all the possible issues and points that might be addressed by an examinee. They are provided to the user jurisdictions for the sole purpose of assisting graders in grading the examination by identifying the issues and suggesting the resolution of the problem contemplated by the drafters. The point sheet is not an official grading guide and is not intended to be a "model answer." Examinees can receive a range of passing grades, including excellent grades, without covering all the points discussed in the point sheet. User jurisdictions are free to modify the guidelines, including any suggested weights assigned to particular points. Grading the MPT is the exclusive responsibility of the jurisdiction using the MPT as part of its admissions process.

The instructions for the test appear on page iii. For further information regarding the test, see the **MPT Information Booklet**.

February 2000 Multistate Performance Tests and Point Sheets

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INSTRUCTIONS

1. You will have 90 minutes to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.

2. The problem is set in the fictitious state of Franklin, in the fictitious Fifteenth Circuit of the United States. In Franklin, the trial court of general jurisdiction is the District Court, the intermediate appellate court is the Court of Appeal, and the highest court is the Supreme Court.

3. You will have two kinds of materials with which to work: a File and a Library. The first document in the File is a memorandum containing the instructions for the task you are to complete. The other documents in the File contain factual information about your case and may also include some facts that are not relevant.

4. The Library contains the legal authorities needed to complete the task, and may also include some authorities that are not relevant. Any cases may be real, modified, or written solely for the purpose of this examination. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read them thoroughly, as if all were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page references.

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

6. Although there are no restrictions on how you apportion your time, you should be sure to allocate ample time (about 45 minutes) to reading and digesting the materials and to organizing your answer before you begin writing it. You may make notes anywhere in the test materials; blank pages are provided at the end of the booklet. You may not tear pages from the question booklet.

7. This performance test will be graded on your responsiveness to instructions regarding the task you are to complete, which are given to you in the first memorandum in the File, and on the content, thoroughness, and organization of your response.

FILE

In re Application Specialists, Inc.

Post, Ives & Reeves
3725 Opal Street
Barkley, Franklin 33501

MEMORANDUM

To: Applicant

From: Walter Post

Date: February 22, 2000

Subject: Application Specialists, Inc./Maria Pedroza

I met yesterday with Nancy Sanders, Vice President of Human Resources for one of our clients, Application Specialists, Inc. (ASI), and Maria Pedroza.

ASI recently offered a job to Ms. Pedroza, a very talented systems engineer who had formerly been employed by S.E. Attles & Associates (SEA) in Millertown, Olympia. ASI and SEA are head-to-head competitors in the computer network business.

As part of her employment agreement with SEA, Ms. Pedroza agreed not to accept employment with a competitor of SEA for one year after the termination of her employment. SEA is threatening to sue Ms. Pedroza if she accepts employment with ASI.

Under the law of the State of Franklin, employee non-competition agreements are usually not enforceable. Such agreements are, however, enforceable under the law of the state of Olympia, where Ms. Pedroza worked for SEA. I have been authorized to file suit for declaratory relief in the Franklin District Court on behalf of Ms. Pedroza, and we must act promptly to ensure that we keep Franklin as our forum.

Please prepare for me a memorandum analyzing which state's law the Franklin District Court will apply under the facts of our case—the law of Franklin or the law of Olympia—and what the likely outcome will be on the issue of the enforceability of the non-competition agreement.

Transcript of Recorded Interview With

Nancy Sanders and Maria Pedroza

February 21, 2000

Attorney: Nancy, I'm glad to see you.

Sanders: Same here, Wally. I'd like to introduce Maria Pedroza. She's the person I told you about yesterday.

Attorney: How do you do, Ms. Pedroza? I'm glad to meet you.

Pedroza: Likewise, Mr. Post. If you'll call me Maria, I'll call you Wally.

Attorney: It's a deal. Nancy, you told me a bit about the problem over the phone yesterday, but why don't we start from the beginning? Maria, pitch in any time.

Sanders: OK. As I told you, we offered Maria a job as Regional Systems Manager in Franklin, and her former employer is threatening to sue her if she goes to work for us.

Attorney: Tell me a little more about the business your company is involved in.

Sanders: As you know, ASI is in the computer network business. We design networks for business enterprises, particularly in the insurance and financial fields. We're a Franklin corporation. Our home office is right here in Barkley, but we also have offices in seven other states.

Attorney: Tell me a little more about the problem.

Sanders: Well, SEA is our major competitor all across the country. They're headquartered in Millertown, Olympia, although they have offices in most of the same cities we do, including Barkley. I believe SEA is an Olympia corporation.

Attorney: Do ASI and SEA compete for the same business—the same client base? Do you compete for the same pool of employees?

Sanders: Yes, pretty much. We both focus on banks and insurance companies. The types of employees we compete for are systems engineers with network experience, and competition for those types is very intense—they're in short supply. We employ about 100 of them at any given time; SEA usually has about 40 of them.

Attorney: Have you ever hired any of SEA's employees before?

Sanders: Well, that's the funny part. We've never actively recruited any of theirs before, yet they're always trying to pirate away our systems engineers. In fact, we've lost some

good people to them. In the past, we've hired two or three of SEA's people from its Franklin branch office. They've sought us out. We haven't recruited them.

Attorney: Maria, how did you come to be interested in ASI?

Pedroza: I read an ad in The Network, a nationwide trade journal, advertising a vacancy in ASI's newly created Regional Systems Manager position. It looked interesting. I had just quit SEA. I sent the letter Nancy just gave you.

Attorney: Nancy, is it a newly created position?

Sanders: Yes, it is. Our business is growing so fast that we've reorganized into several "regions," and we need experienced people to manage each of the regions. The Regional Managers will be our main contacts with existing customers in their regions.

Attorney: Do you envision that the Regional Managers will be responsible for getting new business?

Sanders: No, not really. We're not out to steal SEA's business. We've got as much as we can handle. But, you know, if any of Maria's SEA contacts express an interest in doing business with us, we won't turn them away.

Pedroza: As a matter of fact, Wally, a couple of my SEA clients have already said they'd like to follow me to ASI. I didn't recruit them. They just volunteered.

Attorney: OK. Nancy, why did you offer the job to Maria?

Sanders: She has a great reputation in the industry. We've known for years that she was one of SEA's shining stars, so we were surprised when we got her resume. She said she had resigned from SEA a week ago and was interested in coming to work for us. We jumped at the chance and made her an immediate offer.

Attorney: So, then what happened?

Sanders: A few days ago, I got this letter—here's a copy for you—from SEA's General Counsel threatening to sue us and Maria if she goes to work for us. He attached a copy of the signature page of her employment agreement with SEA and pointed out the non-competition clause. According to him, Maria can't take a job with us until a year after her resignation from SEA.

Attorney: Maria, did you realize you'd signed such a contract?

Pedroza: Yes. I really didn't have any choice.

Attorney: Nancy, has SEA ever gotten this aggressive before?

Sanders: No. We've known for years that they've required their systems engineers to sign non-competes, but they've never complained to us directly. Strangely enough, they don't have non-competition agreements with their Franklin-based employees. They only require their employees in other states to sign employment contracts with non-competes in them.

Attorney: That's because they know they're not enforceable in Franklin. Do you enter into non-competes with your systems engineers?

Sanders: No. We never have. We were told years ago that they were unenforceable and might get us in trouble.

Attorney: That was good advice, whoever gave it to you. Maria, where were you based with SEA?

Pedroza: I lived in Millertown, Olympia and was based in SEA's Millertown office.

Attorney: Are you sure you want to pursue this?

Sanders: Absolutely! We don't think it's fair that they should be able to steal our key employees and then cry foul when one of theirs voluntarily seeks us out. In addition, Maria is the best person for the job. We really want her to come to work for us. We're prepared to finance a lawsuit against SEA.

Attorney: Maria, how do you feel about it? You're going to be the plaintiff.

Pedroza: Well, if ASI is willing to back me, I'm willing to go ahead with it. I really want this job.

Attorney: All right. We're going to have to beat them to the courthouse. I suggest we file a suit in Franklin on Maria's behalf against SEA for declaratory relief asking the court for a ruling that the non-compete agreement is not enforceable under Franklin law.

Sanders: Ok. Do it. Let us know what help you need from us.

S.E. ATTLES & ASSOCIATES
The Leader in Networking

45 Worldwide Web Plaza
Suite 1000
Millertown, Olympia 44902

Telephone: (555)456-0987
Facsimile: (555)456-2434
Website: www.seattles@ultra.mpt

February 17, 2000

Nancy J. Sanders
Vice President, Human Resources
Application Specialists, Inc.
One Marcus Green, Suite 5000
Barkley, Franklin 33501

Re: Maria Anna Pedroza

Dear Ms. Sanders:

It has come to our attention that Maria Anna Pedroza, until recently employed by S.E. Attles & Associates (SEA) as a systems engineer, has accepted an offer of employment with your company. I am sure you are already aware that, as a condition of employment with SEA, Ms. Pedroza executed an agreement that she would not undertake employment with any competitor of SEA for a period of one year after the termination of her employment with SEA. I attach a copy of the relevant part of that agreement and direct your attention to Section 38 thereof.

Ms. Pedroza resigned her employment with SEA on February 11, 2000. Accordingly, she is contractually bound not to accept employment with Application Specialists, Inc. until February 11, 2001.

Your act of offering to employ Ms. Pedroza in direct contravention of our agreement with her is an unconscionable effort on your company's part to gain an unfair competitive advantage. If Application Specialists, Inc. persists in its plan to hire Ms. Pedroza at any time before February 11, 2001, SEA will sue Ms. Pedroza to enjoin her from commencing employment with ASI. We will also sue ASI for intentional interference with our contractual relations, seeking an injunction and damages.

Sincerely yours,

Alfred E. Newell
Vice President and General Counsel

AEN/lt
Enclosure
cc: Maria Pedroza

and EMPLOYEE further understands and agrees that, for any breach of this covenant to protect proprietary information and trade secrets belonging to S.E. ATTLES & ASSOCIATES, EMPLOYEE shall be liable for monetary damages.

38. COVENANT NOT TO COMPETE

EMPLOYEE agrees that during the term of her employment and for a period of one year after the termination thereof, whether said termination be voluntary or involuntary, she will not render, directly or indirectly, any services, whether as an employee or otherwise, to any business that is a competitor of S.E. ATTLES & ASSOCIATES in any area where S.E. ATTLES & ASSOCIATES does business or shall do business at any time during the period of EMPLOYEE'S employment. This covenant not to compete is voluntarily undertaken by EMPLOYEE at the time of her initial employment.

39. CHOICE OF LAW

The parties to this agreement agree that the rights and obligations of the parties and any actions or proceedings instituted with respect to any matters arising under or growing out of this agreement shall be governed by and construed in accordance with the laws of the State of Olympia whether such action or proceeding be instituted in the State of Olympia or elsewhere.

40. COMPLETE AGREEMENT

It is understood and agreed that no prior or contemporaneous promises or representations have been made regarding the subject matter of this agreement that do not appear written herein and that this writing contains the entire agreement of the parties.

Executed this 18th day of August 1996 in the City of Millertown, County of Bass, State of Olympia.

S.E. ATTLES & ASSOCIATES

By Margaret T Speritt
Margaret T. Speritt
Vice President
Human Resources

Maria Anna Pedroza
EMPLOYEE

Maria Anna Pedroza
233 Meadow Lane
Millertown, Olympia 44911

February 12, 2000

Nancy J. Sanders, VP/HR
Application Specialists, Inc.
One Marcus Green, Suite 5000
Barkley, FN 33501

Dear Ms. Sanders:

I am responding to your ad in The Network regarding the Regional Systems Manager position in Barkley. I enclose a copy of my resume for your consideration.

