JULY 2018 Bar Examination

ESSAY I

Andy, a psychiatrist, and Becky, a successful entrepreneur, met and got married in Atlanta. After they married, they purchased a penthouse condominium, titled in Becky's name only, in which they resided during the work week. They also purchased a lake house in North Georgia, which was titled in both spouses' names as tenants in common. They continued to maintain separate bank accounts for their respective incomes and expenses.

The couple did not intend to have children. Andy's sole living relative was his brother, Charlie. Becky was estranged from her sister Kate, her sole living relative.

After a few years of marriage, the couple purchased life insurance policies, each naming the other as sole beneficiary. They also decided to draft their wills. Andy proposed using a form will that he had found online. Becky agreed, and they drafted their wills using the form, each naming the other as sole beneficiary. Becky's will, however, also included a provision stating that, if Andy were to predecease her, her entire estate would pass to her favorite charity, the Boys and Girls Clubs of Metro Atlanta. They executed their wills at Becky's office, in the presence of Becky's assistant, who signed each will on the single witness signature line provided on the form.

Andy subsequently developed drinking and gambling problems. Becky insisted that Andy seek treatment, and Andy closed his practice and entered a rehabilitation facility. After completing his treatment, he attempted to revive his practice.

Andy struggled to attract enough patients to sustain his practice. Having depleted his bank account to fund his addictions and later treatment, Andy asked Becky for a loan. Becky refused. Andy began slipping back into his old habits, and tensions rose. One Saturday evening, Andy and Becky had a heated argument on the dock at their lake house regarding his drinking and her refusal to loan him money. The argument escalated, and Andy bashed Becky over the head with a wine bottle. Becky lost her balance and toppled off the dock into the lake. Andy retreated into the house, still angry.

The next day, Andy contacted police and reported Becky as missing. After a brief search, Becky's body was recovered from the lake. Though Andy insisted he had believed Becky was sleeping soundly in the guest bedroom the previous night, after investigators reviewed the footage from the property's video surveillance system, Andy was arrested. Ultimately, Andy was convicted of felony murder.

Becky's estate is now in probate. Andy, Kate, Charlie, and the Boys and Girls Clubs are all asserting claims to Becky's assets. Please answer the following questions under Georgia law.

1. Is Becky's will enforceable? Please explain your answer fully, including a discussion of the elements of a valid will.

2. Who among the claimants has a rightful claim to Becky's estate? Please explain your answer fully.

3. To whom should the proceeds of Becky's life insurance policy be distributed? Please explain your answer fully.

4. Who will have a rightful claim to the lake house following Becky's death? Please explain your answer fully.

ESSAY II

Tracy had been interviewing for a position as an elementary school teacher at Middletown Academy, a private school in Middletown, Georgia. Tracy recently learned that the Academy's board had narrowed the field of applicants to herself and Suzie, one of Tracy's classmates from State University. Tracy remembered Suzie from their freshman year because Suzie, who commuted to school from home, would often study late in the library and spend the night in the dorm room of one of her classmates. After searching her computer, Tracy found a photo she took when Suzie once slept in a beanbag chair on the floor of Tracy's room. The photo showed Suzie scantily clad and appearing to be drunk and passed out on the floor. Tracy knew that Suzie never drank alcohol, but, believing that the photo could be used to her advantage, Tracy decided to post the photo on her SocialMedia homepage. SocialMedia is an Internet social networking site.

Tracy posted the photo so it could be easily seen by her 984 SocialMedia "pals", acquaintances to whom she had granted access to all of the information she posted on the site. Tracy added the following caption under Suzie's photo:

> "Most of you remember Suzie and her reputation at State University. She never knew I took this photo. Can you believe she's a finalist for the elementary school teaching position at Middletown Academy? Share this with everyone you know who cares about young children."

When Bob, one of Tracy's 984 SocialMedia "pals," saw Tracy's post, he immediately became outraged that an apparent drunk might be teaching his nieces and nephews at Middletown Academy. Bob re-posted the picture of Suzie and Tracy's caption for all of his 482 SocialMedia "pals" to see, many of whom were not "pals" of Tracy. He added the comment, "Share this with everyone you know. This woman should not teach Middletown's kids. She's a DRUNK!"

Tracy's original post and Bob's later post were eventually seen by most of the residents of Middletown, including the members of the Middletown Academy board. As a result, Tracy was selected for the teaching position, even though Suzie was the more qualified candidate.

Suzie has sought your advice about her potential claims under Georgia law. Assume Suzie is NOT a public figure.

1. If Suzie files suit against Tracy for defamation, what is her likelihood of success on this claim? Please explain your answer fully.

2. What other cause(s) of action, if any, may Suzie assert against Tracy? Please explain your answer fully.

ESSAY III

Opal Owner owned a warehouse on the west side in Atlanta. The majority of the warehouse space was unoccupied, but she was leasing 25% of the space to Tina Tenant, who was using it for storage. Tina owned and operated a nearby clothing boutique. She was leasing the warehouse for storage because she had very little room to store inventory which was not currently on display. Since Opal and Tina were old friends, there was no written lease agreement; instead, they agreed on an amount for the monthly rent payment and Opal told Tina she would "provide plenty of notice" if she ever sold the warehouse. Tina always paid her rent on time.

