THE MPT®

MULTISTATE PERFORMANCE TEST

February 2013
MPTs and Point Sheets

www.ncbex.org

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

Contents

Preface

The Multistate Performance Test (MPT) is developed by the National Conference of Bar Examiners (NCBE). This publication includes the items and Point Sheets from the February 2013 MPT. Each test includes two 90-minute items; user jurisdictions may select one or both items to include as part of their bar examinations. (Jurisdictions that administer the Uniform Bar Examination [UBE] use two MPTs as part of their bar examinations.) The instructions for the test appear on page iii. For more information, see the *MPT Information Booklet,* available on the NCBE website at www.ncbex.org.

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

Description of the MPT

The MPT consists of two 90-minute items, one or both of which a jurisdiction may select to include as part of its bar examination. (UBE jurisdictions use two MPTs as part of their bar examinations.) It is administered by participating jurisdictions on the Tuesday before the last Wednesday in February and July of each year.

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

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

The MPT is designed to test an examinee's ability to use fundamental lawyering skills in a realistic situation. Each test evaluates an examinee's ability to complete a task that a beginning lawyer should be able to accomplish. The MPT requires examinees to (1) sort detailed factual materials and separate relevant from irrelevant facts; (2) analyze statutory, case, and administrative materials for applicable principles of law; (3) apply the relevant law to the relevant facts in a manner likely to resolve a client's problem; (4) identify and resolve ethical dilemmas, when present; (5) communicate effectively in writing; and (6) complete a lawyering task within time constraints.

These skills are tested by requiring examinees to perform one or more of a variety of lawyering tasks. For example, examinees might be instructed to complete any of the following: a memorandum to a supervising attorney, a letter to a client, a persuasive memorandum or brief, a statement of facts, a contract provision, a will, a counseling plan, a proposal for settlement or agreement, a discovery plan, a witness examination plan, or a closing argument.

Instructions

The back cover of each test booklet contains the following instructions:

You will be instructed when to begin and when to stop this test. Do not break the seal on this booklet until you are told to begin. This test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.

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

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

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

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

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

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

February 2013 MPT

▶ *FILE*

MPT-1: *In re Wendy Martel*

Walden, Martin & Watterson LLP
Attorneys at Law
1550 Fleming Boulevard
Clayville, Franklin 33340

M E M O R A N D U M

To: Examinee
From: Kimberly Salter
Re: Wendy Martel matter
Date: February 26, 2013

We have been retained by Wendy Martel, a local attorney, in a matter involving fees arising from her representation of a client, David Panelli, M.D., in a sexual harassment action against his former supervisor, Heather Kern, M.D., at the Sandoval Medical Center.

I interviewed Martel yesterday and learned the basic facts. In 2009, Panelli retained Rebecca Blair, another local attorney, to bring his sexual harassment action against Kern under a contingent fee agreement. In 2011, solely as a result of a personality conflict, Panelli discharged Blair and then retained Martel under a similar contingent fee agreement. Martel recently settled the case and obtained a recovery of $600,000.

Martel contacted Panelli to let him know that she had received the settlement funds and that the money was ready to be disbursed. In response, Panelli instructed Martel not to disburse any of the recovery to Blair for the work she had done before he fired her, and not even to give Blair any information about the settlement. Martel seeks our advice on how to proceed.

Please draft an opinion letter in accordance with our guidelines, identifying the questions raised by these facts and advising Martel how she should proceed.

Walden, Martin & Watterson LLP
Attorneys at Law
1550 Fleming Boulevard
Clayville, Franklin 33340

M E M O R A N D U M

To: Associates
From: Executive Committee
Re: Opinion Letters
Date: December 22, 2009

The firm follows these guidelines in preparing opinion letters to clients. In such a letter to a client, *separately* discuss each question as follows:

- State the question.

- Provide a short answer to the question of no more than a few sentences.

- Analyze the issues raised by the question, including both the facts relevant to the question and how the applicable authorities combined with the relevant facts lead to your answer.

Write in a way that is suitable to the client's level of sophistication and that allows the client to follow your reasoning and the logic of your conclusions.

Transcript of Interview with Wendy Martel
February 25, 2013

Kimberly Salter: Wendy, good to see you. You told me a bit about the case on the phone. Why don't you fill me in on the details?

Wendy Martel: Sure. I've got a problem. My client is David Panelli, a psychiatrist here in Clayville. About three years ago, he sued Heather Kern, another psychiatrist, for sexual harassment. He had just completed his residency at the Sandoval Medical Center; Kern had been his supervisor.

Salter: I remember. It was quite a scandal.

Martel: Yes, it filled the papers. Anyway, Panelli hired a local attorney, Rebecca Blair, under a contingent fee agreement, setting her fee as one-third of anything she recovered during her representation.

Salter: So Blair was his original attorney, and she filed the sexual harassment action?

Martel: Right. She filed the complaint and initiated discovery. Soon after filing the action, she and Panelli started experiencing difficulties in communication. I can't say that either of them was at fault; it was just a personality conflict, but one that escalated over time. By July 2011, Panelli had had enough, and he fired Blair and hired me.

Salter: Did Panelli have problems with the quality of Blair's work?

Martel: No, not at all. It was personality, pure and simple.

Salter: Okay. On what basis did Panelli hire you?

Martel: A one-third contingent fee agreement, just like the one he had with Blair.

Salter: What happened next?

Martel: I reviewed the file after I got it from Blair and found she had done a very good job in litigating the case. I also found a copy of a notice of statutory lien she had filed early on to obtain a security interest in any recovery she obtained for Panelli during her representation. It's standard practice in Franklin in contingent fee cases to file such a lien; here's a copy. I went on to complete discovery and filed a summary judgment motion. The court denied it. Pretty soon, however, Kern's lawyer came to appreciate the strength of our case, and we started to discuss

settlement. Last month, we settled the case for $600,000 and filed a dismissal of the action with prejudice.

In the settlement agreement, I obligated myself to pay any claim Blair might have out of the $600,000 and to indemnify Kern and her lawyer in case Blair made any claim against them. That's standard practice in Franklin. Usually, the attorneys can work these matters out.

Salter: Have the settlement funds come through?

Martel: Yes. I just received the check. I have not even cashed it yet.

Salter: Then what?

Martel: I figured I needed to give Panelli what was his and pay Blair something—precisely how much, I didn't know. My practice in situations like this is simply to get on the phone with the other lawyer and work things out informally.

Salter: You didn't do that here?

Martel: No. I sent Panelli an email—here's a copy—telling him I had received the settlement funds. Panelli immediately replied, instructing me not to give Blair anything and not even to tell her anything. I brought his email also. That is when I realized I was in over my head and needed help. So I called you.

Salter: The help you want is an opinion letter, right?

Martel: Right. I need to know how to proceed now that I have the settlement funds. Whatever I do, I want to be sure I am in compliance with Franklin's ethical rules.

Salter: We'll research the issues. What's your time frame?

Martel: Can you get me something soon?

Salter: How about by Thursday?

Martel: That's fine. Thanks, I really appreciate it.

Salter: Thanks. That's all I need. I'll be in touch by Thursday.

STATE OF FRANKLIN
DISTRICT COURT OF SHELBY COUNTY

DAVID PANELLI, M.D.,	)	No. Civ. 640100
Plaintiff,	)	
v.	)	**NOTICE OF LIEN**
HEATHER KERN, M.D.,	)	(Franklin Rev. Stat. § 6070)
Defendant.	)	
	)	

TO ALL PARTIES AND THEIR ATTORNEYS AND TO ALL OTHERS INTERESTED HEREIN:

PLEASE TAKE NOTICE THAT Rebecca Blair, of the Law Offices of Rebecca Blair, attorney of record for Plaintiff David Panelli, M.D., has and claims a lien, under Franklin Revised Statutes § 6070, ahead of all others on Plaintiff's interest in any recovery Blair may obtain herein on Plaintiff's behalf during her representation to secure payment for fees earned.

Date: November 20, 2009

Rebecca Blair

Rebecca Blair
LAW OFFICES OF REBECCA BLAIR
Attorney for Plaintiff David Panelli, M.D.

Email Correspondence

From: Wendy Martel
Sent: Friday, February 22, 2013; 4:24 PM
To: David Panelli
Subject: Settlement Funds

Dear David:

I just received the $600,000 settlement. Before I can proceed further, I've got to notify Rebecca Blair so that she and I can work out some arrangement about sharing the fees. I'll let you know what results.

