

Applicant Number



In re Ace Chemical

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In re Ace Chemical

FILE

Memorandum to Examinee1
Memorandum to file2
Article from the *Franklin Daily News*4

LIBRARY

Excerpts from the Franklin Rules of Professional Conduct.....5
Franklin Ethics Opinion 2015-212.....8
Hooper Manufacturing, Inc. v. Carlisle Flooring, Inc., Franklin Supreme Court (2002).....11

FILE

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

MEMORANDUM

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

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

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

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

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

Montagne & Parks LLC

MEMORANDUM TO FILE

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

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

Potential conflict: Columbia Chamber of Commerce

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

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

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

Potential conflict: Samuel Dawes

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

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

Potential conflict: Ashley Kaplan

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

FRANKLIN DAILY NEWS
Spotlight on a “Rising Star” in the Community

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

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

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

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

LIBRARY

Excerpts from the Franklin Rules of Professional Conduct

Rule 1.6 Confidentiality of Information

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

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

...

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

...

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

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

Rule 1.7 Conflict of Interest: Current Clients

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

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

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

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

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

(2) the representation is not prohibited by law;

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

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

Rule 1.9 Duties to Former Clients

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

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

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

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

Rule 1.10 Imputation of Conflicts of Interest: General Rule

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

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

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

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

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

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

Franklin Ethics Opinion 2015-212

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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.

1) MPT1 - Please type your answer to MPT 1 below

⌂

When finished with this question, click ⌂ to advance to the next question.

(Essay)

===== Start of Answer #1 (1480 words) =====

MEMORANDUM

To: Lauren Scott
From: Examinee
Date: Feb. 21, 2017
Re: Ace Chemical: Potential Conflicts of Interest

Potential Conflict 1 - Columbia Chamber of Commerce

The issue is whether representation of the Chamber is tantamount to a representation of a member of that association. The rules of professional conduct govern the regulation of lawyers, and courts will look to these rules in determining any attorney non-compliance when faced with questions other than attorney discipline. Hooper

(2002). Montagne & Parks LLC wishes to represent Ace Chemical in direct opposition to Roadsprinters. Jim Pickens, President of Roadsprinters, was the chairman of Chamber for one year. The question is whether the representation of Chamber to which Pickens once belonged is equivalent to representation of Pickens himself. Courts will look at several factors in determining this issue: (1) whether the member provided information to that attorney that was necessary for the representation of the association; (2) whether attorney advised members of the association that information gathered would or would not be confidential; and (3) whether representation of both new client and association would materially limit the firm's ability to represent either client. Hooper (2002).

Whether Pickens provided information that was necessary

Confidential information is any information related to the representation of the client and learned during the course of representation. Franklin Rule of Prof. Conduct 1.6. This information covers even publically available information, but must be related to the representation. Extraneous information or conversations are not protected as confidential and cannot be objected to at a later event. In the present case, Pickens was director of Chamber for one year during which this firm represented Chamber. Pickens provided only publicly available information for work on lobbying on behalf of Chamber. The court in Hooper held that "a member's provision of publicly available information to counsel of the trade association does not, in and of itself, disqualify counsel for the trade association from representing a client who is adverse to the member." Hooper (2002). The situation in the present case is significantly similar.