Opal Owner decided it was time to begin marketing the warehouse for sale since it was not producing any substantial rental income. She mentioned her plans to Amy Agent, a commercial real estate agent, and asked for her help in finding a suitable buyer, but did not sign a listing agreement with Amy.

Nevertheless, Amy told Bella Buyer and Paula Purchaser that Opal was considering a sale of the warehouse. Bella decided to approach Opal with an offer. The offer turned out to be for a price substantially in excess of what Opal had thought the warehouse would bring, and she verbally accepted the offer. The terms of Bella's offer included promises to make a cash down payment and to deliver a promissory note for the balance of the purchase price.

Before Opal and Bella were able to reduce their agreement to writing, Paula Purchaser presented a written contract for the purchase of the warehouse to Opal for a cash price which exceeded the verbal offer Bella had made. Believing that she and Bella did not have a binding agreement, Opal executed the contract which Paula had presented and proceeded to close the sale within 30 days. A clause in the contract provided that any lessees in the warehouse would be required to vacate the premises within 10 days after closing. On the day of closing, Paula took possession of the warehouse, and Opal notified her old friend, Tina Tenant, that Tina had 10 days to remove the clothing she was storing and vacate the premises.

Opal is now facing potential liability from multiple parties and has come to you for legal advice as to how to respond.

1. Tina Tenant has told Opal Owner that she will not be able to vacate the premises within the 10 days which Opal has given her and has threatened legal action to prevent Opal from forcing her to do so. Assuming the oral lease agreement between Opal and Tina is valid under Georgia law, may Opal force Tina to vacate the premises within the desired

10 days? If not, how much notice regarding the termination of the lease is Opal required to give Tina under applicable Georgia law before Opal can force Tina to vacate the premises? Please explain your answer fully.

2. Paula Purchaser has demanded that Opal Owner force Tina Tenant to leave the warehouse within the 10-day period prescribed in the contract. If Opal is unable to do this, Paula has threatened legal action to have Opal specifically perform this key provision in the contract. If she is unable to obtain specific performance, Paula has threatened to have the contract rescinded and to have Opal return the purchase price to her. What is the likelihood under applicable Georgia law that Opal will be required to specifically perform the clause in the contract regarding Tina's having to vacate the premises within 10 days? In the alternative, what is the likelihood that the contract between Paula and Opal can be rescinded if Opal is unable to force Tina out within the required 10-day period? Please explain your answer fully.

3. Bella Buyer has also threatened a lawsuit against Opal Owner, alleging that she had a binding agreement to purchase the warehouse which preceded the contract with Paula Purchaser. Under applicable Georgia law, will Opal be required to sell the warehouse to Bella in accordance with their verbal agreement? Please explain your answer fully.

4. Finally, Amy Agent believes she is entitled to a commission on the sale of the warehouse, whether the sale is made to Bella Buyer or to Paula Purchaser. Under applicable Georgia law, is Opal Owner liable to Amy for a commission since Amy told both Bella and Paula about Opal's intention to sell the warehouse? Please explain your answer fully.

ESSAY IV

A Georgia start-up company called "Puffs-R-Us" contacted a Georgia-based battery manufacturer, Battery Bin, to inquire as to the cost of production and installation of 1,000 batteries in its newly designed e-cigarette model, the "E-Cig 3000."

After speaking to Puffs-R-Us and upon receipt of the model specifications, Battery Bin determined that Puffs-R-Us could utilize its standard battery in the E-Cig 3000, thus eliminating the need for Battery Bin to design an entirely new battery specifically for the Puffs-R-Us product. A representative from Battery Bin visited the Puffs-R-Us plant to discuss the cost and installation fees and to allow Puffs-R-Us the opportunity to inspect a sample of the batteries to ensure proper fitting and compatibility.

The next day, Battery Bin faxed a written confirmation to Puffs-R-Us that memorialized the terms discussed in the previous meeting, i.e., that Puffs-R-Us agreed to purchase 1,000 batteries from Battery Bin at a cost of $8,000, that Puffs-R-Us would pay a battery installation fee of $2,000, and that Battery Bin would complete the work within two months. Battery Bin added a term in the written confirmation, which provided that Puffs-R-Us would inspect all batteries upon receipt and immediately notify Battery Bin of any issues with the product. The written confirmation was signed by a Battery Bin representative

and received by Puffs-R-Us on the same day it was sent. Puffs-R-Us delivered all 1,000 of the e-cigarettes to Battery Bin and made no objection to the inspection provision.

Within a month, Battery Bin had shipped all of the e-cigarettes back to Puffs-R-Us with the batteries installed.