For the last four years, I have been a systems engineer for S.E. Attles working out of its Millertown office. About six months ago, I was assigned to a project in Barkley and other parts of Franklin and was impressed by the area. I have decided that I would like to live there permanently. I resigned my job with SEA yesterday, intending to move to Barkley to seek employment.

I believe the job you have advertised is a perfect fit for me. I have worked effectively with SEA's customer base all these years, and I feel I am ready to move into training and management. I am particularly attracted by the opportunity to train new people in our field. Your advertisement comes at a very opportune time for me. Salary requirements are negotiable.

Please let me hear from you at your earliest convenience.

Very truly yours,

Maria Anna Pedroza

Maria Anna Pedroza

Job Announcement

Regional Systems Manager

Top management position with leading network systems applications company.

Responsibility for managing and coordinating staff and business relationships with significant customer base. Managing training in Franklin Technology Zone Program, a state-mandated apprenticeship program designed to enhance employability of Franklin residents in high-tech occupations.

Send resume to attention of Nancy J. Sanders, VP/HR, Application Specialists, Inc., One Marcus Green, Suite 5000, Barkley, Franklin 33501.

LIBRARY

In re Application Specialists, Inc.

Restatement (Second) of Conflict of Laws

§ 187.

(1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.

(2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed at that issue, unless either

(a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or

(b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of §188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

(3) In the absence of a contrary indication of intention, the reference is to the local law of the state of the chosen law.

§ 188.

(1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties . . . .

(2) In the absence of an effective choice of law by the parties (see §187), the contacts to be taken into account . . . to determine the law applicable to an issue include:

(a) the place of contracting,

(b) the place of negotiation of the contract,

(c) the place of performance,

(d) the location of the subject matter of the contract, and

(e) the domicile, residence, nationality, place of incorporation and place of business of the parties.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

(3) If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied . . . .

McGill v. Donaldson, Inc.

Franklin Supreme Court (1965)

Plaintiff appeals from an adverse judgment in an action for declaratory relief to establish his right to be reinstated in the employees' retirement plan of the defendant corporation.

Plaintiff left defendant's employ on July 1, 1960, after meeting all the requirements for benefits under the retirement plan. On October 24, 1960, he went to work for a competitor of the defendant. On December 5, 1960, the retirement committee that administers the plan notified plaintiff that his rights to receive payments had been terminated pursuant to § 7.1 of the plan on the ground that he had entered the employ of a competitor.[1] Plaintiff then brought this action against the corporation seeking a declaration that he was entitled to reinstatement on the ground that the section invoked by the retirement committee was against public policy and unenforceable. The trial court held that § 7.1 was valid.

Section 600 of the Franklin Fair Business Act provides that, "Every contract by which anyone is restrained from engaging in a lawful profession, trade or business of any kind is to that extent void." This section invalidates provisions in employment contracts prohibiting an employee from working for a competitor after completion of his employment or imposing a penalty if he does so.[2] Since the pension plan becomes part of the contract of employment (see *Bos v. U.S. Rayon Co.* (Franklin Court of Appeals, 1958)), such provisions therein are also invalid.

As this Court said long ago:

> Equity will to the fullest extent protect the property rights of employers in their trade secrets and the preservation of their hard-won business advantages, but public policy and natural justice require that equity should be solicitous for the inherent right in all people, not fettered by negative covenants upon their part to the contrary, to follow any of the common occupations of life. A former employee has the right to engage in a competitive business for himself and to enter into competition with his former employer, even for the business of those who had been the customers of his former employer, provided such competition is fairly and legally conducted. *George v. Mossler* (Franklin Supreme Court, 1944).

That principle emanates from the common law

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[1]Section 7.1 provides: "The annuity payments to any retired Employee shall be suspended or terminated in the event such retired Employee at any time enters any occupation or does any act which, in the judgment of the Retirement Committee, is in competition with any phase of the business of the Employer."

[2]This section is to be read in tandem with § 602 of the Act, which provides: ..."unfair competition shall mean and include unlawful, unfair or fraudulent business practices and unfair, deceptive, untrue or misleading advertising." The imposition of an invalid non-competition agreement in an employment contract is a form of unfair competition within the meaning of § 602.

and is embodied in § 600 of the Civil Code. It is true that a number of states have abandoned the common-law prohibition of covenants restraining competition in employment agreements, adopting instead an approach enforcing such covenants to the extent they are reasonable. It may even be correct to say that this "rule of reason" represents a majority rule among jurisdictions that have considered the question.

However, the Franklin courts, led by this court, have been clear in their expression that § 600 represents a strong public policy of the state that should not be diluted by judicial fiat.

The forfeiture imposed upon the plaintiff by the defendant corporation in this case violates that strong public policy.

The judgment is reversed.

The Tree Doctor v. Ryan

Supreme Court of Olympia (1975)

The question presented in this suit for damages is the validity of a restrictive covenant in an employment contract between a company engaged in the business of tree care and one of its former employees. Under the covenant, the employee agreed not to compete with his employer in the area of the five counties including and surrounding Bass County, Olympia for a period of two years after termination of his employment.

During his tenure as an employee of The Tree Doctor, Ryan solicited tree care work for his employer in the five-county area and was in charge of the Easton office. He contacted old customers and potential new customers, suggested that tree work be done, and quoted prices. Ryan's sales leads were secured through the advertising efforts of The Tree Doctor's main office. Ryan was the only person in the Easton office acting as a sales representative. No claim is made by The Tree Doctor that the information furnished to Ryan or its methods or customer lists are trade secrets.

The tree care business is the only means of livelihood Ryan has ever had. He was trained by his uncle from the age of fourteen, joined The Tree Doctor as a trimmer at the age of eighteen, and worked for that employer for twenty years until he resigned in 1972. After his resignation, he bought out and became the sole proprietor of Wye Tree Experts, specializing in the care of shade trees. He began soliciting customers whom he had serviced while working for The Tree Doctor.

The Tree Doctor initiated this suit seeking to enjoin Ryan from engaging in competition and to recover damages for lost business. Ryan defended on the grounds that the covenant not to compete is invalid as against public policy, that it violates his right to earn a lawful living, and that, in any event, it is unreasonable both as to its geographical scope and its post-termination duration.

The trial court, after a one-day bench trial, entered judgment for The Tree Doctor. We affirm with one minor modification.

The general rule in Olympia, as in most jurisdictions, is that restrictive covenants in contracts of employment, by which an employee agrees not to engage in a competing business upon the termination of his employment, are not *per se* invalid. They will be sustained if the restraint is confined within limits that are no wider as to area and duration than are reasonably necessary for the protection of his employer and do not impose undue hardship on the employee or disregard the public interest in avoiding the creation of monopolies.

The rule in Olympia is based upon the judicially made policy determination that employers have a legitimate interest in protecting the customer contacts they have been

able to develop. In almost all commercial enterprises, contact with customers or clientele is a particularly sensitive aspect of the business. Ordinarily, the employer's sole or major contact with customers is through its employees. The possibility is present that the customer will regard or come to regard the attributes of the employee as more important in his business dealings than the special qualities of the product or services of the employer, especially if the product is not greatly different from others that are available. Thus, some customers may be persuaded, or even very willing, to abandon the employer should the employee move to a competing organization or leave to set up a business of his own.

The Legislature has never acted to overrule or limit this judicially created policy, and it must therefore be accepted as a part of the public policy of the State of Olympia that employers within the state may lawfully restrict post-employment competition by agreement with their employees as long as the restrictions are reasonable.

In this case, we find that all the reasons for adhering to the policy are present and none of the reasons for avoiding it are. It is reasonable to prevent Ryan from soliciting the very customers whom he served as an employee of The Tree Doctor within the same area for which he was responsible during his employment. The public interest is not adversely affected because there is no risk that preventing Ryan from competing will result in creation of a monopoly.

The only respect in which we differ from the decision of the trial court is as to the duration of the restriction. In light of the fact that tree care is the only means Ryan has ever known of earning a living and because of the relative saturation of the market in the five-county area, we find that two years is too long a period because it imposes an undue hardship on him. We exercise our well recognized discretion to "blue pencil" the covenant not to compete and reduce the temporal restriction to one year.

Affirmed in part and reversed in part.

Music Makers, Inc. v. Seabird Orient Industries

Franklin Supreme Court (1998)

The sole issue before the Court is whether the law of Franklin or the law of Singapore should be applied to resolve this commercial dispute between the parties.

Music Makers, Inc. (MMI), a Franklin corporation with its principal place of business in Atterbury, Franklin, entered into a written "requirements" contract with Seabird Orient Industries (SOI), a Singapore corporation based in Singapore, for the purchase of all of MMI's requirements for compact disk "blanks," i.e., high quality plastic disks used to create digital recordings of music or "CDs." The contract was negotiated in Singapore, and the goods were to be manufactured there and shipped F.O.B. Singapore to MMI in Franklin.

SOI is alleged to have failed repeatedly to deliver the requisite quantities and, instead, to have sold to a competitor of MMI blanks it should have delivered to MMI. The contract between the parties contained the following choice of law clause: "ARTICLE 47. CHOICE OF LAW: This agreement and any dispute arising under the agreement shall be governed by and construed in accordance with Singapore law."

MMI sued SOI in the Franklin district court on a number of counts, including a claim for breach of the implied covenant of good faith and fair dealing (the "covenant"). The trial court dismissed the claim for breach of the covenant on the grounds that the parties had agreed that their contract would be governed by Singapore law and that Singapore law does not recognize such a covenant in commercial contracts of this type. MMI took this permissive interlocutory appeal.

The starting point for the resolution of any conflict of laws issue in any case is to inquire whether there is indeed a conflict. Some courts would say there is a conflict any time the laws are different. However, we apply the rule that there is a conflict when a different outcome would result under the two laws or where each state has an interest in applying its own law.

In this case, there is a conflict because each jurisdiction has its own interest in applying its own law. The law of Singapore does not countenance an implied covenant of good faith and fair dealing in a contract for manufactured goods between merchants. Singaporean law is based on the policy that contracting parties are presumed to be sufficiently sophisticated that they can express all covenants and conditions to their agreement. The law of the State of Franklin, on the other hand, presumes that such a covenant inheres in every contract. It is a principle adopted in the Franklin Commercial Code as well as in its common law.

In determining the enforceability of arm's-length contractual choice-of-law provisions, Franklin courts apply the "governmental

interest analysis" set forth in the Restatement (Second) of Conflict of Laws § 187, which reflects a strong policy favoring enforcement of such provisions.

Briefly stated, the proper approach under Restatement § 187(2) is for the court first to determine either: (1) whether the chosen state has a substantial relationship to the parties or their transaction, or (2) whether there is any other reasonable basis for the parties' choice of law. If neither of these tests is met, that is the end of the inquiry, and the court need not enforce the parties' choice of law.

If, however, either test is met, the court must next determine whether the chosen state's law is contrary to a fundamental policy of the State of Franklin. If there is no such conflict, the court shall enforce the parties' choice of law.

If there is a fundamental conflict with Franklin law, the court must then determine whether Franklin has a materially greater interest than the chosen state in the determination of the particular issue. If Franklin does have a materially greater interest than the chosen state, the choice of law shall not be enforced for the obvious reason that in such a circumstance we will decline to enforce a foreign state's law contrary to this state's fundamental policy.[1]

We now apply the Restatement tests to the facts of this case.

Substantial relationship or reasonable basis: As to the first required determination (§ 187(2)(a)), Singapore clearly has a substantial relationship. SOI is incorporated and based there, the contract was negotiated there, and the goods were to emanate and be shipped from there. C.f., the factors set out in Restatement § 188. Indeed, a party's incorporation in a state is a contact sufficient to allow the parties to choose that state's law to govern their contract.

