In re Hammond

NCBE DRAFTERS’ POINT SHEET

In this performance test item, applicants work for a law firm. A partner in the firm, Jane Spencer, has received a request for guidance from another attorney, Carol Walker, who represents William Hammond, who, as a result of a suspicious fire, suffered the loss of a building that he owned and that housed his business. Hammond has sought Walker’s advice about whether he has any criminal exposure and whether he may file an insurance claim for the loss of the building. Walker has suspicions that Hammond may have been involved in the fire, but Hammond has not explicitly admitted nor denied involvement and Walker has not explicitly asked.

Walker seeks advice from the applicants’ firm on whether she can successfully move to quash a subpoena duces tecum issued by the District Attorney compelling her to appear before a grand jury convened to investigate the fire and to testify and produce materials relating to her communications with Hammond about the fire. Walker desires not to appear, and Hammond desires that she not disclose any of their communications.

Applicants’ task is to prepare a brief in support of a motion to quash the subpoena on the grounds that under the Franklin Rules of Professional Conduct and the Franklin Rules of Evidence, Walker may not be compelled to give the testimony or produce the materials in question.

The File contains a memorandum describing the task, a memorandum on persuasive briefs, a letter from Walker to Spencer, a memorandum to file by Walker summarizing a meeting with Hammond, another memorandum to file by Walker summarizing a telephone conversation with Ray Gomez (a friend of Hammond), a police incident report, the subpoena duces tecum, and a draft of the motion to quash the subpoena.

The Library contains a provision of the Franklin Rules of Professional Conduct relating to the ethical duty of confidentiality, a provision of the Franklin Rules of Evidence relating to the attorney-client privilege and the crime-fraud exception, and provisions of the Franklin Criminal Code relating to arson. The Library also contains two decisions from jurisdictions outside Franklin bearing on a question, unresolved in Franklin, involving the attorney-client privilege and the crime-fraud exception.
I. Detailed Analysis

The following discussion covers all the points the drafters intended to raise in the problem. Applicants need not cover them all to receive passing or even excellent grades. Grading decisions are left to the discretion of the user jurisdictions.

In arguing the motion to quash the subpoena duces tecum, applicants must address two separate questions: First, may Walker be compelled to appear before the grand jury to disclose her communications with Hammond about the fire, whether by testimony or by production of materials, under the Franklin Rules of Professional Conduct? Second, may she be compelled to do so under the Franklin Rules of Evidence? As will appear, applicants should give a negative answer to each question.

In the call memo, applicants are urged to remain faithful to the Franklin Rules of Professional Conduct and observe client confidences. This requires applicants to distinguish carefully between those facts that are not protected by ethical and evidentiary rules and those that are protected, including any communications between Walker and Gomez and any suspicions Walker may have about Hammond’s involvement in the fire.

- Applicants should include in their arguments only those facts that are not protected, as the task memorandum underscores the importance of maintaining client confidences.

A. Whether Walker May Be Compelled to Appear before the Grand Jury to Disclose Her Communications with Hammond under the Franklin Rules of Professional Conduct

The first question for applicants to address is whether Walker may be compelled to appear before the grand jury to disclose her communications with Hammond about the fire, whether by testimony or by production of materials, under the Franklin Rules of Professional Conduct.

Under Rule 1.6 of the Franklin Rules of Professional Conduct—which is identical to Rule 1.6 of the American Bar Association’s Model Rules of Professional Conduct, the source of many jurisdictions’ analogous rules—a lawyer may not, as a general matter, reveal information relating to the representation of a client, whether or not that information consists of a communication between lawyer and client, and whether or not it is confidential.

- It is plain that the communications between Walker and Hammond about the fire fall within the general rule of confidentiality.
• On their face, they contain information relating to the representation and are confidential communications between lawyer and client.

• There are, however, three exceptions to Rule 1.6. The lawyer may make a disclosure
  • (a) if the client gives informed consent,
  • (b) if the disclosure is impliedly authorized in order to carry out the representation, and
  • (c) if any one of certain circumstances is found to exist—here, specifically, “to prevent, mitigate or rectify substantial injury to the financial interest or property of another that is reasonably certain to result or has resulted from the client’s commission of a crime or fraud in furtherance of which the client has used the lawyer’s services.”