Best wishes,

Wendy

Wendy Martel
Law Offices of Wendy Martel
100 Drumm Street
Clayville, Franklin 33340
Telephone: 255.555.0859
Email: wmartel@martellaw.com

From: David Panelli
Sent: Friday, February 22, 2013; 4:28 PM
To: Wendy Martel
Subject: RE: Settlement Funds

Wendy:

You must remember, I fired Blair eighteen months ago; I want her to remain fired. I forbid you to tell her anything about the settlement or to give her anything. You got me the recovery; she didn't. You've earned your fee; take it and send me what's mine.

David

February 2013 MPT

▶ *LIBRARY*

MPT-1: *In re Wendy Martel*

EXCERPTS FROM FRANKLIN RULES OF PROFESSIONAL CONDUCT

Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle 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.

. . .

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(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.

Rule 1.4 Communications

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Rule 1.6 Confidentiality of Information

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

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

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

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

. . . or

(6) to comply with other law or a court order.

Comment

* * *

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. This contributes to the trust that is the hallmark of the client-lawyer relationship. . . . Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work-product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the

client but also to all information relating to the representation. A lawyer may not disclose such information except as required or permitted by the Rules of Professional Conduct or other law.

* * *

[16] . . . In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish one of the purposes specified in Rule 1.6(b).

Rule 1.15 Safekeeping Property

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

. . .

(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

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.

STATE BAR OF FRANKLIN
ETHICS OPINION NO. 2003-101

Issue:

Client retains Attorney for representation in a personal injury action under a contingent fee agreement entitling Attorney to one-third of any recovery he obtains during his representation. Client obtains medical care from Physician, agreeing that Physician will be paid $10,000 out of the proceeds of any recovery. Attorney and Client both have knowledge of Physician's interest in the recovery. After Attorney obtains a recovery for Client in the amount of $300,000 and places the resulting funds in a trust account, Client instructs Attorney to disburse $100,000 to himself for his fees, to disburse the remaining $200,000 to Client, and not to disburse the $10,000 to Physician. What should Attorney do in this situation?

Digest:

Attorney should contact Client and Physician, describing the existence and details of the dispute and stating (1) that Attorney cannot represent either Client or Physician in the dispute; (2) that if Client and Physician agree, Attorney will retain the disputed $10,000 in trust until they resolve the dispute; but (3) that in the absence of such an agreement, Attorney will seek guidance from the court. Attorney should also disburse to Client that portion of the funds that is undisputed.

Discussion:

In *Greenbaum v. State Bar* (Fr. Sup. Ct. 1996), the Franklin Supreme Court held that an attorney must promptly disburse to the client any funds that the attorney holds in trust for the client that the client is entitled to receive. *Greenbaum* qualified its holding by stating that the attorney may nevertheless continue to hold in trust, even contrary to the client's instructions, any portion of such funds on which the attorney has a claim in conflict with the client. *Greenbaum*, however, did not address the situation in which a third party has such a conflicting claim. The Franklin Rules of Professional Conduct address this issue briefly in the comment to Rule 1.15:

> Third parties may have lawful claims against funds held in trust by an attorney, such as a client's creditor who has a lien on funds recovered in a personal injury action. An attorney may have a duty to protect such a third-party claim against

> wrongful interference by the client, as when the attorney has entered into a fiduciary relationship with the third party. In such cases, the attorney must refuse to surrender the funds to the client until the claim has been resolved, and must so advise the client. An attorney should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

Under the facts stated, Attorney must act as follows to remain within the parameters established by our Rules of Professional Conduct:

1. An attorney must disburse to a client such funds as the attorney holds in trust for the client *to which the client is entitled*. Under the facts stated, in representing Client, Attorney had knowledge of the existence of Physician's interest in the funds in question. As a result, Attorney entered into a fiduciary relationship with Physician by operation of law and subjected himself to the fiduciary duties to deal with Physician with utmost good faith and fairness and to disclose to Physician material facts relating to Physician's interest in the funds. *Cf. Johnson v. State Bar* (Fr. Sup. Ct. 2000) (by representing client with knowledge of chiropractor's lien, attorney entered into fiduciary relationship and subjected herself to fiduciary duties to deal with chiropractor with utmost good faith and fairness and to disclose material facts, that is, those facts that are "significant or essential to the issue or matter at hand"). Under such circumstances, Attorney's disbursement of the disputed $10,000 to Client would violate Attorney's fiduciary duties to Physician and would make Attorney liable for compensatory and perhaps even punitive damages. Attorney's disbursement would also make Client liable for breach of contract. Franklin Rule of Professional Conduct 1.4(a)(5) requires a lawyer to "consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by [these rules] or other law." For this reason, Attorney's disbursement of the disputed funds to Client would be fraught with difficulties.

2. Attorney's disbursement of the disputed $10,000 to Physician contrary to Client's instructions would violate Attorney's duties under *Greenbaum*. *Greenbaum* requires Attorney to disburse to

Client all such funds as Client is entitled to receive. It is risky for Attorney unilaterally to determine Client's "entitlement." The reasons for Client's demand that Attorney not disburse the $10,000 to Physician are unstated and may or may not be legitimate. For example, Client may have an evil motive, or Client may be misinformed about something and that misinformation has led to his instruction to Attorney. Whatever his reasons, they are not clear from the facts before us and may not be clear to Attorney. There are, in addition, fiduciary duties burdening Attorney in favor of Physician. For those reasons, Attorney would be ill-advised to prejudge the merits of such a dispute and act in favor of either Client or Physician.

3. If Client and Physician are unable to resolve their dispute, Attorney should seek guidance from the court and so inform Client and Physician.

This opinion is issued by the State Bar of Franklin pursuant to authority delegated to it by the Franklin Supreme Court. It is intended to guide attorneys who practice in the State of Franklin but does not purport to bind any court or other tribunal.

Clements v. Summerfield

Franklin Supreme Court (1992)

Plaintiff Ralph Clements, an attorney, was retained by defendant Marian Summerfield to bring an action for personal injury. Clements and Summerfield entered into a contingent fee agreement, under which Summerfield agreed to pay Clements one-third of any recovery he obtained during his representation. Some time thereafter, but before any recovery had been obtained, Summerfield discharged Clements and retained another attorney.

Clements then filed the present action against Summerfield, alleging that Summerfield breached the contingent fee agreement by discharging him without cause and by refusing to pay him his fees. Clements sought a declaration that the agreement was valid and that he had a one-third interest in any recovery ultimately obtained. Summerfield moved to dismiss the action on the ground that Clements did not and could not state a claim for relief. The district court granted the motion and dismissed the action. The Court of Appeal affirmed. We granted review.

Under a contingent fee agreement, an attorney does not have any right to fees unless and until the contingency specified has occurred. Without a right to fees, the attorney does not have a cause of action against the client for breach arising from failure to pay. The contingency specified may occur after the attorney's representation has terminated and another attorney has taken his or her place. In that case, the discharged attorney's right to, and cause of action for, fees is limited to *quantum meruit*, that is, the reasonable value of the services rendered during his or her representation, paid as a share of the total fees payable to the successor attorney—not as something in addition to those fees. Otherwise, the client's right to discharge the discharged attorney, which is absolute, might be unduly burdened by the prospect of paying the original attorney's full fees plus fees to the successor attorney as well.

We find no injustice in limiting the fees of the discharged attorney to an amount consisting of the reasonable value of the services rendered during the representation. In doing so, we preserve, as noted, the client's absolute right to discharge the discharged attorney. We also preserve the discharged attorney's right to fees that are fair. Of course, what fees are fair for the discharged attorney depends on the facts of the individual case as seen through the lens of equity, and may range from nothing out of the total fees payable to the successor attorney to the total fees in their entirety. We

expect that in all but the rarest case, a fair fee for the discharged attorney will fall somewhere between those extremes. We trust that trial courts will be able to strike an appropriate balance.[1]

In light of the foregoing, Clements' action is premature. Since Summerfield has yet to obtain any recovery in her personal injury action, the contingency specified in the contingent fee agreement has yet to occur. As a result, Clements does not yet have any right to fees from Summerfield, and hence does not yet have a cause of action against her for fees.

Affirmed.

[1]By way of illustration, if a discharged attorney obtained no recovery during his representation, he would be entitled to nothing under his contingent fee agreement. If a successor attorney subsequently obtained a recovery during her representation, she would be entitled to receive whatever her contingent fee agreement specified—for example, if she had a one-third contingent fee agreement and obtained a $300,000 recovery, she would be entitled to receive $100,000. The discharged attorney would then be entitled to receive whatever share, if any, of the $100,000 fee received by the successor attorney that the court determined to be the reasonable value of his services under the circumstances.