Contrary to a fundamental policy of Franklin: We perceive no fundamental policy of Franklin requiring the application of Franklin law to MMI's claim based on the implied covenant. The covenant is not a governmental regulatory policy designed to restrict freedom of contract, but an implied promise inserted in an agreement to carry out the presumed intentions of the contracting parties. As we observed in *Furley v. Interactive Components, Inc.* (1988), "When a court enforces the implied covenant, it is in essence acting to protect the interest in having the private promise performed rather than to protect, for example, some general duty to society which the law places on an employer irrespective of the contractual terms in agreements with its employees."

MMI has directed us to no authority exalting the implied covenant over the express cove-

[1]A strict reading of § 187 of the Second Restatement would require us to make one additional inquiry, i.e., whether our state is also the state whose law would apply under a "most significant relationship" test. We believe that, when the question of a fundamental state policy is at stake, no such inquiry is necessary or appropriate. In such a case, we will apply our own law irrespective of which state has the "most significant relationship."

nant of these parties that the law of Singapore shall govern their agreement. Accordingly, the second exception to the rule of § 187 does not apply.

Materially greater interest than the chosen state: Let us assume *arguendo* that Franklin's law recognizing such a covenant does rise to the level of a "fundamental policy." The next and final step in the analysis would require us to determine whether Franklin has a "materially greater interest" than Singapore in the determination of the particular issue.[2]

We can conceive of situations where a Franklin statute (for example, one designed to protect employees' wages or freedom to contract for terms of employment) might predominate over the law of a chosen state where such protections are not available. In such a case we would refuse to enforce the parties' choice of the other state's law on the ground that Franklin's interest was materially greater. In the present case, however, we cannot conceive that Franklin's interest in enforcing an implied contractual covenant in a commercial contract outweighs Singapore's interest in indulging the presumption that the parties have expressed all conditions and covenants.

We affirm the judgment of the trial court.

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[2]Many jurisdictions that have adopted the "governmental interest" Rest. § 187 approach to resolving conflicts issues also include a "comparative impairment" inquiry; i.e., which state's interests would be "more seriously impaired" by enforcement of the parties' chosen law. We find it unnecessary to extend the inquiry to include this step of the analysis. See *Addles Washing Town v. Dry Cleaners Supply* (Franklin Supreme Court, 1987).

POINT SHEET

In re Application Specialists, Inc.

Palmer, Springs & Deckenbach
Attorneys at Law
477 Maynard Way
Kittridge, Franklin 33321
(555) 586-9853

MEMORANDUM

TO: Applicant

FROM: Anna Springs

DATE: February 22, 2000

SUBJECT: Proffet v. Dinsdale Instruments, Inc.

We represent Dinsdale Instruments, Inc. (DII) and its president, Richard Dinsdale, defendants in a suit filed by Mary Proffet. Today we concluded the evidentiary phase of the trial. In a meeting with the judge to settle jury instructions before tomorrow afternoon's closing arguments, the judge tentatively rejected our jury instruction on the measure of damages to be applied in Ms. Proffet's claim for quantum meruit and said she was probably going to give the instruction proffered by Proffet's attorney. When I objected, the judge said she would reconsider but she wants us to brief the issue.

Please draft a brief that persuades the court to adopt our jury instruction. Follow the guidelines in the firm's memo regarding persuasive briefs and the specific instructions of the judge.

Palmer, Springs & Deckenbach

Attorneys at Law

MEMORANDUM September 8, 1995

TO: Attorneys

FROM: Mario Deckenbach

RE: Persuasive Briefs

All persuasive briefs shall conform to the following guidelines.

All briefs shall include a Statement of Facts. The aim of the Statement of Facts is to persuade the tribunal that the facts support our client's position. The facts must be stated accurately; however, emphasis should be placed on the material facts that best support our client's position. The statement of facts need not be exhaustive but it must contain key facts sufficient to inform the court of the essence of the dispute and the relief sought.

The office follows the practice of breaking the argument into its major components and writing carefully crafted subject headings that illustrate the arguments they cover. Avoid writing briefs that contain only a single broad argument heading. The argument heading should succinctly summarize the reasons the tribunal should take the position you are advocating. A heading should be a specific application of a rule of law to the facts of the case and not a bare legal or factual conclusion or a statement of an abstract principle. For example, improper: THERE HAS BEEN NO BREACH OF CONTRACT. Proper: THE REFUSAL OF THE PLAINTIFF TO FOLLOW HER EMPLOYER'S DIRECTION TO CONCEAL THE PRICE-FIXING CONSPIRACY IS NOT A BREACH OF PLAINTIFF'S CONTRACT OF EMPLOYMENT.

The body of each argument should analyze applicable legal authority and persuasively argue how the facts and law support our client's position. Authority supportive of our client's position should be emphasized, but contrary authority also should generally be cited, addressed in the argument, and explained or distinguished. Do not reserve arguments for reply or supplemental briefs.

The lawyer need not prepare a table of contents, a table of cases, a summary of argument, or the index. These will be prepared, where required, after the draft is approved.

PLAINTIFF'S JURY INSTRUCTION NO. 17

Proffet v. Dinsdale Instruments, Inc.

If you find that the plaintiff, Mary Proffet, rendered valuable services that benefited the defendants, you may award compensation to plaintiff for the reasonable value of her services by awarding her either:

1. The reasonable value of what it would have cost defendants to obtain from another person the services that Ms. Proffet provided; or

2. The value by which defendants were benefited as a result of the services rendered by Ms. Proffet.

See Restatement, Restitution, Section 1 and Comment.

Proffered: Yes ___
No ___
Given: ___
Rejected: ___

DEFENDANTS' JURY INSTRUCTION NO. 21

Proffet v. Dinsdale Instruments, Inc.

If you find that there already existed an agreement establishing the plaintiff's compensation for her services, you must award Mary Proffet nothing on her claim for recovery in quantum meruit.

If, however, you find that no such agreement existed and that Mary Proffet rendered valuable services that unjustly enriched the defendants, you must assess the value of those services in quantum meruit by applying the following measure: the reasonable value of what it would have cost the defendants to obtain from another person the services provided by Ms. Proffet.

See Quigley v. Rayner (Franklin Supreme Court, 1987) and Rosener v. First Financial Mortgage, Inc. (Franklin Court of Appeal, 1996).

Proffered: Yes ___
No ___
Given: ___
Rejected: ___

Trial Transcript

Excerpt of Testimony of Plaintiff, Mary Proffet

* * *

Question (By counsel for plaintiff): So you first went to work for Dinsdale Instruments in 1973, is that right?

Answer: Yes.

Q: What job did you hold at first?

A: I was Richard's bookkeeper.

Q: How long were you the bookkeeper?

A: Well, I'm not really sure how long I held the title. I mean I kept the books for lots of years, but I also took on other jobs as time went on. But then, as the company got bigger, it just got to be too much, so we hired other bookkeepers and accountants. I guess that was about 1988 or 1989.

Q: What caused you and Richard to have a falling out?

A: Well, it had been coming on a long time. I had worked my tail off at growing the business and I'd been asking him for a long time to give me stock in the company, and he wouldn't do that. About three years ago, I found out he was going to transfer about half of the company stock to his no-account son who's never done a day's work. I confronted Richard, and he told me it was none of my business, that it was his stock, and he could do with it as he pleased. That was the last straw. I quit.

Q: What part did you play in "growing the business," as you put it?

A: The company was rocking along at about half a million dollars, more or less, when I started working for Richard. Over time, I took over the financial, administrative, marketing, and sales end of things to give him more of a chance to concentrate on production, which was his strong suit.

Q: About what time period are you talking about?

A: Well, it was progressive. I mean, it took time for Richard to get enough confidence in me to turn those functions over to me. But I'd say that by about 1989 or 1990, I was fully in charge. He made me a vice president of the corporation. My main job was marketing.

Q: At some point, did Dinsdale Instruments begin manufacturing a new product line?

A: Yeah, it happened about 10 years ago.

Q: Tell the jury about that.

Counsel for defendant: Objection. Calls for a narrative answer.

The Court: Overruled. Go ahead and answer, Ms. Proffet.

A: OK. We had been manufacturing some high quality industrial-type flashlights. They were kind of bulky things. In my travels connected with my marketing job, I got to talking with

customers and sales representatives and got the idea that really good quality smaller specialty flashlights you could carry in your car or pockets or purses or key rings—that sort of thing—would be a good idea. I mean, there were lots of products like that out there, but they were mostly cheap novelty items. I convinced Richard to give it a try. He manufactured them, and I marketed the heck out of them. They caught on, and we started to make money hand over fist.

Q: Ms. Proffet, what was the net asset value of Dinsdale Instruments in 1989 when you first became vice president of marketing?

A: It was right at $500,000.

Q: You said these new flashlights caught on. What do you mean by that?

A: I mean they sold like hotcakes, doubling and tripling each year and they still are selling like mad. They make up about 90% of the company's sales today. On account of my idea to start producing those flashlights, the company is worth a lot more today.

Q: All right. As of the time you left Dinsdale, what was the net asset value of the company?

A: It was right at $198 million. See what I mean? All that growth is because of my idea and hard work.

Counsel for plaintiff: That's all I have, your honor.

The Court: All right. Ms. Springs? Cross-examination?

Counsel for defendant: Yes, your honor. Thank you.

Cross-Examination of Plaintiff

Question (By counsel for defendant)**:** Ms. Proffet, the company employed more than 500 people, didn't it?

A: Yes.

Q: The manufacturing operation was of the highest quality, wasn't it?

A: Yes, we made the best flashlights on the market.

Q: And Mr. Dinsdale developed these manufacturing techniques, didn't he?

A: Yes, we all worked hard. But if it hadn't been for my idea and hard work, we wouldn't be anywhere near as large as we are today. I ought to be entitled to a share of the growth. I don't see why Richard should get all the benefit.

Q: You understand, don't you, that Dinsdale Instruments is a corporation and that Richard Dinsdale owns the stock of the corporation?

A: Yeah. It's a corporation, but Richard doesn't own all the stock any more. He gave about half of it to his deadbeat son. That's the half that should've gone to me.

Q: Let's explore that. At no time in all years you knew him did Mr. Dinsdale ever promise or even suggest that you would get stock in the company. Isn't that correct?

A: Well, it depends on what you mean by "promise or suggest." He kept telling me he'd think about it.

Q: But it's true, isn't it, that he never agreed to give you or even let you buy any stock?

A: Yeah. I guess he's still thinking about it.

* * *

Q: When you first became vice president of marketing in 1989, what was the amount of your salary?

A: I don't remember exactly. I think it was about $25,000 a year, about that.

Q: You received pretty generous salary increases every year, didn't you?

A: Well, I don't know about generous, but, yeah, I got yearly raises. Other people get stock when they transform a company.

Q: What was the amount of your salary in the last year you worked for Dinsdale?

A: (Inaudible.)

Q: I'm sorry, Ms. Proffet. Could you say that just a bit louder so the jury can hear you?

A: $350,000 a year.

Q: Thank you. And in addition, you got some sizeable bonuses, didn't you?

A: Not in relation to my contribution to the profits of the company. But, even so, I was entitled to them. After all, it was my work and my ideas that made the company all this money. I had the right to be compensated for it.

Q: Let me show you the document we've marked Defendants' Exhibit 27. I'll tell you that it's a schedule compiled from the company's payroll records showing the annual compensation you received from Dinsdale during the time you were vice president of marketing. Would you look at it and tell me if it's accurate.

Counsel for plaintiff: Your honor, I object on best evidence and relevancy grounds.

Counsel for defendant: Your honor, this is a summary of business records and counsel has been given access to the original records to verify the information on the exhibit. And it's highly relevant. Ms. Proffet is asserting a claim for quantum meruit, and it's relevant to show she's been adequately paid for her services.

The Court: Objection overruled on both grounds. Proceed. Ms. Proffet, can you answer the question?

A: Yes, your honor. I mean I can't be absolutely sure it's accurate, but it appears to be.