The exceptions to Rule 1.6 do not apply to Walker/Hammond communications

• The first exception, client consent, is not present. Hammond has not given Walker consent, informed or otherwise, to disclose their communications about the fire to the grand jury.
  • Indeed, he specifically requested that she not do so.

• Neither is the second exception present. Disclosure of the communications between Walker and Hammond about the fire to the grand jury or otherwise is not impliedly authorized in order to carry out Walker’s representation of Hammond.
  • Again, Hammond has specifically requested that she make no such disclosure.

• Finally, the specified circumstance (the third exception) is apparently inapplicable at the threshold. That circumstance would be applicable only if Walker were to reasonably believe that disclosure of her communications with Hammond about the fire was necessary to “prevent, mitigate or rectify substantial injury to the financial interest or property of another that is reasonably certain to result or has resulted from” Hammond’s “commission of a crime or fraud in furtherance of which” he “has used” her “services.”
  • The very fact that Walker is seeking to quash the subpoena reveals that she has no such belief—and certainly has no such belief that disclosure to the grand jury is necessary.

  • In any event, it appears that “substantial injury to the financial interest or property of another” could result only if Hammond filed a fraudulent insurance claim.
  • That Hammond will do so is not “reasonably certain.”
• Walker has advised Hammond that if he was involved in any way in the fire, he cannot collect insurance and may face criminal charges.

• At the present time, without knowing the cause of the fire or whether Hammond will file an insurance claim, it is unreasonable, indeed speculative, to conclude that financial injury to a third party (i.e., the insurer) will occur.

• Thus, there is little basis for concluding that Walker has an obligation to reveal any client confidences.

• Further, the language of Rule 1.6(b) is permissive (e.g., “a lawyer may reveal information…”) not mandatory, so even if an exception applied, the rules would not require Walker to disclose the communications.

In light of the foregoing, applicants should argue that Walker may not be compelled to appear before the grand jury to disclose her communications with Hammond about the fire, whether by testimony or by production of materials, under the Franklin Rules of Professional Conduct.

B. Whether Walker May Be Compelled to Appear before the Grand Jury to Disclose Her Communications with Hammond under the Franklin Rules of Evidence

The second question for applicants to address is whether Walker may be compelled to appear before the grand jury to disclose her communications with Hammond about the fire, whether by testimony or by production of materials, under the Franklin Rules of Evidence.

Summary of the applicable law

Under Rule 513 of the Franklin Rules of Evidence (which is similar to the lawyer-client evidentiary privilege in many jurisdictions), a client “has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made for the purpose of facilitating the rendition of” a lawyer’s services. There is no privilege, however, if the client sought or obtained a lawyer’s services in furtherance of a crime or fraud.

A confidential communication between a client and a lawyer is presumed to be privileged. To rebut the presumption, a party claiming otherwise must carry the burden of proof by a preponderance of the evidence. A party claiming that a confidential communication is privileged
must nevertheless disclose the communication to the court to determine the communication’s status if a party claiming that the communication is not privileged presents evidence sufficient to raise a substantial question about the communication’s status. Franklin courts have not yet determined whether, to be sufficient, the evidence presented must establish probable cause to believe that the communication is not privileged, see, e.g., State v. Sawyer (Columbia Sup. Ct. 2002), or whether there must merely be “some evidence” to that effect, see, e.g., United States v. Robb (15th Cir. 1999).