February 2013 MPT

▶ *FILE*

MPT-2: *In re Guardianship of Will Fox*

PINE, BRYCE & DIAL, LLP
1348 W. Main Street
Melville, Franklin 33521

M E M O R A N D U M

To: Examinee
From: Karen Pine
Date: February 26, 2013
Re: Fox Guardianship and Motion to Transfer

Our client, Betty Fox, is a member of the Blackhawk Tribe, lives on the Blackhawk Reservation, and is the paternal grandmother of Will Fox, age 10. Will's mother is dead, and his father (Betty's son) is incapacitated as a result of a recent automobile accident. When the accident happened, Betty moved into her son's house to care for Will. She has been planning to move Will to her home on the Reservation and was surprised to learn that Will's maternal grandparents, Don and Frances Loden, had filed a Petition for Guardianship and Temporary Custody in Oak County District Court.

After consultation with Betty, I filed a petition on her behalf in Blackhawk Tribal Court requesting that she be appointed Will's guardian. I also filed a motion to transfer the Lodens' state court proceeding to the tribal court. The state court has ordered simultaneous briefs on our motion to transfer.

Please prepare our brief in support of the Motion to Transfer Case to Blackhawk Tribal Court. Be sure to follow the firm's guidelines on persuasive briefs, but do not include a separate statement of facts. Make all the arguments needed to establish that the state court should transfer the case. Anticipate and respond to any arguments against the transfer to tribal court that the Lodens' attorney is likely to raise.

PINE, BRYCE & DIAL, LLP

M E M O R A N D U M

To: All Lawyers
From: Litigation Supervisor
Date: August 14, 2009
Re: Persuasive Briefs

All persuasive briefs shall conform to the following guidelines:

Statement of the Case

In one paragraph, provide a succinct statement of the parties, the nature of the case (e.g., complaint for declaratory relief), and the matter or issue in dispute (e.g., lack of jurisdiction). When needed, note the posture of the case (e.g., discovery is completed). Finally, briefly explain the client's requested relief (e.g., grant the motion to dismiss). **For example: The patient has sued her physician for negligence in failing to diagnose colon cancer following the patient's colonoscopy. The patient's expert has testified that the cancer was readily detectable from the colonoscopy. The physician has filed a motion to dismiss, raising an issue involving the expert's qualifications. The patient objects and asks the court to deny the motion.**

Statement of Facts [omitted]

Body of the Argument

The body of each argument should analyze applicable legal authority and persuasively argue how both the facts and the law support our client's position. Supporting authority should be emphasized, but contrary authority should generally be cited, addressed in the argument, and explained or distinguished. Do not reserve arguments for reply or supplemental briefing. Be mindful that courts are not persuaded by exaggerated, unsupported arguments.

Break the argument into its major components and write carefully crafted subject headings that illustrate the arguments they cover. The argument headings 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, <u>improper</u>: It is not in the child's best interests to be placed in the mother's custody. <u>Proper</u>: Evidence that the mother has been convicted of child abuse is sufficient to establish that it is not in the child's best interests to be placed in the mother's custody.**

Do not prepare a table of contents, a table of cases, or an index.

STATE OF FRANKLIN
DISTRICT COURT OF OAK COUNTY

IN THE MATTER OF THE PETITION OF Don and Frances Loden, Husband and Wife, **FOR GUARDIANSHIP AND TEMPORARY CUSTODY OF** Will Fox, a minor (DOB 1/3/03)	Case No. 2013- FA-238

PETITION FOR GUARDIANSHIP AND TEMPORARY CUSTODY

Petitioners Don and Frances Loden allege as follows:

1. Petitioners are husband and wife, of lawful age and under no legal disability, and reside in the city of Melville, Oak County, Franklin. They are the maternal grandparents of Will Fox.

2. Will Fox is 10 years of age and was born in Melville, Franklin, on January 3, 2003, and has lived here his entire life.

3. Sally Loden Fox, Petitioners' daughter, was Will's biological mother. She died in childbirth. Will's biological father, Joseph Fox, suffered an incapacitating brain injury in a car accident on November 21, 2012. Joseph is in a coma and unable to care for Will. Will has no court-appointed guardian and, since his father's accident, has been cared for by Petitioners and by his paternal grandmother.

4. Petitioners are part of Will's extended family. Will has resided with Petitioners periodically since the death of his mother. Will has attended school and has received medical care in Melville, near Petitioners' home. Will has cousins and playmates in Melville.

5. Petitioners are reputable persons of good moral character with sufficient ability and financial means to rear, nurture, and educate Will in a suitable and proper manner.

YOUR PETITIONERS PRAY THE COURT to appoint Petitioners as guardians and temporary custodians of the minor, Will Fox.

Frank Byers

Filed: February 1, 2013

Frank Byers
LAW OFFICES OF FRANK BYERS
Attorney for Petitioners Don and Frances Loden

STATE OF FRANKLIN
DISTRICT COURT OF OAK COUNTY

IN THE MATTER OF THE PETITION OF Don and Frances Loden, Husband and Wife, **FOR GUARDIANSHIP AND TEMPORARY CUSTODY OF** Will Fox, a minor (DOB 1/3/03)	Case No. 2013-FA-238

MOTION TO TRANSFER CASE TO TRIBAL COURT

Betty Fox moves the Court to transfer this action to the Tribal Court of the Blackhawk Tribe, pursuant to the Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. §§ 1901 *et seq*., and states:

1. Will Fox is an "Indian child" as defined by ICWA, is under 18 years of age, and is a member of the Tribe.

2. Will is the biological son of Joseph Fox, a member of the Blackhawk Tribe, and Sally Loden Fox. Sally died on January 3, 2003. Joseph is incapacitated as the result of a car accident that occurred on November 21, 2012. Betty Fox is the mother of Joseph and the paternal grandmother of Will.

3. The Blackhawk Tribe is an "Indian tribe" as defined by ICWA, 25 U.S.C. § 1903.

4. The Blackhawk Tribe is "the Indian child's tribe" as defined by ICWA, in that the child is a member of the Tribe.

5. This is a "child custody proceeding" subject to transfer to the Blackhawk Tribal Court under ICWA.

6. ICWA requires that the state court transfer a child custody proceeding involving an Indian child to the jurisdiction of the tribe when the Indian custodian petitions the state court to do so, unless there is good cause not to do so. 25 U.S.C. § 1911(b).

7. In accordance with Blackhawk tribal custom, Betty Fox is the Indian custodian of the child in that she is the only living Indian grandparent and that she has physical care, custody, and control of the child. Betty Fox has been the principal caregiver of Will since the incapacitation of his only living parent, Joseph.

8. Good cause does not exist to deny transfer of this proceeding.

9. Betty Fox filed a Petition for Guardianship of Will in the Blackhawk Tribal Court on February 11, 2013.

WHEREFORE Betty Fox asks the Court to transfer the above-captioned proceeding to the Tribal Court of the Blackhawk Tribe and to grant such other relief as the Court deems just and proper.

Karen Pine

Filed: February 11, 2013

Karen Pine
LAW OFFICES OF PINE, BRYCE & DIAL, LLP
Attorney for Petitioner Betty Fox

IN THE TRIBAL COURT OF THE BLACKHAWK TRIBE

IN RE THE GUARDIANSHIP OF	)	
Will Fox, a minor	)	
Betty Fox,	)	Case No. FAM 13-3
Petitioner	)	

PETITION FOR GUARDIANSHIP

Betty Fox petitions this Tribal Court to permit her to become guardian of the minor child Will Fox (DOB 1/3/03) and states as follows:

1. Betty Fox is of lawful age and under no legal disability. She is a member of the Blackhawk Tribe and resides on the Reservation of the Blackhawk Tribe within the borders of the State of Franklin. She has resided on the Reservation from birth to the present.

2. Betty Fox desires to be appointed the guardian and custodian of Will Fox, a male minor child who is 10 years of age. Betty Fox is the paternal grandmother of Will.

3. The biological mother of the child was Sally Loden Fox, a non-Indian, who died in childbirth on January 3, 2003. The biological father of the child is Joseph Fox, who was severely injured in an automobile accident on November 21, 2012, and remains in a coma. He is unable to care for Will.

4. Both Joseph Fox and Will Fox are members of the Blackhawk Tribe, as demonstrated by the letter from the Tribal Court of the Blackhawk Tribe, attached.