Question (By counsel for defendant)**:** I offer Defendants' 27.

Counsel for plaintiff: No objection.

The Court: Very well, Defendants' 27 is received.

* * *

Excerpt of Testimony of Defendant, Richard Dinsdale

* * *

Question (By counsel for defendant): Mr. Dinsdale, at the time Ms. Proffet began working for you, was Dinsdale Instruments a corporation?

Answer: No. It was a sole proprietorship. I invested everything I had and didn't get any help from anybody. I incorporated the company in 1987.

Q: Since that time, who have been the shareholders of Dinsdale Instruments?

A: Until about three years ago, when I transferred half of the shares to my son, I was the only shareholder.

Q: Did you ever promise to give or sell Ms. Proffet any shares in the company?

A: No. She kept asking me over the years to let her buy in, but I told her no every time. I told her I wanted to keep the stock in the family.

* * *

Question (By counsel for defendant): You heard Ms. Proffet's testimony about the growth in the net asset value of the company—from about $500,000 to almost $198 million. Do you agree with those numbers?

Answer: Yeah, they're about right.

Q: Do you agree with her assessment that she was mainly responsible for the growth of the company?

A: Of course not. She did come up with the ideas for manufacturing and marketing the line of personal flashlights, and she kind of mobilized the resources to keep it going. So, yeah, she deserves a lot of credit. But, remember, she got paid pretty well for what she did. After all, it was her job in marketing to come up with ideas like the flashlight idea. That's what all people in jobs like hers are supposed to do. But I'm the one who financed it and figured out how to manufacture it. And, let's not forget the other 500 company employees.

Q. Let me show you Defendants' Exhibit 27. Do you recognize it?

A: That's a list of her salary and bonuses during the time she was vice president of the company.

Q: How were her salary and bonuses set each year?

A: Well, at the beginning of each fiscal year, she and I would sit down and review things. The company was going great guns and she was doing a great job. She'd always make a survey of comparable compensation packages for her counterparts in similar size companies and

she'd tell me how much she thought she should be paid to keep up with the competition and I always agreed. So, I guess you'd say she set her own wages.

Q: Was particular consideration given to the bonuses during your discussions?

A: Yes. She'd always say she wanted me to sell her some stock or give her stock options. I told her I didn't want to do that. I recognized how much she had contributed to the company, and I told her the bonuses were intended to reward her for that.

* * *

In camera Conference to Settle Jury Instructions

* * *

The Court: All right, let's move on to the instructions on the measure of damages on Ms. Proffet's claim for quantum meruit. I'm inclined to give Plaintiff's Instruction number 17.

Counsel for defendant: Excuse me, your honor. I'd like you to take a look at Defendants' Instruction number 21. That accurately reflects the law. The one plaintiff is proposing doesn't.

Counsel for plaintiff: That's not right, your honor. It's pretty clear from the facts that Ms. Proffet was the moving force behind the company and that the jury is entitled to give her a quantum meruit award measured by the amount her efforts increased Dinsdale's net worth.

Counsel for defendant: No, not at all. The facts show . . . .

The Court: Wait a minute. I'm not going to listen to factual arguments at this time. I'm tentatively saying I'm going to give Plaintiff's number 17, but I'm open to being convinced otherwise. We're not instructing the jury until tomorrow, so here's what we'll do.

I want each of you to brief me on which one is the correct instruction. I don't want you to submit just a string of case citations. I want you to explain the law and, more important, tell me how the evidence supports your view of the law. A jury instruction has to be supported by the facts in evidence, so, in your briefs, use the facts and spell out how they support the instruction you want me to give. Also, tell me what's wrong with the instructions you don't want me to give.

Counsel for defendant: Thank you, your honor.

Counsel for plaintiff: Yes, your honor.

* * *

SCHEDULE OF COMPENSATION

Mary Proffet, Vice President/Marketing

1989 to 1998

Year	Salary	Bonus	Total
1989	$25,000	$1,500	$26,500
1990	35,000	3,000	38,000
1991	50,000	10,000	60,000
1992	75,000	15,000	90,000
1993	100,000	25,000	125,000
1994	150,000	50,000	200,000
1995	200,000	100,000	300,000
1996	250,000	150,000	400,000
1997	300,000	200,000	500,000
1998	350,000	300,000	650,000
Totals:	$1,535,000	$854,500	$2,389,500

Deft. Exhibit 27

LIBRARY

Proffet v. Dinsdale Instruments, Inc.

RESTATEMENT, RESTITUTION

Section 1. Unjust Enrichment.

A person who has been unjustly enriched at the expense of another is required to make restitution to the other.

Comment:

* * *

c. Unjust retention of benefit. Even where a person has received a benefit from another, he is liable to pay therefor only if the circumstances of its receipt or retention are such that, as between the two persons, it is unjust for him to retain it. The mere fact that a person benefits another is not of itself sufficient to require the other to make restitution therefor.

* * *

d. Where the benefit and loss do not coincide. In [some] situations, a benefit has been received by the defendant but plaintiff has not suffered a corresponding loss or, in some cases, any loss, but nevertheless the enrichment of the defendant would be unjust. In such cases, the defendant may be under a duty to give the plaintiff the amount by which he has been enriched. [For example], where a person in a fiduciary relation to another makes a profit in connection with transactions conducted by him as fiduciary, he is ordinarily accountable to his beneficiary for the profit, although the beneficiary suffered no loss. . . .

* * *

Section 107. Effect of Existence of Bargain upon Right to Restitution.

(1) A person of full capacity who, pursuant to a contract with another, has performed services or transferred property to the other or otherwise has conferred a benefit upon him, is not entitled to compensation therefor other than in accordance with the terms of such bargain, unless the transaction is rescinded for fraud, mistake, duress, undue influence or illegality, or unless the other has failed to perform his part of the bargain.

(2) In the absence of circumstances indicating otherwise, it is inferred that a person who requests another to perform services for him or to transfer property to him thereby bargains to pay therefor.

Comment on Subsection (1):

* * *

b. . . . If the suit is for breach of contract the disappointed promisee is entitled to the value of what he was promised. In cases in which he seeks restitution on the ground of unjust enrichment he is entitled to no more than the value of the benefit which he has conferred upon the other party.

Rosener v. First Financial Mortgage, Inc.

Franklin Court of Appeal (1996)

Robert Rosener and First Financial Mortgage, Inc. entered into a letter agreement under which Rosener undertook to introduce First Financial to potential mortgage purchasers. The agreement provided that: "This agreement will govern the amount of compensation paid to Rosener in the event successful mortgage transactions are initiated through firms introduced to First Financial by Rosener." The letter goes on to state that First Financial will pay Rosener a fixed percentage commission on "the principal balance of all mortgages sold to or through firms introduced by Rosener for a period of 10 years."

In short order, Rosener began to "register" names of financial institutions by sending frequent letters to First Financial listing the names of the various firms. About five months later, Rosener wrote to First Financial stating that he had "introduced First Financial to nearly every competitive buyer of mortgages in the United States," and that although he might later make additional "introductions," he had fulfilled his agreement by "introducing" First Financial to the listed parties and that he expected to be paid his commission for every transaction consummated between First Financial and any one of the financial institutions he had "registered."

First Financial wrote back telling Rosener it was not the understanding that the mere "registering" of names would lock Rosener into a commission for the next 10 years. At this point, dealings between First Financial and Rosener ceased.

First Financial retained another financial adviser and entered into an agreement with her that provided for the payment of commissions for every completed mortgage transaction procured by her. In 1993 and 1994, the new adviser, completely independently of Rosener's activities and "registrations," procured a number of completed transactions with financial institutions that had earlier been "registered" by Rosener and was paid her commissions. When Rosener learned of this, he sued for breach of contract.

The court below, properly concluding that the letter agreement between Rosener and First Financial was not an integrated agreement, received parol evidence to explain the meaning of the contract. The court found, and we agree, that there was indeed a contract which, because of customary business practices, required as a precondition to Rosener's right to receive a commission that he be the procuring cause of any completed transaction. Accordingly, First Financial had not breached the agreement.

Then, *sua sponte* and inexplicably, the court declared the contract "rescinded" on the ground of mistake and awarded Rosener a quantum meruit recovery for the reasonable value of the services performed. This was error.

A quantum meruit or quasi-contractual recovery rests upon the equitable theory that a contract to pay for services rendered is implied by law for reasons of justice. However, it is well settled that there is no equitable basis for an implied-in-law promise to pay reasonable value when the parties have an actual agreement covering compensation. Quantum meruit is an equitable theory that supplies, by implication and in furtherance of equity, implicitly missing contractual terms. A quantum meruit analysis cannot supply "missing" terms that are not "missing." The reason for the rule is that where the parties have freely, fairly and voluntarily bargained for certain benefits in exchange for undertaking certain obligations, it would be inequitable to imply a different liability.

The court ignored the rule that equitable entitlement to a quantum meruit payment is not implied where the parties have actual contract terms covering payment. A court may not, not even under the guise of equity jurisprudence, substitute the court's own concepts of fairness in place of the parties' own contract.

We reverse.

Quigley v. Rayner

Franklin Supreme Court (1987)

Margaret Rayner, an artist of some renown, was a contestant in a competition sponsored by Alexander & Barton, Ltd. to produce a mural for the foyer of that company's new high-rise office building in Dorston, Franklin. Pursuant to the terms of the competition, she painted a 3' x 5' picture of her conception of the mural for entry in the contest and shipped it via common carrier for timely arrival at the offices of the designated contest judges.

The crate containing Ms. Rayner's painting was mistakenly delivered to a retail store in Barnard, Franklin, about 75 miles distant from the intended destination in Dorston. Vernon Quigley, manager of the store in Barnard, noticed the error after the common carrier's driver had departed. It happens that Mr. Quigley's home is equidistant between Barnard and Dorston, so he took it upon himself to load the crate in his pickup truck and, not knowing its contents, deliver it to the Dorston destination stenciled on the crate. The delivery was made within the time allowed under the rules of the contest. The next day would have been too late. Mr. Quigley obtained a receipt for the delivery and sent it and a handwritten explanation of the circumstances to Ms. Rayner, whose return address had also been stenciled on the crate as "sender." In his note, Mr. Quigley stated that he would "appreciate being paid" for his effort.

As fate would have it, Ms. Rayner's painting was selected as the winning entry. The award for the painting of the mural carried with it a commission of $150,000. The results of the contest were widely publicized and came to the attention of Mr. Quigley, who presented Ms. Rayner with a demand for a "sizeable reward" for his part in having procured her the commission. Ms. Rayner declined, offering instead to pay Mr. Quigley $475.00, the amount of the freight bill she would have had to pay the common carrier. He rejected the offer and sued for "$75,000 or such other sum as the court deems proper in quantum meruit."

The trial court awarded him $475.00, the reasonable value measured by what it would have cost Ms. Rayner to obtain the services from another person. In this case, the common carrier's freight bill for making the delivery was a convenient point of reference. The Court of Appeal affirmed.

Mr. Quigley had no contractual obligation to deliver the crate to Dorston and no contractual right to be paid for it. At the very best, he was a gratuitous bailee whose obligation was to exercise minimal care to safeguard the crate.

The absence of a contract between Ms. Rayner and Mr. Quigley, however, does not preclude recovery in quantum meruit. The underlying idea behind quantum meruit is the law's distaste for unjust enrichment where one confers upon another a benefit that has enriched the other. But it is one thing to require that the

FILE

In re Lewis T. Travin

defendant be benefited by services and quite another to measure the value of those services by the amount by which the defendant was benefited as a result of them. This resulting benefit theory is the measure the plaintiff urges us to adopt.