Upon receipt of the shipment, a Puffs-R-Us employee used one of the e-cigarettes to smoke and immediately sent the remaining products to various vendors. Within days, Puffs-R-Us had received numerous complaints from vendors that some of the batteries were not working, rendering the e-cigarettes unusable. Puffs-R-Us called Battery Bin to tell them that the batteries were not working and that their agreement was now void.

Questions:

1. Would this transaction be governed by the Georgia Uniform Commercial Code? Please explain your answer fully.

2. Did this transaction yield an enforceable agreement under Georgia law? Please explain your answer fully.

3. Assuming the agreement is enforceable, would the additional term in Battery Bin's written confirmation also be enforceable? Please explain your answer fully.

Applicant Number

[redacted]

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State of Franklin v. Hale

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State of Franklin v. Hale

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

OFFICE MEMORANDUM

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

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

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

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

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

OFFICE MEMORANDUM

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

. . .

III. Legal Argument

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

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

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

* * *

STATE OF FRANKLIN
DISTRICT COURT OF JUNEAU COUNTY

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

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

FACTS

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

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

* * *

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

TESTIMONY OF SARAH REED

Prosecutor: Please state your name for the record.

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

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

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

Reed: August 25, 2017.

Court: When did he propose?

Reed: July 25, 2017.

Court: When did you start dating?

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

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

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

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

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

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

DIRECT TESTIMONY OF DETECTIVE DENISE LEE

Prosecutor: Please state your name for the record.

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

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

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

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

Prosecutor: And what did Ms. Reed tell you?

Defense Att'y: Objection. Hearsay.

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

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

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

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

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

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

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

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

CROSS-EXAMINATION

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

Lee: No.

* * *

DIRECT TESTIMONY OF BOBBY TRUMBULL

Prosecutor: Please state your name for the record.

Trumbull: Bobby Trumbull.

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

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

Prosecutor: What were you arguing about?

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

Prosecutor: Did you owe him the money?

Trumbull: Yes.

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

Trumbull: No.

CROSS-EXAMINATION

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

Trumbull: Yes.

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

Trumbull: No.

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

Trumbull: Yes.

* * *

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

DIRECT TESTIMONY OF DETECTIVE MARK JONES

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

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

CROSS-EXAMINATION

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

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

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

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

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

Jones: Yes, I did.

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

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

DIRECT TESTIMONY OF ASSISTANT DISTRICT ATTORNEY LUCY BEALE

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

Beale: Yes.

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

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

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

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

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

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

DIRECT TESTIMONY OF GIL WOMACK

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

Womack: Yes.

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

Womack: Yes.

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

Womack: Yes.

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

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

Defense Att'y: And what happened?

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

CROSS-EXAMINATION

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

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

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

Womack: Yes.

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

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

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Relevant Franklin Statutes and Rules

Franklin Rule of Evidence 804. Hearsay Exceptions; Declarant Unavailable

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

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

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

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

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

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

Franklin Rule of Criminal Procedure 33

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

Haddon v. State
Franklin Supreme Court (2012)

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

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

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

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

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

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

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

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

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

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

State v. Capp
Franklin Court of Appeal (2014)

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

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

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

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

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

Affirmed.

State v. Preston
Franklin Court of Appeal (2011)

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

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

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

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

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

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

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

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

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

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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.

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MULTISTATE PERFORMANCE TEST

Rugby Owners & Players Association

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FILE

Rugby Owners & Players Association

FILE

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

MEMORANDUM

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

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

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

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

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

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

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

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

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

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

EXAMPLE

ARTICLE II – DURATION OF THE ASSOCIATION

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

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

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

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

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

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

Attorney: Tell me about the structure of the league.

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

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

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

Attorney: Such as?

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

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

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

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

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

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

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

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

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

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

Attorney: How is it going to work?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Fischer: We'd need your advice.

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

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

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

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

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

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

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

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

INITIAL DRAFT OF

ARTICLES OF ASSOCIATION

OF THE

RUGBY OWNERS & PLAYERS ASSOCIATION

ARTICLE I — OBJECTIVES

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

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

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

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

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

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

ARTICLE II — DURATION OF THE ASSOCIATION

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

ARTICLE III — MEMBERSHIP

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

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

ARTICLE IV — BOARD OF DIRECTORS

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

[Explanation]

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

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

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

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

[Explanation]

SECTION 6. MEETINGS OF THE BOARD.

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

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

[Explanation]

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

[Explanation]

ARTICLE V — OFFICERS

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

[Explanation]

ARTICLE VI — MANAGEMENT OF THE ASSOCIATION

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

ARTICLE VII — APPORTIONMENT & DISTRIBUTION OF REVENUES

[Language to be completed]

[Explanation]

ARTICLE VIII—AMENDMENT OF ARTICLES

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

[Explanation]

LIBRARY

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

Section 10.0 – Unincorporated Membership Associations Generally

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

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

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

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

. . .

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Judgment affirmed.

MULTISTATE PERFORMANCE TEST DIRECTIONS

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

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

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

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

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

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

Do not include your actual name anywhere in the work product required by the task memorandum.

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