5. Will resided with his father in Melville, Franklin, approximately 250 miles (a three- to four-hour drive) from the Reservation, from his birth to the date of his father's accident. He has continued to reside there in the care of Betty Fox since his father's accident, visiting occasionally with his maternal grandparents, Don and Frances Loden. Since the age of six, Will has attended the annual powwows on the Reservation with Betty Fox.

6. On February 1, 2013, Don and Frances Loden filed a petition in the District Court of Oak County, State of Franklin, Case No. 2013-FA-238, seeking guardianship and temporary custody of Will. No orders have been entered in any court affecting the custody or guardianship of Will or the parental rights of Joseph.

7. Don and Frances Loden are not members of any tribe.

8. On February 11, 2013, Betty Fox filed a motion in the District Court of Oak County, State of Franklin, seeking to transfer the state court proceeding from state court to the Tribal Court of the Blackhawk Tribe, pursuant to the Indian Child Welfare Act, 25 U.S.C. §§ 1901 *et seq*.

9. Betty Fox is a reputable person of good moral character with sufficient ability and financial means to rear, nurture, and educate the child in a suitable and proper manner. She is part of Will's extended family and is Indian.

Wherefore, Petitioner Betty Fox asks the Tribal Court:

A. To accept transfer of jurisdiction of Case No. 2013-FA-238 from the District Court of Oak County, State of Franklin, to this Tribal Court and deny the Lodens' petition.
B. To appoint Betty Fox guardian of Will Fox.
C. For such further relief and for the entry of such additional order or orders as may be necessary or appropriate in this proceeding.

Karen Pine

Filed: February 11, 2013

Karen Pine
LAW OFFICES OF PINE, BRYCE & DIAL, LLP
Attorney for Petitioner Betty Fox

BLACKHAWK TRIBAL COURT

P.O. Box 752

BLACKHAWK AGENCY, FRANKLIN 33912-0752

Re: Will Fox

Date: February 10, 2013

TO WHOM IT MAY CONCERN:

This letter confirms that the following persons are members of the Blackhawk Tribe:

Betty Fox (DOB July 31, 1959)

Joseph Fox (DOB October 6, 1982)

Will Fox (DOB January 3, 2003)

This letter attests that the Blackhawk Tribe is a recognized tribe under the Indian Child Welfare Act (ICWA) and that the Blackhawk Tribal Court is a recognized instrumentality of the Tribe. The Tribal Court has a family court unit, with power and authority over any family matter. I am the ICWA Director.

Sam Waters

ICWA Director

Email from Joseph Fox to Betty Fox

From: Joseph Fox
Sent: August 23, 2011
To: Betty Fox
Subject: Will's Visit

Mom,

Will loved attending the powwow on the Reservation last week. This was his third powwow—he can't stop talking about it. And he loved spending the week with you. He is already talking about going to the powwow next year, and of course, we will both be with you for the holidays. I know that the long drive is tiring, but it's worth it to see how much Will loves being on the Reservation. I hope he always remembers that he is a Blackhawk. Will loves visiting Sally's parents as well. I hope nothing ever happens to me, but it is great to know that Will has grandparents who love him.

Love,

Joseph

Excerpt from *Journal of Native American Law,* Vol. 8 (2003)

Native American Customs Regarding Care of Children

The Indian Child Welfare Act (25 U.S.C. §§ 1901 *et seq*.) was enacted to address abuses in the removal of Native American ("Indian" as the Act calls them) children from their homes and therefore from their tribes and reservations. The Senate hearings revealed a lack of understanding of Native American customs among those officials entrusted with placement of children.

Almost all Native American tribes have a long-standing custom or practice of caring for their children within the extended family. Even where Native American parents have not appointed a custodian, tribes expect that an extended family member will become the custodian of the child. In most tribes, it is expected that the maternal grandparents, if available, will be the custodians if the natural parents are deceased or unable to parent the children. A few tribes, such as the Blackhawk, expect that the Native American grandparents, maternal or paternal, will become the custodians.

Although guardianship is established by native custom and practice, it is not unusual for those who have become guardians through native custom or practice to seek tribal court appointment as guardians. This step is taken for practical reasons because the tribal court's order appointing the guardian avoids disputes with various entities, such as schools, medical providers, and the like.

* * * *

February 2013 MPT

▶ *LIBRARY*

MPT-2: *In re Guardianship of Will Fox*

EXCERPTS FROM THE INDIAN CHILD WELFARE ACT OF 1978 (TITLE 25 U.S.C.)

§ 1902 Congressional declaration of policy

The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

§ 1903 Definitions

For the purposes of this chapter, except as may be specifically provided otherwise, the term—

(1) "child custody proceeding" shall mean and include—

(i) "foster care placement" which shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;

(ii) "termination of parental rights" which shall mean any action resulting in the termination of the parent-child relationship;

(iii) "preadoptive placement" which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and

(iv) "adoptive placement" which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

. . .

(2) "extended family member" shall be as defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, shall be a person who has reached the age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent;

(3) "Indian" means any person who is a member of an Indian tribe . . . ;

(4) "Indian child" means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe;

. . .

(6) "Indian custodian" means any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child;

. . .

§ 1911 Indian tribe jurisdiction over Indian child custody proceedings

. . .

(b) Transfer of proceedings; declination by tribal court

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: *Provided,* that such transfer shall be subject to declination by the tribal court of such tribe.

DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
GUIDELINES FOR STATE COURTS; INDIAN CHILD CUSTODY PROCEEDINGS

* * * *

Determination of Good Cause to the Contrary

(a) Good cause not to transfer the proceeding exists if the Indian child's tribe does not have a tribal court as defined by [25 U.S.C. §§ 1901 *et seq*. (Indian Child Welfare Act)] to which the case can be transferred.

(b) Good cause not to transfer this proceeding may exist if any of the following circumstances exists:

(i) The proceeding was at an advanced stage when the petition to transfer was received and the petitioner did not file the petition promptly after receiving notice of the hearing.
(ii) The Indian child is over 12 years of age and objects to the transfer.
(iii) The evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or the witnesses.
(iv) The parents of a child over five years of age are not available and the child has had little or no contact with the child's tribe or members of the child's tribe.

(c) Socio-economic conditions and the perceived adequacy of tribal or Bureau of Indian Affairs social services or judicial systems may not be considered in a determination that good cause exists.

(d) The burden of establishing good cause to the contrary shall be on the party opposing the transfer.

In re Custody of R.M.
Franklin Supreme Court (2009)

Joan Albers filed in the Franklin district court a Petition for the Sole Physical and Legal Custody of R.M. (DOB 4/20/2005). The Petition did not seek to terminate the parental rights of R.M.'s parents. Albers, the maternal aunt of R.M., has shared responsibility for raising R.M. since the child was two months old. Albers, R.M., and R.M.'s parents are members of the Falling Rock Tribe. The district court granted the motion by R.M.'s parents to transfer this matter to the Falling Rock Tribal Court, relying on the Indian Child Welfare Act (ICWA), 25 U.S.C. § 1911(b). The Court of Appeal affirmed. Albers appeals.

The Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901 *et seq*., was the product of rising concern over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes. U.S. Senate oversight hearings yielded numerous examples documenting "[t]he wholesale removal of Indian children from their homes, . . . the most tragic aspect of Indian life today." *Indian Child Welfare Program, Hearings before the Subcomm. on Indian Affairs of the S. Comm. on Interior and Insular Affairs*, 93d Cong., 2d Sess., 3 (1974) (statement of William Byler). The Association on American Indian Affairs reported that 25 to 35 percent of all Indian children had been separated from their families and placed in adoptive families, foster care, or institutions. It also identified serious adjustment problems encountered by these children during adolescence, as well as the impact of the adoptions on Indian parents and the tribes themselves.

Additional witnesses at the Senate hearings testified to the impact on the Indian tribes of this history. One witness testified:

> Culturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of the tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their People. . . . Many of the individuals who decide the fate of our children are at best ignorant of our cultural values, and at worst contemptuous of the Indian way and convinced that removal, usually to a non-Indian household or institution, can only benefit an Indian child.

In enacting the Act, Congress found that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children" and that "the States, exercising their recognized

jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." 25 U.S.C. § 1901.

Albers argues in her appeal of the transfer of the matter to tribal court that ICWA does not apply. She contends that this is not a child custody matter because she does not seek to terminate the parental rights of R.M.'s parents. She simply wants to be able to make decisions for R.M. The parents, however, argue that what Albers seeks is a foster care placement that is governed by § 1911(b) of ICWA.