The resulting benefit theory is an open-ended standard which can have the effect of giving the plaintiff a recovery that has no reasonable relation to the value of the services rendered. Such a recovery allows the value of the services to depend upon the impact of the benefit conferred on the defendant rather than upon the intrinsic value of the services. Allowing recovery based on the resulting benefit theory would frequently impose, as it would in this case, an unconsented-to exchange of a part of the underlying enterprise and impart a windfall.

While it might be proper in some circumstances to apply the resulting benefit theory of recovery in quantum meruit, this is not such a case. Here, it would confer upon Mr. Quigley a windfall out of proportion to any possible expectation he might have had when he performed the services. The most he could reasonably have expected would have been that he would be paid what it might otherwise have cost the plaintiff. That is the correct measure of damages in these circumstances.

Accordingly, we affirm.

Law Office of Rachel Keane
97 Park City Lane
Lawndale, Franklin 33343

TO: Applicant
FROM: Rachel Keane
DATE: February 24, 2000
RE: Complaint No. 57-304, Lewis T. Travin

We have been retained by Lewis T. Travin to represent him in a matter before the Franklin State Bar Office of Lawyer Discipline. The initial complaint, lodged by a prosecuting attorney from Lake County, alleges Travin assisted a criminal defendant, George Clausen, whom he knew to be using a false identity.

I have already spoken to Mr. Travin and have included notes from that interview. The matter is at the preliminary investigation stage in which Travin must respond by letter to these allegations. Before I respond to the Office of Lawyer Discipline, I want you to prepare a memorandum for me addressing the following points:

- The Office of Lawyer Discipline hasn't itemized the charges against Travin, so the first thing I want you to do is to identify and state separately his potential acts of misconduct. Do not treat the fact that Travin failed to inform the Fairview police about Clausen's use of a false name as an act of misconduct. I have concluded that he was not required to do so by the Rules of Professional Conduct.
- Second, using each potential act you have identified as a heading, marshall the law and facts to argue persuasively that the act identified in the heading did not violate the Franklin Rules of Professional Conduct.
- Third, assuming that Travin did commit one or more acts of professional misconduct, discuss the facts we can put forth in support of an argument that his acts were done in good faith, that they were only technical violations, and that the Office of Lawyer Discipline should therefore dismiss the charges.

I have attached some of the Franklin Rules of Professional Conduct that may be relevant for your use in completing this assignment. As you know, in substance these rules are identical to the ABA's Model Rules of Professional Conduct.

NOTES OF INTERVIEW WITH LEWIS TRAVIN

Travin came in to see me February 22, 2000. Brought in a letter from State Bar investigator and a letter from the District Attorney.

DA (Ann Crowley) got a report from a probation officer named Peter Owens to the effect that Travin participated in helping his client foist off a false name in a prosecution for driving while intoxicated (DWI). Travin wants us to represent him in the State Bar proceedings.

Here's what Travin says happened:

- Approximately November 16, 1999, Travin was retained by a guy named George Clausen to represent him in a DWI case.
  - This case was in the Lawndale Division of the Lake County District Court.
  - Travin agreed and became counsel of record for Clausen.
  - Apparently, Clausen was a repeat offender — 1 prior DWI, involving an accident with serious injuries.
- About December 6, 1999, Clausen called Travin, told him he was in jail in Fairview — another DWI.
  - Clausen told Travin he'd been booked in Fairview under a false name he gave the police — "Frank Bogason."
  - Apparently, he's got a Florida driver's license under the name of "Bogason."
  - "Bogason" asked Travin to help him get out of jail.
  - Travin refused and advised "Bogason" that it would be worse for him if he got caught (as he was sure to be) and that he should come clean and give his real name.
  - "Bogason" said he'd think about it, but that he was scared because of his priors.
  - Travin made it clear that he'd do nothing further for "Bogason."
- When Travin was meeting with Clausen to prepare for an appearance in Lawndale, he learned the following facts about what "Bogason" had done in the Fairview proceeding.

- On December 16, 1999, "Bogason" appeared without counsel and pleaded guilty in the Fairview Division as a first offender.
  - Apparently, "Bogason" was in court and observed that the judge was handing out light sentences — "a slap on the wrist."
  - "Bogason" had intended to come clean and disclose that he was really Clausen but changed his mind when he saw the judge's leniency.
  - Judge noted "Bogason's" Florida license, and ordered a pre-sentence report — Peter Owens was the assigned probation officer.
- Travin says he was very troubled, especially in light of the fact that he was going to be appearing with Clausen in Lawndale.
- Travin says he felt ethical Rule 1.6 was controlling, but to be sure, he talked to other lawyers who do criminal defense work (Williams, Neary, and Chen).
  - They confirmed his conclusion — i.e., he couldn't get actively involved in Clausen's deception, but he couldn't reveal what was going on.
- On December 27, 1999, Travin, as Clausen's attorney, accompanied Clausen to court in Lawndale. Clausen entered a guilty plea. The judge sentenced him to six months in jail and suspended all but four weekends of it; one year's probation; and loss of his driver's license for one year. The judge didn't ask any questions about priors or the correctness of the rap sheet. Travin remained silent about Clausen's use of false name in Fairview case.
- On January 14, 2000, Travin accompanied Clausen to a scheduled interview with Peter Owens on the Fairview case.
  - Travin said he wasn't going to go with Clausen because that was the case in which he'd used "Bogason," but Clausen "begged" him — said he was nervous about getting caught.
  - Travin told him he'd certainly get caught and that it would be much worse for him unless he volunteered the truth.
  - Travin told him — "I'll go with you, but only on the condition that you tell Owens what your real name is. If you do that, then I'll represent you for the limited purpose of getting you the best deal possible under these circumstances. I'm not gonna be part of your scam."

- Clausen said "OK" and "promised" he'd come clean no matter what.
- At the meeting, Owens went out of his way to say he was acting on behalf of the judge in Fairview and that Clausen should consider himself as still being under oath to tell the truth.
- Travin remained silent during the interview — waiting for Clausen to give his real name. When it became apparent that Clausen wasn't going to come clean, Travin asked for a break — took Clausen out into the hall.
- Clausen said, "I'm not gonna tell Owens about the false name — there's too much at stake — I'm not gonna do any more time on this one if I can avoid it. And you better not say anything either."
- Travin then chewed Clausen out for lying to him too and said, "I'm leaving — you're on your own."
- Travin left. Hasn't seen or talked to Clausen since January 14, 2000 (the day he walked out on the Fairview interview).

- Apparently, Owens didn't buy "Bogason's" story about why Travin left the interview.
  - Owens checked further and found out that Clausen and "Bogason" were one and the same.

FRANKLIN STATE BAR ASSOCIATION
OFFICE OF LAWYER DISCIPLINE
1600 Mill Ferry Road, Suite 110
Grand Falls, Franklin 33325

February 14, 2000

Lewis T. Travin, Esq.
213 Main Street
Lawndale, Franklin 33343

Re: Lawyer Discipline Case No. 57-304

Dear Mr. Travin:

Attached is a letter from Ann Crowley received by this office on January 20, 2000, alleging conduct on your part that may have violated one or more provisions of the Franklin Rules of Professional Conduct. In response to this complaint, we have opened an investigative file, case number 57-304, and will be looking into the matters alleged. I am a nonlawyer employee of the Office of Lawyer Discipline and have been assigned the case for investigation.

In accordance with our procedures, you are allowed 30 days from the date of this letter to respond in writing to the charges contained in the attached complaint letter. Your response may be as lengthy as necessary, but keep in mind that it will become a part of your case file and should communicate your explanations for your conduct as succinctly and clearly as possible.

As you are aware, it is the duty of all attorneys licensed in the State of Franklin to cooperate fully in any disciplinary proceeding.

Sincerely yours,

Johnny Ripka

Johnny Ripka
Investigator

Enc.

District Attorney for Lake County
Fairview Division
Municipal Office Building
Fairview, Franklin 33349

January 18, 2000

Office of Lawyer Discipline
State Bar of Franklin
1600 Mill Ferry Road
Grand Falls, Franklin 33325

Dear Sir or Madam:

Peter Owens, a county probation officer in Lake County who is frequently assigned to make probation reports for the Fairview Division of the Lake County District Court, has brought to my attention what appears to be unethical conduct on the part of Lewis Travin, an attorney who often appears in the courts of Lake County. The conduct occurred in connection with two cases against a defendant charged with driving while intoxicated, one in the Fairview Division of the court and the other in the Lawndale Division. The defendant was a repeat offender who tried to escape the possible severe penalties he faced for repeat offenses by giving a false name and false identification at his arrest in Fairview and, subsequently, in criminal case #99-444 in the Fairview Division in which he was charged with DWI. At the time of his arrest in Fairview, when the defendant gave his name as Frank Bogason, DWI charges were already pending against him under his true name, George Clausen, in the Lawndale Division of the Lake County court. He was represented in case #99-367 in Lawndale by Lewis Travin, who had entered an appearance on Clausen's behalf.

Court records in Fairview do not indicate that Mr. Travin appeared for the man known as "Bogason" in the Fairview proceeding. In the Fairview case, "Bogason" secured his release on bail. At the arraignment, although he was informed of his right to counsel, he chose to appear on his own behalf without a lawyer. On the trial date, he entered a plea of "guilty," and the Honorable Harry Gebippe ordered a pre-sentence report from the Lake County probation department. Mr. Travin accompanied "Bogason" to a meeting that Peter Owens, the probation officer, had set up as part of his investigation for the pre-sentence report. The probation officer says that Mr. Travin hardly said a word during the meeting and left in the middle of it, but Mr. Owens assumed Mr. Travin knew "Bogason" and was representing him.

Mr. Travin's departure, as well as "Bogason's" demeanor, raised the probation officer's suspicions. At the conclusion of the meeting, Mr. Owens conducted a full background check which revealed that "Bogason" and Clausen were the same person and that Clausen had another DWI case in Lawndale. When Mr. Owens discovered that Mr. Travin was representing Clausen in the Lawndale case and hadn't revealed his knowledge about "Bogason's" true identity or his other convictions, he came to me for guidance on how to proceed.

I do not know the extent of Mr. Travin's involvement in the Clausen/"Bogason" fraud, but I believe this incident is worth investigating. At the very least, Mr. Travin knew at the time of the meeting with the probation officer that his client was perpetrating a fraud, yet did nothing to report it.

Please let me know if I can be of further assistance.

Very truly yours,

Ann Crowley

Ann Crowley
Assistant District Attorney

FRANKLIN STATE BAR ASSOCIATION
OFFICE OF LAWYER DISCIPLINE

PRELIMINARY INVESTIGATION SUMMARY

Subject of Investigation: Lewis T. Travin, Esq.
File Number: #57-304
Staff Investigator: Johnny Ripka
Date of Report: January 31, 2000

After receiving letter of complaint from Ann Crowley, Esq., Assistant District Attorney, Lake County, I conducted a telephone interview of Peter Owens, Probation Officer, Lake County Probation Department, who was identified as the complainant in Crowley's letter. Owens stated he had been assigned to conduct a Pre-Sentence Investigation (PSI) of a Frank Bogason, a defendant who had pleaded guilty to DWI before Judge Gebippe in the Fairview Division of the Lake County District Court. Owens did the usual name search of Criminal Records Division, which revealed that Bogason had no priors. Owens then scheduled a PSI interview of Bogason at the Probation Office. Prior to the interview, Bogason telephoned Owens and said he would be accompanied by his lawyer, Lewis T. Travin, Esq. When Owens inquired about the attorney because his review of Bogason's file revealed he had appeared and pleaded without counsel, Bogason said he hired Travin when he got called to appear for the PSI interview.

On the date scheduled for the interview, Bogason arrived with another person whom he introduced as Lewis T. Travin, his attorney. Bogason sat across the desk from Owens but Travin moved his chair behind and away from his client. Owens had barely begun the interview (confirming name and address, etc.) when Travin interrupted and asked to confer with his client. They left the office and about ten minutes later Bogason reappeared without his lawyer. When Owens inquired about Travin, Bogason said that his lawyer had another appointment and had to leave.

Owens continued the PSI interview but was very conscious that Bogason appeared nervous and evasive. Owens felt something was wrong and after the interview decided to do further investigation. He initiated a criminal record check based on address and age. This turned up the name of George Clausen of the same age, DOB, and living at the same address. Clausen had two priors, including a DWI conviction in the Lawndale Division of Lake County District Court on December 27, 1999. Owens then pulled the file on Clausen. When he examined the arrest photo of Clausen, Owens realized that Clausen and Bogason were the same person.

Owens speculated that Clausen used the false name of Bogason because he realized he faced serious jail time as a third offender under his real name. Because Clausen (Bogason) presented himself as a first offender and thus not subject to a jail sentence of six months or more, a public defender, who might have uncovered the misrepresentation, wasn't appointed. Owens said Clausen might have gotten clean away with the deception but for the fact he had a Florida driver's license and a local address. Judge Gebippe, who is well known for being easy on first offenders, ordered the PSI because he wanted an out-of-state background check.

LIBRARY

In re Lewis T. Travin

RULE 1.2 Scope of Representation

(a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (c), (d), and (e), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the objectives of the representation if the client consents after consultation.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

(e) When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

COMMENT:

Criminal, Fraudulent and Prohibited Transactions.

[1] A lawyer is required to give an honest opinion about the actual consequences that appear likely to result from a client's conduct. The fact that a client uses advice in a course of action that is criminal or fraudulent does not, of itself, make the lawyer a party to the course of action. However, a lawyer may not knowingly assist a client in criminal or fraudulent conduct. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

[2] When the client's course of action has already begun and is continuing, the lawyer's

responsibility is especially delicate. The lawyer is not permitted to reveal the client's wrongdoing, except where permitted by Rule 1.6. However, the lawyer is required to avoid furthering the purpose, for example, by suggesting how it might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposes is legally proper but then discovers is criminal or fraudulent. Withdrawal from the representation, therefore, may be required.

* * * *

RULE 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

COMMENT:

* * * *

Disclosure Adverse to Client.

[1] The confidentiality rule is subject to limited exceptions. In becoming privy to information about a client, a lawyer may foresee that the client intends serious harm to another person. However, to the extent a lawyer is required or permitted to disclose a client's purposes, the client will be inhibited from revealing facts which would enable the lawyer to counsel against a wrongful course of action. The public is better protected if full and open communication by the client is encouraged than if it is inhibited.

Several situations must be distinguished.

[2] First, the lawyer may not counsel or assist a client in conduct that is criminal or fraudulent. See Rule 1.2(d). Similarly, a lawyer has a duty under Rule 3.3(a)(4) not to use false evidence. This duty is essentially a special instance of the duty prescribed in Rule 1.2(d) to avoid assisting a client in criminal or fraudulent conduct.

[3] Second, the lawyer may have been innocently involved in past conduct by the client that was criminal or fraudulent. In such a situation the lawyer has not violated Rule 1.2(d) because to "counsel or assist" criminal or fraudulent conduct requires knowing that the conduct is of that character.

[4] Third, the lawyer may learn that a client intends prospective conduct that is criminal and likely to result in imminent death or substantial bodily harm. As stated in paragraph (b)(1), the lawyer has professional discretion to reveal information in order to prevent such consequences. The lawyer may make a disclosure in order to prevent homicide or serious bodily injury which the lawyer reasonably believes is intended by a client. It is very difficult for a lawyer to "know" when such a heinous purpose will actually be carried out, for the client may have a change of mind.

[5] The lawyer's exercise of discretion requires consideration of such factors as the nature of the lawyer's relationship with the client and with those who would be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. Where practical, the lawyer should seek to persuade the client to take suitable action. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose. A lawyer's decision not to take preventive action permitted by paragraph (b)(1) does not violate this Rule.

* * * *

RULE 3.3 Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

* * * *

COMMENT:

Representations by a Lawyer.

An advocate is responsible for pleading and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer . . . . However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. In appropriate circumstances, a lawyer may be able to avoid disclosure to the court by effectively withdrawing.

* * * *

RULE 4.1 Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

COMMENT:

Misrepresentation.

A lawyer is required to be truthful when dealing with others on a client's behalf, but generally

has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by failure to act.

* * * *

Fraud by Client.

Paragraph (b) recognizes that substantive law may require a lawyer to disclose certain information to avoid being deemed to have assisted the client's crime or fraud. The requirement of disclosure is, however, subject to the obligations created by Rule 1.6.

* * * *

ABA Formal Opinion 87-353

Lawyer's Responsibility With Relation To Client Perjury

The professional obligations of a lawyer relating to client perjury as now defined by the Model Rules of Professional Conduct (1983), particularly in Model Rule 3.3(a) and (b), require a reconsideration of ABA Formal Opinion 287 (1953), which was based upon an interpretation of the earlier ABA Canons of Professional Ethics (1908). Formal Opinion 287 discussed in part the lawyer's responsibility with regard to false statements the lawyer knows that the client has made to the tribunal.

Formal Opinion 287 addressed two situations: one, a civil divorce case; the other, the sentencing procedure in a criminal case. In the civil matter, the client informs his lawyer three months after the court has entered a decree for divorce in his favor that he had testified falsely about the date of his wife's desertion. A truthful statement of the date would not have established under local law any ground for divorce and would have resulted in the dismissal of the action as prematurely brought. Formal Opinion 287 states that under these circumstances, the lawyer must advise the client to inform the court of his false testimony, and that if the client refuses to do so, the lawyer must cease representing the client. However, Formal Opinion 287 prohibits the lawyer from disclosing the client's perjury to the court.

In this factual situation, Model Rule 3.3 also does not permit the lawyer to disclose the client's perjury to the court, but for a significantly different reason. Contrary to Formal Opinion 287, Rule 3.3(a) and (b) require a lawyer to disclose the client's perjury to the court if other remedial measures are ineffective, even if the information is otherwise protected under Rule 1.6, which prohibits a lawyer from revealing information relating to representation of a client. However, under Rule 3.3(b), the duty to disclose continues only "to the conclusion of the proceeding . . . ." From the Comment to Rule 3.3, it would appear that the Rule's disclosure requirement was meant to apply only in those situations where the lawyer's knowledge of the client's fraud or perjury occurs prior to final judgment and disclosure is necessary to prevent the judgment from being corrupted by the client's unlawful conduct.[1] Therefore, on the facts

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[1]This explanation, at least, is consistent with the distinction between information relating to continuing crime, which is not protected by the attorney-client privilege, and information relating to past crime, which is protected.

considered by Formal Opinion 287, where the lawyer learns of the perjury after the conclusion of the proceedings—three months after the entry of the divorce decree—the mandatory disclosure requirement of Rule 3.3 does not apply and Rule 1.6, therefore, precludes disclosure.

In the criminal fact setting, Formal Opinion 287 is directly contrary to the Model Rules with regard to one part of its guidance to lawyers. Briefly, the criminal defense lawyer is presented with the following three situations prior to the sentencing of the lawyer's client: (1) the judge is told by the custodian of criminal records that the defendant has no criminal record and the lawyer knows this information is incorrect based on his own investigation or from his client's disclosure to him; (2) the judge asks the defendant whether he has a criminal record and he falsely answers that he has none; (3) the judge asks the defendant's lawyer whether his client has a criminal record.

Formal Opinion 287 concludes that in none of the above situations is the lawyer permitted to disclose to the court the information he has concerning the client's actual criminal record. In situations (1) and (3) Opinion 287 is still valid under the Model Rules, since there has been no client fraud or perjury, and, therefore, the lawyer is prohibited, under Rule 1.6, from disclosing information relating to the representation.[2] However, in situation (2), where the client has lied to the court about the client's criminal record, the conclusion of Opinion 287 that the lawyer is prohibited from disclosing the client's false statement to the court is contrary to the requirement of Model Rule 3.3.[3] This rule imposes a duty on the lawyer, when the lawyer cannot persuade the client to rectify the perjury, to disclose the client's false statement to the tribunal.[4]

Model Rule 3.3(a) and (b) represent a major policy change with regard to the lawyer's duty

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[2]Although in situation (3), where the court puts a direct question to the lawyer, the lawyer may not reveal the client's confidences, the lawyer, also, must not make any false statements of fact to the court. Formal Opinion 287 advised lawyers facing this dilemma to ask the court to excuse the lawyer from answering the question. The Committee can offer no better guidance under the Model Rules, despite the fact that such a request by the lawyer most likely will put the court on further inquiry, as Opinion 287 recognized.

[3]This is different from a situation where the client's false statement was made in a prior proceeding. If the client made a misrepresentation about his criminal record in a prior proceeding, the lawyer is prohibited from revealing this fact without consent, and the possibility that the client will continue to deceive another court is not a future crime that comes within the narrow exceptions to Rule 1.6.

[4]The Comment to Rule 3.3 suggests that the lawyer may be able to avoid disclosure to the court if the lawyer can effectively withdraw. But the Committee concludes that withdrawal can rarely serve as a remedy for the client's perjury.

as stated in Formal Opinion 287. It is now mandatory, under these Model Rule provisions, for a lawyer who knows the client has committed perjury to disclose this knowledge to the tribunal if the lawyer cannot persuade the client to rectify the perjury.

When the lawyer knows the client has committed perjury, disclosure to the tribunal is necessary under Rule 3.3(a)(2) to avoid assisting the client's criminal act.[5]

[5]Rule 3.3(a)(2), does not apply to a situation where the lawyer has not appeared in the tribunal or assisted the fraud in any way and disclosure is not necessary to avoid assisting a criminal or fraudulent act by the client.

FILE

Proffet v. Dinsdale Instruments, Inc.

In re Application Specialists, Inc.

DRAFTERS' POINT SHEET

The task in this performance test item is for the applicants to draft an objective memo to the supervising attorney on a choice of law issue. The problem is set in the State of Franklin.

The client, Application Specialists, Inc. (ASI), has made an offer of employment to Maria Pedroza, a former employee of S.E. Attles & Associates (SEA), a direct competitor of ASI. Pedroza had signed an employment agreement at SEA containing a covenant that she would not enter into employment with a competitor for one year after the termination of her employment with SEA. The employment agreement also contains a recitation that the agreement and any actions brought under it shall be "governed by and construed in accordance with the laws of the State of Olympia."

In the State of Franklin, where ASI is incorporated and based, employee non-competition agreements are not enforceable. In the State of Olympia, where SEA is incorporated and based and where Pedroza worked mainly, such agreements are enforceable as long as they are reasonable. SEA has threatened to sue Pedroza if she commences employment with ASI.

The File contains the instruction memo from the supervising attorney, a transcript of an interview with the VP/Human Relations of ASI, the threatening letter from SEA and a copy of the signature page of the employment agreement, Pedroza's letter expressing interest, and a copy of the job advertisement placed by ASI. The Library contains sections from the Restatement (Second) of Conflict of Laws, and three cases. Not all the materials are relevant.

Applicants are expected to analyze the materials and draft a memo concluding that (1) the Franklin district court will probably apply Franklin law and (2) the covenant not to compete will probably be found to be unenforceable.

1. Overview: There is no prescribed format for the work product, although it should look facially like a law office memorandum to another attorney.

This is largely an exercise in legal analysis. The facts are straightforward. The template for the analysis is plainly suggested by the *Music Makers* case, and, if the applicants use it as an outline, the task will be much simplified.

2. The Analysis: Basically, the problem calls for the applicants to recognize that there is a conflict in the laws of the two interested states and that the contract in issue contains a choice of law provision. They must work their ways through the subparts of Rest. § 187(2), arguing

ultimately that there is a fundamental state policy in Franklin that will result in the court ignoring the contractual choice of law and concluding that the covenant not to compete will be declared invalid in Franklin.