Under § 1911(b), upon receipt of a petition to transfer by a parent, an Indian custodian, or the Indian child's tribe, the state court child custody proceedings are to be transferred to the tribal court, except in cases of "good cause," objection by a parent, or declination of jurisdiction by the tribal court.

The critical issue in determining whether ICWA applies is not how a party captions the petition, but rather what the petition seeks. ICWA defines foster care placement as encompassing four requirements: (1) the Indian child is removed from the child's parent or Indian custodian, (2) the child is temporarily placed in a "foster home or institution or the home of a guardian or conservator," (3) the parent or Indian custodian cannot have the child returned upon demand, and (4) parental rights have not been terminated. 25 U.S.C. § 1903(1).

ICWA does not define these terms. Franklin state law, however, defines the guardian of a minor as one with "the powers and responsibilities of a parent with sole legal and physical custody to the exclusion of all others." FR. REV. STAT. § 72.04. For example, a guardian is empowered to facilitate the minor's education and social and other activities and to authorize medical care. Under Franklin law, a "conservator for a minor" has the power to provide for the needs of the child and has the duty to pay the reasonable charges for the support, maintenance, and education of the child. *Id.* § 72.08.

Here, by seeking to have sole legal custody of R.M., Albers in effect seeks the ability to decide her care, including the ability to remove R.M. from her parents and place her temporarily in Albers's home. The parents would not be able to have the child returned upon demand.

The terms "conservator" and "guardian" describe the very powers Albers seeks. Albers cannot avoid the effect of ICWA by calling her petition one for "sole physical and legal custody." Thus, her petition falls within the definition of "foster care placement" to which ICWA applies.

Albers also claims that she can object to the transfer to tribal court because she is an Indian custodian. In doing so, Albers relies on the legislative history of ICWA. "[B]ecause of the extended family concept in the Indian community, parents often transfer physical custody of the Indian child to such extended family members on an informal basis, often for extended periods of time and at great distances from the parents. While such a custodian may not have rights under State law, they do have rights under Indian custom which this bill seeks to protect, including the right to protect the parental interest of the parents." H.R. REP. NO. 95-1386 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7543.

We assume that Albers would be an Indian custodian under ICWA. Nevertheless, while Indian custodians such as Albers are eligible to *petition* to transfer, they do not have the right to *object* to the transfer. 25 U.S.C. § 1911(b). Being an Indian custodian does not give Albers the right to object to the transfer in this case.

Finally, Albers argues that good cause exists not to transfer the matter under § 1911(b) but to keep it in state court because the evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or the witnesses. The Bureau of Indian Affairs has issued Guidelines to help state courts in determining good cause not to transfer. BUREAU OF INDIAN AFFAIRS, *Guidelines for State Courts; Indian Child Custody Proceedings ("Guidelines").* Although the Guidelines have not been promulgated as administrative regulations, they clarify the congressional intent behind this legislation. We therefore follow them.

The Guidelines recognize that undue hardship is one of the circumstances that would warrant a finding of good cause not to transfer. However, Albers has failed to meet her burden. *See Guideline (d).* The tribal court is located just over an hour's travel time from Albers's home and less than two hours' travel time from the home of R.M.'s parents. It is within one to two hours' driving time of school and medical personnel and any other witnesses likely to be called to testify. In fact, Albers admits to often taking R.M. to the reservation to visit with family and friends, a trip that was not inconvenient to her. It has been our experience that tribal courts have the power to subpoena witnesses needed to prove parties' allegations. We have no reason to question that power here, and our state courts will issue subpoenas upon request of tribal courts. Accordingly, good cause not to transfer does not exist here.

The district court correctly applied the law in this case by ordering the transfer to the Tribal Court.

Affirmed.

February 2013 MPT

▶ *POINT SHEET*

MPT-1: *In re Wendy Martel*

In re Wendy Martel

DRAFTERS' POINT SHEET

Examinees' law firm has been asked by attorney Wendy Martel for advice about a problem arising out of her representation of David Panelli, M.D. Martel has recently settled Panelli's case, has just received the settlement funds, and has yet to cash the check representing the settlement amount. Martel's questions involve issues of what she may do in the face of Panelli's instructions prohibiting her from disbursing any of the recovery to Rebecca Blair, Panelli's former attorney, and prohibiting her from even giving Blair any information about the recovery. Examinees' assignment is to draft an opinion letter for Martel, in accordance with the firm's memorandum on drafting client opinion letters, which instructs examinees to (1) state each question involved; (2) provide a short answer to the question; and (3) write an analysis of the issues raised by the question, including the relevant facts and how the applicable authorities combined with the relevant facts lead to the conclusion.

The File consists of the instructional memo from the supervising attorney, the memorandum on opinion letters, a transcript of the interview with Martel, a copy of Blair's lien, and copies of the Martel/Panelli emails. The Library consists of excerpts from the Franklin Rules of Professional Conduct, an ethics opinion, and a case from the Franklin Supreme Court.

The following discussion covers all the points the drafters of the item intended to incorporate, but examinees may receive good grades without covering them all.

I. Background

In 2009, Dr. David Panelli, a psychiatrist, brought an action for sexual harassment against Heather Kern, M.D., who had been his supervisor at the Sandoval Medical Center while he was a resident. Panelli retained attorney Rebecca Blair pursuant to a contingent fee agreement, entitling her to a fee of one-third of any recovery that she might obtain against Kern during her representation. Blair filed a notice of statutory lien against any recovery to secure her fee, which is standard practice in Franklin.

Between 2009 and 2010, Blair filed the complaint and initiated discovery. Soon after filing the lawsuit, she and Panelli experienced difficulties in communication as a result of a personality conflict. The personality conflict escalated over time.

In 2011, as a result of their personality conflict, Panelli discharged Blair and retained Martel in her place under a contingent fee agreement, like the one with Blair, entitling Martel to a fee of one-third of any recovery that she might obtain against Kern. Martel undertook her representation of Panelli with knowledge of Blair's lien. Upon review of the case file Martel received from Blair, Martel determined that Blair had done a very good job in litigating the case.

One month ago, Martel settled Panelli's sexual harassment action against Kern for $600,000. In the settlement agreement, Martel obligated herself to pay, out of settlement funds, any claim Blair might have and to indemnify Kern and her attorney in case Blair made any claim against them. Such an obligation is consistent with local practice. The court dismissed the action with prejudice.

On February 22, 2013, Martel received the $600,000 settlement and informed her client, Panelli, that she had received the funds and would contact Blair concerning Blair's share. Panelli instructed Martel not to disburse any of the recovery to Blair and not even to give Blair any information about the recovery. Panelli instructed Martel to disburse her fee to herself and to disburse what remained to him.

Martel has come to examinees' law firm for advice. She believes that Blair is entitled to some part of the recovery, but because of Panelli's instructions, she is unsure how to proceed and wants to be sure that whatever she does, she acts ethically.

II. The Substantive Law

Under *Clements v. Summerfield* (Fr. Sup. Ct. 1992), an attorney has a right to his or her fee from a client under a contingent fee agreement when the contingency specified has occurred and does not have any such right unless and until the contingency occurs. If the contingency occurs after the representation has terminated, the attorney's right to his or her fee is limited to the reasonable value of the services rendered during the representation (i.e., *quantum meruit*), paid out of the total fee payable to any successor attorney.

According to *Greenbaum v. State Bar* (Fr. Sup. Ct. 1996), cited in Franklin State Bar Ethics Op. No. 2003-101, an attorney must promptly disburse to the client any funds that the attorney holds in trust for the client that the client is entitled to receive. An attorney may nevertheless continue to hold in trust, even contrary to a client's instructions, any portion of funds that the attorney holds in trust for the client on which a third party has a claim in conflict

with the client, and must so advise the client. The attorney should not resolve the dispute unilaterally. Franklin State Bar Ethics Op. No. 2003-101.

Under *Johnson v. State Bar* (Fr. Sup. Ct. 2000), cited in Franklin State Bar Ethics Op. No. 2003-101, an attorney becomes a fiduciary to a third party, and subjects him- or herself to fiduciary duties running in the third party's favor, by undertaking representation of a client with knowledge of the third party's lien against the client's recovery. The fiduciary duties in question include the duty to deal with the third party with utmost good faith and fairness and to disclose material facts.

III. Ethical Requirements

Several ethics rules are directly relevant to this item.