- The covenant not to compete: In section 38 of the Pedroza/SEA contract, Pedroza agreed that "for a period of one year after the termination [of her employment] she would not [work for] a competitor of S.E. Attles & Associates."
- The conflict: Franklin Fair Business Act § 600 voids "[e]very contract by which anyone is restrained from engaging in a lawful profession . . . ."
    - The forum court (Franklin) will apply its own choice of law principles, which the court in *Music Makers* says is the "governmental interest" approach of Rest. § 187.
    - Also, as the *Music Makers* court says, "The starting point for the resolution of any conflict of laws issue in any case is to inquire whether there is indeed a conflict."
    - The conflict in this case is set up by analyzing the decisions in *McGill* and *The Tree Doctor*.
    - The Franklin Supreme Court, in *McGill v. Donaldson*, has interpreted § 600 broadly to "invalidate provisions in employment contracts prohibiting an employee from working for a competitor after completion of his employment. . . ."
    - In the State of Olympia, there is no statute that regulates the subject, but in *The Tree Doctor v. Ryan*, the Supreme Court of Olympia declared the judicially established principle that "restrictive [non-competition] covenants in contracts of employment . . . will be sustained if the restraints are [reasonable] . . . ."
- The contractual choice of law clause: Section 39 of Pedroza's employment contract with SEA provides that "this agreement shall be governed by and construed in accordance with the laws of the State of Olympia."
    - The key issue in this test item is whether the Franklin District Court will enforce that provision.
    - At this point, the applicants should focus on the decision of the Franklin

Supreme Court in *Music Makers v. Seabird Orient.*

- The first point the court makes is that it will enforce the parties' "arm's-length contractual choice-of-law provisions" if possible and observes that Rest. § 187 "reflects a strong policy favoring enforcement of such provisions."
- This is a manifestation of the policy that favors preservation of the parties' freedom of contract.

- The court must first inquire, however, whether:
  - The chosen state (Olympia) has a substantial relationship to the parties or their transaction or there is any other reasonable basis for their choice.
  - If not, the court can ignore the parties' choice of law.
  - There is no doubt here, however, that Olympia has a "substantial relationship." That is where SEA is incorporated and based (a factor which the *Music Makers* court says is, in and of itself, a sufficient basis to support the choice of Olympia law), the contract was made there (see signature page of the contract), Pedroza worked there (see her letter).[1]
  - Thus, the court must move on to the next step—i.e., "determine whether the chosen state's law is contrary to a fundamental policy of the State of Franklin."
- Fundamental Policy of the State of Franklin: Resolution of this point requires analysis of the Franklin court's holding in *McGill v. Donaldson*, which contains plenty of grist for the argument that § 600, indeed, "represents a strong public policy of the state which should not be diluted by judicial fiat."
  - The conclusion should be that the prohibition against enforcement of employee non-competition agreements does, indeed, constitute a fundamental policy of Franklin.

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[1] Rest. § 188 in the Library might give the applicants some hints on factors that can be used to establish a substantial relationship. It is otherwise something of a red herring that might tempt applicants who are inclined to go off on the outdated conflict of laws theory that conflict issues involving contracts are resolved on the basis of "place of making," "place of performance," etc.

- Applicants should also note that the rule in Olympia that allows enforcement of reasonable non-compete covenants is also based on a policy determination: "that employers have a legitimate interest in protecting the customer contacts they have been able to develop."
- Applicants might take this opportunity to discuss whether the Pedroza non-compete covenant (one year and wherever SEA does business) is reasonable under *The Tree Doctor* standards, i.e., that, if not, it wouldn't even be enforceable in Olympia. It is not, however, necessary to the analysis.

- Materially Greater Interest Than The Chosen State: Having concluded that a fundamental policy of Franklin is implicated, the applicants should move on to the next step indicated by the *Music Makers* court, i.e, "whether Franklin has a materially greater interest than the chosen state [Olympia] in the determination of the particular issue."
  - If so, the court will not enforce the contractual choice of law, "for the obvious reason that we will decline to enforce a foreign state's law contrary to this state's fundamental policy."
  - At this point the applicants will have to work with the rulings of the courts in *Music Makers* and *The Tree Doctor* and reach a reasoned conclusion that Franklin's interest in protecting employees who wish to earn their livings in Franklin is the dominant interest. Some considerations they can bring to bear are:
    - ASI's primary motive in hiring Pedroza is to have her manage existing business, although she might occasionally and incidentally proselytize SEA's clients. This minimizes the rationale expressed by the Olympia court (the preservation of the former employer's customer base) and makes it clearer that the restraint is nothing more than a punitive measure against the employee.
    - Pedroza will be based in Franklin where, at best, SEA has only a satellite operation.
    - Pedroza initiated the application for employment with ASI; she was not recruited by ASI.

- SEA cannot reasonably expect that a covenant not to compete would stand up in Franklin; *viz.*, SEA does not even try to extract such covenants from its own employees based in Franklin because it knows they are not enforceable.
- The fact that Franklin's policy is legislatively based, compared to Olympia's judicially created policy, should also weigh in the balance.
- The state's interest in the success of the Technology Zone Program also emphasizes Franklin's material interest in the policy.

- Thus, Franklin's interest is "materially greater," and the court will not enforce Olympia law. Rather, it will apply Franklin law, with the inevitable result that the court will declare the covenant not to compete invalid and unenforceable.

POINT SHEET

Proffet v. Dinsdale Instruments, Inc.

Proffet v. Dinsdale

DRAFTERS' POINT SHEET

This performance test involves the quasi-equitable doctrine of quantum meruit.

Richard Dinsdale was the owner and sole shareholder of Dinsdale Instruments, Inc. (DII). Mary Proffet, who worked for the corporation, was largely responsible for conceiving of, developing, and marketing a product that resulted in an exponential growth in the net asset value of the corporation.

Their relationship has come to an acrimonious end, and Proffet has sued Dinsdale and the corporation for damages. The breadth of her lawsuit is not specified in the problem, but one of her claims is for recovery in quantum meruit. Basically, she is claiming that she is entitled to recover half of the value of the company, i.e., the value of her services measured by the amount by which her efforts contributed to the growth of the company during her tenure as Vice President of Marketing. One of her theories is that she is entitled to the recovery based on the "resulting benefit" conferred upon Dinsdale by her efforts.

Dinsdale's theory is that Proffet had an employment contract with DII and she was not entitled to a quantum meruit recovery; but that, even if quantum meruit applies, the proper measure of recovery is the "intrinsic value" of her services, i.e., what it would have cost to secure her services elsewhere, and that, in any event, she has already been adequately compensated.

The evidentiary phase of the trial has ended, and the attorneys for the parties have met with the judge to settle jury instructions. There is a dispute over the respective jury instructions regarding the measure of damages to be applied to Proffet's quantum meruit claim. The contending instructions are contained in the File.

The applicants are asked to prepare a persuasive brief explaining to the court why the instruction proffered by Proffet is defective and the one proffered by Dinsdale is correct.

1. **Overview:** There are two major points the applicants are expected to deal with: (1) Because Proffet was employed by Dinsdale under an agreement that established her compensation, she is not entitled to a quantum meruit recovery at all; and (2) they must recognize that the second part of Proffet's instruction, which would allow the jury to apply a "resulting benefit" theory of recovery on the quantum meruit claim, is contrary to the case law in the Library and that the law supports the "intrinsic value" theory.

The applicants' work product should be in the form of a brief that conforms to the guidelines set forth in the firm's memo re: persuasive briefs. Thus, we expect to see a statement of facts that emphasizes the facts that are helpful to Dinsdale's case and an argument section, with argumentative headings, which merges the law and the facts into a persuasive statement (as opposed to an objective, "on the one hand, on the other hand" memo).

2. **Statement of Facts:** The facts are found in the File documents: excerpts from the trial testimony of Proffet and Dinsdale and the summary of Proffet's compensation. The judge, having just been through the trial, is necessarily familiar with the facts, so the Statement of Facts can be short and to the point, but it must emphasize the facts that are helpful to Dinsdale and, at the same, not ignore the unhelpful facts, particularly those supporting Proffet's assertions that she was the one who came up with the idea for the new product and that she marketed it successfully.

The following points should probably be covered by the applicants in their factual statements:

- The history of Dinsdale Instruments as an entity and its ownership:
  - Dinsdale was always the sole owner of the company until he decided to transfer some of the shares to his son.
  - He always resisted Proffet's efforts to acquire shares in the company and affirmatively told her he would not transfer shares to her.
- Proffet's significant contributions to the growth of the company:
  - Proffet's beginnings with the company were humble and she ascended the corporate ladder.
  - She did indeed conceive of, develop, and market the highly successful flashlights.
  - The company has grown from a value of $500,000 to $198 million.
- The increasingly generous compensation package given to Proffet:
  - The annual increases in salary were calculated to meet the competition for her counterparts in other companies.
  - The bonuses were intended to compensate her for her significant contributions to the success of the company.
  - The package was freely negotiated and based on comparative information gathered and presented by Proffet herself.

3. **Argument:** This section should be broken down into at least two major headings,

one dealing with each of the major points indicated in "Overview," above. To be responsive to the call of the question, the applicants should do two things: (1) point out the defect in the "resulting benefit" component of Proffet's instruction and explain why the "intrinsic value" measure urged in Dinsdale's instruction is correct, and (2) explain why, in any event, Proffet's compensation contract precludes quantum meruit recovery. It is a toss-up which issue should be discussed first, the "resulting benefit" v. "intrinsic value" issue or the contract preclusion issue. The applicants are expected to weave the facts and the law together and produce a persuasive argument.

- THE INSTRUCTION PROFFERED BY MR. DINSDALE IS CORRECT BECAUSE THERE WAS AN AGREEMENT ESTABLISHING MS. PROFFET'S COMPENSATION; ACCORDINGLY, SHE IS NOT ENTITLED TO ANY RECOVERY IN QUANTUM MERUIT WHATSOEVER.
    - The applicants should have no difficulty in determining that Proffet's employment by the corporation was a contractual relationship and that her salary and bonus were part of her employment contract.
    - The holding in *Rosener* is that, "[T]here is no equitable basis for an implied-in-law promise to pay reasonable value when the parties have an actual agreement covering compensation. Quantum meruit is an equitable theory that supplies, by implication and in furtherance of equity, implicitly missing contractual terms. A quantum meruit analysis cannot supply 'missing' terms that are not 'missing.' The reason for the rule is that where the parties have freely, fairly and voluntarily bargained for certain benefits in exchange for undertaking certain obligations, it would be inequitable to imply a different liability."
        - The facts clearly show that she freely negotiated her salary and bonus each year and that they were certainly fair compensation.
        - That is the bargain they struck, and there is no basis for supplanting or supplementing it with a quantum meruit recovery.
- THE INSTRUCTION PROFFERED BY MR. DINSDALE IS CORRECT: THE PROPER MEASURE FOR A QUANTUM MERUIT RECOVERY IN THIS CASE IS THE REASONABLE VALUE OF WHAT IT WOULD HAVE COST MR. DINSDALE TO OBTAIN THE SAME SERVICES FROM ANOTHER PERSON, AND THAT COST IS EASILY ASCERTAINABLE HERE.

- Again, the *Quigley* case is controlling.
- The facts given in the File provide the means by which the reasonable "intrinsic value" can be ascertained.
  - In order to justify her annual increases, Proffet would make a survey of compensation packages paid to her counterparts in similar positions in other companies.
  - Presumably, the amount Dinsdale agreed to pay Proffet each year was the amount for which he could have gotten someone similarly situated to do the job.
  - Just as does the freight bill in *Quigley*, the surveys made by Proffet furnish the "convenient point of reference" with which to ascertain the intrinsic value of her services.