Franklin Rule of Professional Conduct 1.15 sets forth several attorney obligations in the possession of property of another, including maintenance in a separate account. Rule 1.15(d) imposes a duty on the attorney to notify the client or third person of the possession of property in which the client or third person has an interest and imposes a duty to deliver such property to the client or third person. Rule 1.15(e) imposes a duty to keep property separate when multiple parties with an interest in the property dispute the nature of one another's interests, until the dispute is resolved.

In addition, under Franklin Rule of Professional Conduct 1.4(a)(3), an attorney must keep the client reasonably informed about the matter, and 1.4(a)(5) requires an attorney to consult with his or her client about any relevant limitation on the attorney's conduct when the attorney knows that the client expects assistance not permitted by the Rules or other law.

Franklin Rule of Professional Conduct 1.6 states that an attorney may not reveal information relating to the representation of a client unless

- the client gives informed consent, Rule 1.6(a);
- the disclosure is impliedly authorized in order to carry out the representation, *id.*; or
- the disclosure is permitted as specified by Rule 1.6(b), including
    - to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another, Rule 1.6(b)(2); and
    - as otherwise required or permitted by law, Rule 1.6(b)(6) & Comment [3].

Even when permitted to make a disclosure, an attorney should not make a disclosure that is greater than the attorney reasonably believes necessary to accomplish the purpose. Rule 1.6, Comment [16].

IV. Analysis

Examinees must read the client interview, other factual materials, and the Franklin Rules of Professional Conduct and other legal authorities to determine the issues presented by Martel's situation and then draft a well-reasoned opinion letter that offers clear advice to Martel on how she should proceed. Because a component of the task is identifying and articulating the issues Martel faces, it is expected that examinees may take slightly different approaches to describing the questions raised. Nevertheless, examinees should recognize that the opinion letter to Martel should address Martel's duty to safeguard the settlement funds, whether (and when) any of the settlement funds should be disbursed to Panelli, whether Blair has a claim to a share of the funds and how her share should be measured, what information about the case Martel may provide to Blair, and what additional advice, if any, Martel should give to Panelli. Examinees may set out these issues as five distinct questions (as in the example below) or may analyze them in some other combination.

The discussion below illustrates how examinees might set forth the questions raised in Martel's situation.

1. Martel's responsibility for the settlement funds

Question presented: What is Martel's responsibility upon receiving property in which others have an interest?

Short answer: Upon receipt of property in which others have an interest, Martel must keep the property separate from her own property, typically in a trust account.

Analysis: The initial responsibility for an attorney is to safeguard the property and to separate her own property from that in which a client or third party has an interest. Rule 1.15(a). Thus Martel should immediately deposit the $600,000 settlement check into her client trust account. Further, Martel must notify the client, a step she has already taken. Rule 1.15(d).

2. Disbursement of funds

Question presented: What, if any, disbursement is Martel required to make to the client, Panelli, and when is she required to make it?

Short answer: Martel is required to disburse to Panelli $400,000 of the $600,000 recovery and is required to do so now.

Analysis: Martel is required to disburse to the client, Panelli, $400,000 out of the $600,000 recovery she holds in trust because it is clear that this is the amount to which the client is entitled and there is no one else claiming an interest in this portion of the settlement. Rule 1.15(d); *see also Greenbaum v. State Bar*. The recovery is in settlement of Panelli's sexual harassment action against Kern. Panelli is entitled to immediately receive the recovery of $600,000 *minus* the $200,000 that Martel is entitled to receive under her one-third contingent fee agreement, *see Clements v. Summerfield*, resulting in an undisputed amount of $400,000 due to Panelli.

3. Blair's claim

Question presented: Does Blair have a claim for fees and, if so, what if anything is Martel required to do in response?

Short answer: Blair has a claim for fees based on the reasonable value of the services she rendered during her representation. Until the matter is resolved, Martel is required to hold the $200,000 in trust.

Analysis: Blair has a claim for fees for her work for Panelli based on her contract with Panelli and the doctrine of *quantum meruit*. *Clements v. Summerfield*. Blair had a contract with Panelli that was contingent upon a recovery. That contingency has been met because there is a settlement. Therefore, Blair's claim is ripe. She filed a lien to protect that claim, and Martel is aware of that lien. In addition, in the settlement agreement, Martel obligated herself to pay any claim that Blair might have and to indemnify Kern and her attorney from any claim that Blair might make against them.

The amount owed to Blair must be determined by a court because Panelli has forbidden any discussion between Martel and Blair about the case. Normally, the amount owed to the discharged attorney is determined under equitable principles, based on the doctrine of *quantum meruit*. *Clements v. Summerfield*. Determining the value of the services performed by Blair will most likely require disclosure of information beyond

that which Martel can make. *See* Franklin State Bar Ethics Op. No. 2003-101. Perceptive examinees might note that once she has knowledge of the fact and amount of the recovery, Blair can file an action, and the court can then determine the amount owed to her. This amount is not one Blair and Martel can work out on their own because it would require Martel to reveal more information than she is permitted to reveal.

Until the Blair claim is resolved, Martel must hold the entire $200,000 in the trust account and cannot disburse any portion to herself.

4. Confidentiality and Blair

Question presented: What, if anything, is Martel required or permitted to disclose to Blair?

Short answer: Martel is *required* to disclose to Blair the fact and the amount of the recovery. Martel is neither required nor permitted to disclose to Blair anything else.

Analysis: Because Blair has a claim, Martel is required to disclose to Blair the fact and the amount of the recovery. Rule 1.15(d). Martel owes a fiduciary duty to Blair to disclose facts material to the recovery because she undertook representation of Panelli with knowledge of Blair's lien against Panelli's recovery. *See* Franklin State Bar Ethics Op. No. 2003-101; *Johnson v. State Bar*, cited therein. The fact and the amount of the recovery are material to Blair's claim for her fee based on the reasonable value of the services she rendered during her representation of Panelli. *Clements v. Summerfield*. Without information about the fact and the amount of the recovery, Blair cannot make any claim, and Martel is not permitted to resolve the situation unilaterally. *See* Franklin State Bar Ethics Op. No. 2003-101.

It is true that the duty of confidentiality imposed on Martel by Franklin Rule of Professional Conduct 1.6 extends to all information relating to the representation of a client—which, in this case, includes information relating to the recovery. *See* Rule 1.6, Comment [3]. But the duty of confidentiality does *not* prohibit Martel from making the disclosure in question because it permits disclosure as otherwise required by law, namely, the law governing the fiduciary relationship of Martel to Blair. Rule 1.6(b)(6). Until the matter with Blair is resolved, Martel is required to continue to hold the $200,000 in trust. *See* Franklin State Bar Ethics Op. No. 2003-101; Rule 1.15(e).

Some examinees may argue that Martel may reveal information related to representation of Panelli in order to prevent him from committing fraud. *See* Rule 1.6(b)(2). The fraud exception to the confidentiality of information depends on a determination of the client's intent, because fraud requires an intent to deceive. It is unclear from the facts whether Panelli has an intent to deceive. The Franklin Ethics Opinion points out that under the facts presented there, the client's motive was unclear. Likewise, here it is unclear why Panelli has given the instruction he has. Examinees who rely on the fraud exception to disclose information must point to some facts that show intent to deceive, i.e., that Panelli understands that under the contract between Blair and Panelli, Blair is entitled to a portion of the funds, and that nevertheless Panelli wants to prevent Blair from recovering by concealing information through the attorney-client privilege. Other examinees might argue that the fraud exception might apply but that the facts do not provide enough information to prove that Panelli intends to deceive. Either conclusion has merit, but examinees must address the issue of intent to deceive as an element to be proven. If indeed there is intent to deceive, the fraud exception would be applicable, but if not, it would not be applicable.

In sum, Martel is not permitted to disclose to Blair anything more than the fact and the amount of the recovery, since the duty of confidentiality prohibits her from disclosing more information than she reasonably believes necessary to accomplish the purpose. *See* Rule 1.6, Comment [16].

5. Martel's duty to Panelli

Question presented: What advice is Martel required to give to Panelli?

Short answer: Martel is required to advise Panelli that

- Martel owes a fiduciary duty to Blair to disclose facts material to the recovery, and Martel cannot do what Panelli has instructed because to do so would violate her legal duty to Blair and expose Martel to liability for a breach of her fiduciary duty to Blair;
- Panelli's instructions may expose him to liability to Blair for breach of contract with respect to their initial contingent fee agreement; and
- Martel cannot and will not follow his instructions.

Analysis: An attorney cannot honor a client's instructions when following those instructions would violate another duty. Martel owes a fiduciary duty to Blair to disclose facts material to the recovery. Franklin State Bar Ethics Op. No. 2003-101; *Johnson v. State Bar*, cited therein; *see* Rule 1.4(a)(5).

Panelli's instructions expose Panelli himself to liability for breach of contract with respect to his contingent fee agreement with Blair, *see Clements v. Summerfield*, and expose Martel to liability for breach of fiduciary duty, *see Johnson v. State Bar*, cited in Franklin State Bar Ethics Op. No. 2003-101. *See* Rule 1.4(a)(5).

In short, Martel cannot ethically follow Panelli's instructions. *See* Rule 1.4(a)(5). And Martel must inform Panelli that she will not follow these instructions. *See* Rule 1.4(a)(3).

February 2013 MPT

▶ *POINT SHEET*

MPT-2: *In re Guardianship of Will Fox*

In re Guardianship of Will Fox
DRAFTERS' POINT SHEET

The task for examinees in this performance test is to draft a brief in support of the Motion to Transfer a state guardianship and child custody proceeding to Blackhawk Tribal Court. The client is Betty Fox, the grandmother of Will Fox, an Indian child as defined by the Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1901 *et seq*. Under ICWA, it is presumed that the state court will transfer jurisdiction of foster care placement proceedings to the tribal court unless there is good cause not to.

The current court proceedings are the result of an incapacitating injury suffered by Will's father, Joseph Fox. Since the accident, Will has been cared for by his grandmother, Betty Fox. Will's mother died at childbirth, and Will has no court-appointed guardian. Recently, the Lodens, his maternal non-Indian grandparents, filed a Petition for Guardianship and Temporary Custody in Franklin state court, seeking a declaration that the Lodens be Will's guardians and temporary custodians. Less than two weeks later, Betty Fox filed a Petition for Guardianship of Will in Blackhawk Tribal Court and, on the same day, filed in state court a Motion to Transfer Case (i.e., the Lodens' petition for guardianship and temporary custody) to Tribal Court.

In preparing the brief in support of the Motion to Transfer, examinees must establish grounds to invoke the presumption that under ICWA, the court should transfer the matter to the Tribal Court. Because of the simultaneous briefing schedule, examinees must also anticipate any objections that the Lodens are likely to raise and respond to them.

The File contains the instructional memo from the supervising attorney, the firm guidelines for persuasive briefs, the Lodens' Petition for Guardianship and Temporary Custody, the Motion to Transfer Case to Tribal Court, the Petition for Guardianship filed by Betty Fox with an attachment from the Blackhawk Tribal Court, an email from Joseph Fox to his mother, and an excerpt from the *Journal of Native American Law*. The Library contains excerpts from the Indian Child Welfare Act of 1978, the Bureau of Indian Affairs Guidelines for State Courts; Indian Child Custody Proceedings, and *In re Custody of R.M*., a Franklin Supreme Court case.

The following discussion covers all the points the drafters of the item intended to incorporate, but examinees may receive excellent grades without covering them all.

I. Procedural Posture of the Proceedings

1. Don and Frances Loden filed a Petition for Guardianship and Temporary Custody in Franklin state court on February 1, 2013.
2. Betty Fox filed a Motion to Transfer in state court on February 11, 2013, petitioning the court to transfer the Lodens' petition to Blackhawk Tribal Court pursuant to the Indian Child Welfare Act of 1978 (ICWA).
3. Also on February 11, Betty Fox filed a Petition for Guardianship in Tribal Court.

II. Overview

Examinees are directed to draft a brief in support of the Motion to Transfer Case to Tribal Court. As the judge has set simultaneous dates for filing briefs, examinees are instructed to anticipate and respond to any probable arguments that the Lodens might make pursuant to ICWA or case law. Thus, in drafting the brief, examinees must

- make all arguments needed to establish that the matter filed by the Lodens falls within the presumptive transfer provision of ICWA, 25 U.S.C. § 1911(b), and should be transferred to tribal court; and
- anticipate and respond to the likely objections the Lodens will make—namely, the good cause exceptions found in the Bureau of Indian Affairs, Guidelines for State Courts; Indian Child Custody Proceedings.

Examinees are to prepare a statement of the case and an argument following the firm's guidelines. No specific organizational format is specified, but examinees should follow some clear pattern in analyzing the issues. Examinees should argue persuasively that the Motion to Transfer to Tribal Court should be granted.

Note: Examinees who argue the merits of the guardianship petition have not followed directions, which are to prepare the brief in support of the Motion to Transfer to Tribal Court.

III. Statement of the Case

Examinees are directed to prepare a statement of the case succinctly noting the parties, the nature of the case, and the specific matter or issue in dispute. The statement of the case should also describe the client's requested relief. A sample statement follows:

Betty Fox petitions this court to transfer the Lodens' Petition for Guardianship and Temporary Custody to Tribal Court pursuant to the Indian Child Welfare Act (ICWA).

Under ICWA, foster care proceedings are to be transferred to tribal court when the requirements are met. Betty Fox is the Indian custodian with authority to petition the court to transfer this foster care proceeding involving Will Fox, an Indian child. Accordingly, the Lodens' Petition is one governed by ICWA.

IV. Legal Analysis

Examinees should recognize that there are two key arguments to make in the brief in support of the Motion to Transfer—that ICWA applies to this proceeding (despite its being filed in state court) and that there is no good cause not to transfer the case to tribal court.

A. Application of ICWA

The first major issue is whether the Lodens' Petition falls within the scope of ICWA and meets the requirements for transfer to tribal court. A sample brief heading for this argument section might be as follows:

Because Betty Fox is an Indian custodian of Will Fox, an Indian child, and because the Lodens' Petition seeks foster care placement of Will, an Indian child, the court must transfer the Lodens' Petition to Tribal Court.

Thorough examinees will briefly describe the legislative intent underlying ICWA: The Indian Child Welfare Act of 1978 (ICWA) provides for the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of Indian children in foster care or adoptive homes. The purpose of the Act is to promote the preservation of Indian heritage, culture, and values. ICWA § 1902; *In re Custody of R.M.*

The Act mandates that, in the absence of "good cause" to the contrary, state courts *shall* transfer to tribal courts proceedings in which the following requirements are met: (1) the proceedings involve an Indian child; (2) the Indian child is not domiciled or residing within the reservation of the child's tribe; (3) a parent, an Indian custodian, or the Indian child's tribe petitions for transfer; and (4) the proceedings are for the foster care placement of an Indian child or the termination of parental rights. ICWA § 1911(b); *see also In re R.M*. Examinees should analyze the factors in light of the facts and argue that Betty Fox's petition meets all four factors.

- Will is an Indian child not domiciled on the reservation.
    - An Indian child is defined in ICWA as an unmarried person who is under age 18 and who either is a member of an Indian tribe or is eligible for such membership and is the biological child of a tribe member. ICWA § 1903(4). Will is age 10 and is a member of the Blackhawk Tribe. (Blackhawk Tribal Court letter)
    - Will is not domiciled on the reservation. He has lived all his life in Melville, and although he has made regular visits to the Reservation, that is not his domicile. (Loden and Fox Petitions)
- Betty Fox is eligible to petition because she is the Indian custodian.
    - As stated, Betty Fox is a member of an Indian tribe, the Blackhawk.
    - Persons eligible to petition for the transfer of the matter to state court include parents, the Indian custodian, and the Indian child's tribe. ICWA § 1911(b).
    - The ICWA defines "Indian custodian" as "any Indian person who has legal custody of an Indian child under tribal law *or custom* or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child." (Emphasis added.) ICWA § 1903(6).
    - Here, Will's mother is deceased, and his father is incapable of petitioning. There is no indication that the tribe seeks the transfer. (Loden and Fox Petitions)
    - Because of the suddenness of Joseph's incapacitation, there is no evidence that he took steps or otherwise expressed an intent to transfer temporary physical care, custody, or control of Will to Betty, nor has there been any determination of who now has custody of Will under state law.
    - Nevertheless, although Betty has not been awarded legal custody by tribal law, she is the custodian under tribal custom. The long-standing custom and practice among Native American tribes is that children are raised by the extended family. Even where no custodian is appointed by the Native American parents, the tribes expect that a family member will become custodian of the child. Under the customs of the Blackhawk Tribe, Betty, as the only Native American grandparent, is expected to become the custodian of Will. (*Journal of Native American Law*)
    - The legislative history of ICWA stresses the importance of tribal custom. "[B]ecause of the extended family concept in the Indian community, parents often

transfer physical custody of the Indian child to such extended family members on an informal basis, often for extended periods of time and at great distances from the parents. While such a custodian may not have rights under State law, they do have rights under Indian custom which this bill seeks to protect, including the right to protect the parental interest of the parents." H.R. REP. No. 95-1386, cited in *In re Custody of R.M.*

- Here, Betty is the only Native American grandparent. She assumes custody under tribal custom.
- Treating Betty as the Indian custodian is consistent with the congressional policy underlying ICWA, which is "to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture . . . ." ICWA § 1902.