- THE INSTRUCTION PROFFERED BY MS. PROFFET IS DEFECTIVE BECAUSE PART 2 OF THAT INSTRUCTION WOULD ALLOW THE JURY TO APPLY THE DISCREDITED "RESULTING BENEFIT" THEORY OF RECOVERY ON HER CLAIM FOR QUANTUM MERUIT.
  - The focus should be on Part 2 of the disputed instruction because that is the part that leaves open the possibility of a huge award.
  - Applicants should recognize that the theory of quantum meruit is based on the notion that one should not be unjustly enriched from the efforts of another.
    - The authority for this proposition is found in *Rosener, Quigley*, and the Restatement.
    - An argument on this point is that Dinsdale has not been unjustly enriched.
    - Quite aside from whether Proffet's compensation package is a contract that precludes quantum meruit recovery, the facts show that she has been very generously compensated (see the chart showing her compensation).
      - By paying Proffet's salary and bonus, Dinsdale paid the agreed upon price.
      - Moreover, the evidence shows that Dinsdale's intention in paying Proffet a hefty bonus was to reward her for her contribution to the company.

- And, since quantum meruit is essentially an equitable theory, it is plain that Proffet has not been treated inequitably and Dinsdale is not unjustly enriched under the circumstances. *See* Rest., Restitution §1, Comment c. ("Even where a person has received a benefit from another, he is liable to pay therefor only if the circumstances of its receipt or retention are such that, as between the two persons, it is unjust for him to retain it.")

- Under *Quigley*, the resulting benefit theory is, in most cases, the incorrect measure of damages and the intrinsic value theory is the proper measure.
  - This is because, if the resulting benefit theory were applied in this case, it would be a windfall compensating Proffet far beyond any reasonable expectation she might have had.
    - According to her testimony, Proffet believes she should receive about half of the value of the company.
  - She knew all along that Dinsdale had no intention of giving her a piece of the company, and the effect of applying the resulting benefit theory would be exactly that—she would effectively be getting what she already knew was not part of the bargain.
- The bottom line is that, in *Quigley*, the Franklin Supreme Court has restricted the use of the resulting benefit theory.
  - The court leaves open the possibility that there might be a proper case for application of the resulting benefit theory, but not where it will result in a windfall out of proportion to any reasonable expectation the plaintiff could have had.
  - It is abundantly clear that she never had any expectation that she would get any of the company, much less half of it.

POINT SHEET

In re Lewis T. Travin

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DRAFTERS' POINT SHEET

Lewis Travin, an attorney, has retained the firm to represent him in an incipient disciplinary proceeding before the Office of Lawyer Discipline of the Franklin State Bar Association. The proceeding arises from his representation of a criminal defendant named George Clausen, charged with driving while intoxicated ("DWI") in the Lawndale Division of the District Court.

At the time Travin agreed to represent him, Clausen had one prior conviction for DWI involving an accident and serious injuries. About two weeks later, Clausen was arrested and jailed in Fairview on another DWI. He gave the arresting officer a false name, Frank Bogason, the name on a Florida driver's license in his possession. Clausen phoned Travin, told him he'd used the false name of Bogason, and asked Travin to help get him out of jail in Fairview. Travin refused, told Clausen/Bogason to "come clean," and made it clear he'd do nothing further to help him, *qua* Bogason.

Clausen/Bogason appeared *pro se* in the Fairview court and pleaded guilty *qua* Bogason hoping to avoid a severe sentence, which would have been imposed if his prior convictions had been known. Because of the out-of-state driver's license, the judge ordered Peter Owens, a probation officer, to conduct a pre-sentence investigation.

Later, while meeting with Clausen to prepare for their appearance in the Lawndale proceeding, Travin learned about what Clausen, *qua* Bogason, had done in Fairview. Although he was troubled by this conduct, Travin appeared in the Lawndale court with Clausen, where Clausen entered a guilty plea and was sentenced. The Lawndale judge asked no questions about Clausen's record, and Travin remained silent about his client's use of the false name in Fairview.

When it came time for Clausen to meet with Owens regarding the Fairview pre-sentence investigation, he asked Travin to accompany him. Travin said he would, but only on the condition that Clausen disclose his real name to Owens. Clausen agreed. Travin accompanied Clausen to the meeting, where Clausen, *qua* Bogason, introduced Travin as his attorney. Travin remained silent. It soon became clear that Clausen was reneging on his agreement to come clean, whereupon Travin called a recess, took Clausen out into the hall, and read him the riot act. Clausen said he'd changed his mind and that Travin had better not to say anything to Owens. Travin told Clausen he was on his own and left.

Owens became suspicious, checked further, discovered the Clausen/Bogason connection, and reported it to the District Attorney. The DA, in turn, wrote a letter of complaint to the Office of Lawyer Discipline charging Travin with violation of the Franklin Rules of Professional Conduct. The investigator for the Bar Association communicated the particulars to Travin and invited him to file a written response to the charges.

The task for the applicants is to draft a memorandum that does three things:

- Identifies each potential act of misconduct
- Using each such act as a heading, marshals the law and the facts to argue persuasively that Travin's acts did not violate the Rules of Professional Conduct; and
- Articulates the facts that support an argument that Travin's acts were done in good faith, were only technical violations, and that, therefore, the charges should be dismissed.

The File contains notes of an interview with Travin, the letters from the investigator and the deputy DA, and the investigator's report of his discussion with the probation officer. The Library contains selections from the Franklin Rules of Professional Conduct and an ABA ethics opinion.

1. **Overview:** The applicants' work product should be in the form of a three-part memorandum covering all the subparts indicated above. The point of departure should be to identify "each potential act of misconduct." This should be relatively easy because the events are set forth chronologically in the interview notes. The acts, taken chronologically, are:

- Travin's failure to report to the Fairview court Clausen's use of the false name when he later learned that Clausen had pleaded guilty *qua* Bogason.
- Travin's failure to disclose to the judge at the time of his appearance in the Lawndale court Clausen's use of the false name in the Fairview proceeding.
- Travin's failure to disclose Clausen's real name at the time of the meeting with the probation officer.

The following discussion covers all the points the drafters of the test item had in mind. Applicants can achieve "passing" and even excellent grades without covering all the points mentioned below. Grading as to format and degree of persuasiveness of the work product are within the discretion of the user jurisdictions.

2. **The Potential Acts of Misconduct**

- **Travin's failure to report to the Fairview court Clausen's use of the false name**

when he later learned that Clausen had pleaded guilty *qua* Bogason.

- This conduct invokes Rule 3.3, the thrust of which is the relationship between the lawyer and the court.
- Rule 3.3(a)(2) prohibits a lawyer from failing "to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a . . . fraudulent act by the client." On this point:
  - It is fairly clear that Clausen was not a "client" insofar as the earlier Fairview proceedings were concerned.
  - Travin explicitly told Clausen that he would not represent him in the Fairview case.
  - It is, however, a close question because, at the time Travin learned about Clausen's earlier Fairview plea *qua* Bogason (i.e., while they were preparing for the Lawndale appearance), Clausen was a "client."
  - Moreover, because Travin was not present at Fairview and did not represent Clausen there, Travin did not "assist" a fraudulent act by Clausen. It was a <u>past</u> act, so Travin's failure to disclose it did not violate Rule 1.2(d). And disclosure <u>would</u> have violated Rule 1.6.
- Even if Clausen could technically have been considered Travin's "client" for these purposes at that time, Travin did all that was required of him: he warned him of the consequences and advised him to come clean. See, Rules 1.2 and 1.6.
- Accordingly, Travin did not violate any rule of conduct by failing to report it to the Fairview court.

- **Travin's failure to disclose to the judge at the time of his appearance in the Lawndale court Clausen's use of the false name in the Fairview proceeding.**
  - This presents a closer question because Clausen's fraud in the Fairview court prevented another prior conviction from appearing on the record before the court in Lawndale. If the Lawndale judge had known about the Clausen\Bogason Fairview plea, he would certainly have imposed more jail time than the four weekends he gave Clausen.
  - But the facts make it clear that neither Clausen nor Travin made any

representation to the Lawndale court, and the court did not ask any questions about Clausen's record.[1] Thus, disclosure under Rule 3.3(a)(2) was not necessary in order to "avoid assisting a . . . fraudulent act by the client," and Rule 1.6 prohibits Travin from disclosing information relating to the representation. See the ABA ethics opinion.

- This deception is not a future crime, of which Rule 1.6 could require disclosure.

- **Travin's failure to disclose Clausen's real name at the time of the meeting with the probation officer.**
  - If there was any violation of the Rules by Travin, it resides herein.
  - It is clear that Clausen was Travin's client in relation to the Fairview case at the time of the meeting, albeit that the terms of his representation were tightly proscribed. Travin counseled Clausen on the consequences of perpetuating the fraud and conditioned his appearance at the meeting on Clausen's agreement to disclose his real name. Thus, Travin complied with the requirements of Rule 1.2(d).
  - Travin allowed himself to be introduced to Peter Owens as "Bogason's" lawyer at a time when Owens still thought Clausen was Bogason.
  - The key element of the analysis here is whether Owens is a "tribunal" within the meaning of Rule 3.3. The hint for the applicants is the passage in the attorney's notes to the effect that Owens went out of his way to say he was acting on behalf of the court. It is clear enough that Owens is at least an agent of the Fairview court and that his pre-sentence report to the court is going to influence the sentence the judge will impose. Owens is probably a tribunal for these purposes.
  - If so, Travin was under a duty to disclose because failure to do so would mean that he was "assisting a . . . fraudulent act by the client" under Rule 3.3(a)(2), i.e., at the time of the meeting, the deception was a current act

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[1] An applicant might also mention Rule 4.1 re Truthfulness In Statements To Others. The Comment to that Rule states that, "Misrepresentations can also occur by failure to act." Certainly, Travin's silence could be considered a misrepresentation under this definition, but Rule 1.6 still stands in the way and prohibits Travin from disclosing.

designed to mislead the probation officer and, consequently, the court. And, under Rule 3.3(b), the obligation to disclose applies "even if compliance requires disclosure of information otherwise protected by Rule 1.6."

- The mitigation lies in the fact that Clausen affirmatively forbade the disclosure.
- Travin did the next best thing—he withdrew.
- Under Rule 3.3, effective withdrawal might avoid the obligation to withdraw.

3. **Facts Supporting Dismissal**

- **There are facts that militate in favor of dismissal, even if there has been a technical violation by Travin.**
  - It is clear that he was sensitive to the problem. He discussed the matter with some criminal defense colleagues, who confirmed his belief that he could not reveal Clausen's deception.
  - At all stages of the matter he counseled Clausen regarding the consequences and urged him to come clean.
  - The only time he had the opportunity to tell a court what was going on was during his Lawndale appearance, and he was precluded by the Rules from making the disclosure there.
  - He agreed to attend the meeting with Peter Owens only after getting Clausen to agree that he would tell he truth.
  - When it was clear that Clausen was reneging, Travin stopped the proceedings and again urged Clausen to tell the truth. Clausen refused and ordered Travin not to say anything to Owens either.
  - At that point, Travin did about the only thing he could have done. He withdrew. The Comment to Rule 3.3 suggests that effective withdrawal from the matter might avoid the obligation to disclose. Travin never appeared on Clausen's behalf in the Fairview court, which is where the deception occurred. Moreover, Clausen violated the express terms under which Travin agreed to represent him. Withdrawal under those circumstances was appropriate.
  - Overall, it is abundantly clear that Travin never intended to be part of the

fraud and that he affirmatively tried to persuade Clausen to disclose it.

- Moreover, the law is less than clear and is susceptible to varying interpretations.
- Also, Travin's withdrawal from the meeting with Owens had the effect of putting Owens on inquiry.
    - Which had the ultimate effect of revealing Clausen's deception.

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