- Accordingly, this is a state court proceeding involving an Indian child not domiciled on the reservation, which the Indian custodian has petitioned to transfer to tribal court. Thus, three of the four requirements for ICWA to govern this action are present.
- Finally, the state court proceeding is one for foster care placement as defined by ICWA.
    - In determining if ICWA applies to any particular case, the Franklin Supreme Court has stated: "The critical issue . . . is not how a party captions the petition, but rather what the petition seeks." *In re Custody of RM.*
    - A petition will be treated as a foster care placement when (1) the action is one to remove the Indian child from the child's parent or Indian custodian, (2) the Indian child is temporarily placed in a foster home or institution or the home of a guardian or conservator, (3) the parent or Indian custodian cannot have the child returned upon demand, and (4) parental rights have not been terminated. ICWA § 1903(1)(g). The Lodens' Petition meets these four requirements of a covered foster care case.
    - It is clear that the first ICWA requirement is met. The Lodens seek to remove the Indian child (Will) from the Indian custodian (Betty). The Lodens seek to be appointed Will's guardians and temporary custodians and rear, nurture, and

educate him. (Lodens' Petition) This request is incompatible with Will's remaining under Betty's care and custody.

- Second, granting the Lodens' petition will place Will in the home of a guardian or conservator. Examinees might note that while ICWA does not define the terms "guardian" and "conservator," those terms are discussed in Franklin case law.
    - In *In re Custody of R.M.*, the child's aunt sought "sole physical and legal custody," terms that were undefined. The court found that the powers that the aunt sought were essentially the same as those of "guardian" as defined by Franklin state law. Franklin courts had defined "guardian" to mean one with "the powers and responsibilities of a parent . . . to the exclusion of all others." The court explained that a guardian is empowered to facilitate the minor's education and social and other activities, to authorize medical care, and to make such decisions as a parent would.
- Similarly, the Lodens seek to be named the guardians and temporary custodians of Will to the exclusion of all others. (Lodens' Petition) If declared to be Will's guardians, the Lodens will have the power to make decisions for him, including where he resides, to remove him from his Indian home, and to prevent his return to the Indian custodian. Thus, the third requirement is met.
- Lastly, the parental rights have not been terminated. The fact that Will had been living in his father's home at the time of Joseph's injury indicates that parental rights had not been terminated. (The Petition for Guardianship filed in tribal court also states that "[n]o orders have been entered in any court affecting the custody or guardianship of Will or the parental rights of Joseph.")

- Examinees should recognize that in order to establish an airtight argument that ICWA covers the state court proceeding and that transfer to tribal court is appropriate, all the components for tribal court jurisdiction must be set out and "checked off."

Betty Fox has shown that this case falls under ICWA, and therefore there is a presumption under § 1911(b) that the state court should transfer the case to the tribal court upon petition by the Indian custodian.

B. Standing to object to transfer under ICWA

Perceptive examinees might identify another argument in support of the Motion to Transfer—whether the Lodens have standing under ICWA to object to the transfer. This issue requires examinees to carefully read the statute and case. A sample heading might be as follows:

> The Lodens do not have standing to object to the transfer because they are not Will's parents, the only entity statutorily permitted to object.

ICWA permits only the parents of an Indian child to object to a transfer of proceedings to tribal court. There is a distinction under ICWA between those entities who can *petition* for a transfer and those who can *object* to a transfer. ICWA § 1911(b); *In re R.M*. As Will's maternal grandparents, the Lodens lack standing to object to the transfer under the plain language of ICWA § 1911(b) ("the court . . . shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either *parent*. . .") (emphasis added). Here, the Lodens are not Will's parents. But this issue is not dispositive, because under § 1911(b) the state court must still determine whether there exists good cause not to transfer.

C. No good cause exists not to transfer

The other major issue is whether there is good cause for the state court to decide *not* to transfer the matter to tribal court even though the proceeding is governed by ICWA. Examinees should refer to the Bureau of Indian Affairs guidelines regarding the circumstances that constitute "good cause" and determine whether any of those circumstances exist here. Below is a sample heading for this argument section:

> The Lodens cannot show good cause not to transfer the matter to tribal court because there should be no difficulty presenting evidence to the Tribal Court and the Indian child has an ongoing relation with the Tribe.

Pursuant to ICWA § 1911(b), a state court may refuse to transfer a foster care proceeding to tribal court where "good cause to the contrary" exists. The Department of the Interior Bureau of Indian Affairs has published *Guidelines for State Courts; Indian Child Custody Proceedings*. These *Guidelines*, which the Franklin Supreme Court follows, *see In re R.M*., identify factors to

be considered in determining whether there is "good cause to the contrary." The party opposing the transfer to tribal court bears the burden of proving good cause. *Guideline (d)*.

First, under *Guideline (a)*, there is good cause not to transfer where there is no tribal court. In this case, there is a tribal court, so there is no basis for good cause under that guideline. (Letter from Blackhawk Tribal Court)

Guideline (b) specifies four circumstances under which the state court may refuse to transfer an otherwise covered ICWA proceeding to tribal court.

- (1) The proceeding was at an advanced stage when the petition to transfer was received and the petitioner did not act promptly after notice of the hearing.
    - This is not true here. Betty Fox filed her petition to transfer within two weeks of the Lodens initiating proceedings in state court. (Loden and Fox Petitions)
- (2) The child is older than 12 and objects to the transfer.
    - This factor does not apply—Will is only 10. Even if the Lodens argue that age 10 is close enough to being over age 12 (ignoring the plain language of the *Guideline*), there is no indication that Will objects to the transfer.
- (3) The evidence could not be adequately presented in the tribal court without undue hardship to the parties or the witnesses.
    - The Lodens may argue that the evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or the witnesses. They may claim that the distance between Melville and the Reservation will make it difficult to present evidence in tribal court concerning Will's medical status, his schooling, or his relationship with his extended family, all of which has been located in Melville. (Loden Petition)
    - In *In re R.M.*, the Franklin Supreme Court held that there was no basis for an undue hardship argument where the tribal court was located an hour's travel time from the petitioner's home and two hours' drive from the locations of the other parties and witnesses.
    - Here, the Reservation is 250 miles from Melville (a three- to four-hour drive), admittedly farther away than the two hours deemed not inconvenient in *R.M.*
    - Nevertheless, it seems unlikely that such a distance is so inconvenient as to constitute undue hardship. Will and his father made the drive to the Reservation for the annual powwow and for holidays. (Joseph Fox email)

- Also, the tribal court has the power to subpoena witnesses needed to prove the petitioner's allegations. *See In re R.M*. Presumably, the Blackhawk court can subpoena any witnesses living in Melville.
- For these reasons, the Lodens cannot meet their burden of proving that there is good cause not to transfer on the basis of undue hardship.

- (4) The parents of a child over age five are unavailable and the child has had little or no contact with the tribe.
  - Here, the parents are unavailable (Will's mother is dead and his father is incapacitated) and Will is over five, but this factor also requires that the child have had little or no contact with the Indian tribe or with members of the tribe.
  - This is certainly not the case here. Will lived with his Indian father, a member of the Blackhawk Tribe, until his father's injury. Will has had contact with the tribe through his father and through his grandmother, the Indian custodian. Will visited the Reservation annually for the powwow. He also visited Betty on the Reservation for holidays. According to his father, Will loved being on the Reservation. (Email from Joseph Fox) And Betty, the Indian custodian, has cared for Will since his father's accident in November 2012.

As the party opposing transfer, the Lodens bear the burden of showing that good cause exists not to transfer. *Guideline (d)*. For the reasons discussed above, they will be unable to meet that burden and the Franklin state court should transfer this proceeding to Tribal Court.

Note: While there is little, if any, support for a finding of good cause not to transfer based on circumstances (1) and (2), the more thorough examinees will mention them and briefly note why they do not apply. But the bulk of the discussion of good cause should focus on the third circumstance, undue hardship, and to a lesser extent on the fourth consideration, the child's contact with the tribe.

www.ncbex.org

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