- The Walker/Hammond communications are presumed to be privileged.
- From all that appears, all communications between Hammond and Walker about the fire were confidential and all were made for the purpose of facilitating the rendition of Walker’s services as a lawyer to Hammond as a client.
- Therefore, all the communications in question are presumed privileged because they were confidential and are in fact privileged because they were not only confidential but were also made with a view toward the rendering of legal services.
- Hammond has impliedly (if not expressly) authorized, and instructed, Walker to claim the privilege on his behalf and to refuse to disclose any of the communications to the grand jury through his expressed desire that Walker not disclose any communications.
- As things stand, the Gordon County District Attorney cannot carry her burden of proof by a preponderance of the evidence that any of the communications between Hammond and Walker about the fire were not privileged by virtue of the crime-fraud exception.
- The District Attorney’s evidence establishes the following:
  - the building housing the Hammond Container Company was destroyed by fire;
  - Hammond owned the business and the building;
  - Hammond had insured the building;
  - Hammond has made inquiries about filing an insurance claim, but has not filed such a claim;
  - Hammond sought a bank loan prior to the fire, and was turned down because of his company’s financial condition;
  - the Fire Marshal classified the fire as suspicious in origin;
  - Hammond has not been willing to fully cooperate with the police;
• there is a discrepancy between what Hammond and his friend Gomez said they were doing the day of the fire; and
• Hammond retained Walker two days after the fire.
• To be sure, this evidence supports an inference that Hammond may have committed arson with the intent to defraud the insurer of his building and may intend to carry through by filing a fraudulent insurance claim.
• Even if he caused the fire, Hammond has not violated Fr. Criminal Code § 3.01, Arson of Building, because that makes it a crime to damage with fire the building of another, not one’s own building.
• But the evidence does not support an inference that Hammond sought or obtained Walker’s services to further any such crime or fraud. True, the evidence allows conjecture about Hammond’s purpose in retaining Walker, but it does not point to an improper purpose—to further a crime or fraud—rather than a proper one—to defend against an accusation of a crime or fraud.

Whether the Gordon County District Attorney has sufficient evidence to require Walker to disclose her communications with Hammond about the fire for the court to determine their status (in camera) as privileged or nonprivileged depends upon whether the District Attorney has evidence sufficient to raise a substantial question about their status.

• Whether the District Attorney has such evidence may depend in turn on whether the court would apply the stricter “probable cause” standard or the looser “some evidence” standard. Applicants should argue that the stricter standard applies.

• If the court should apply the “probable cause” standard, the Gordon County District Attorney’s evidence would be insufficient to require Walker to disclose her communications with Hammond about the fire for the court to determine their status as privileged or nonprivileged.

• As explained, although the evidence supports an inference that Hammond may have committed arson with the intent to defraud the insurer of his building and may intend to carry through by filing a fraudulent insurance claim, it does not support an inference that Hammond sought or obtained Walker’s services to further any such crime or fraud.

• Hammond requested claim forms and information from Mutual Insurance before he hired Walker (see Police Report). Thus, it is unlikely that he sought advice from
Walker about how to submit an insurance claim—he had already obtained such information.

- Moreover, the nature of the potential crime in this instance—insurance fraud—is not comparable to the complex financial fraud perpetrated by the defendant in Robb. In short, it is not the type of crime for which one would necessarily need legal advice to commit.

- There is evidence that Hammond had a motive to commit insurance fraud, but the police report notes only that the bank denied Hammond’s application for a business loan. The more damaging information—Hammond’s statements to Walker that he had been having financial problems and could not make his next payroll or mortgage payment—is found only in the privileged attorney-client communications at issue. Thus those statements are not available to the district attorney at this stage in the proceedings.

- Applicants who divulge what Hammond told Walker regarding his dire financial straits may receive less credit for their discussion, as they will have violated client confidentiality.

- If the court should apply the “some evidence” standard, the Gordon County District Attorney’s evidence would arguably remain insufficient to require Walker to disclose her communications with Hammond about the fire for the court to determine their status as privileged or nonprivileged.

- It is true that the “some evidence” standard may apparently be satisfied by a client’s retention of a lawyer “in the midst of a fraudulent scheme.” United States v. Robb (15th Cir. 1999).

- But whether Hammond is indeed involved in a “fraudulent scheme” is the very question to be resolved. To assume that he is involved simply begs the question. As stated, he sought advice about whether he could file an insurance claim, not how he could do so.

- The Fire Marshal’s report failed to find specific evidence of the cause of the fire, but classified it as suspicious. At this point in time, there is no determination that the fire was intentionally set. [Contrast with Robb, in which there was clear evidence of manipulation of the price of the mining stock.]
• Just burning down his own building is not arson. Frank. Crim. Code § 3.01.

• By contrast, in Robb, there was evidence available to the government that the defendant had employed his lawyer in the midst of his fraudulent mining scheme, and the actual mining records revealed the misrepresentations in the publicly disseminated information. Accordingly, the government met the “some evidence” standard required to trigger in camera review of the attorney-client communications.

• The Walker/Hammond relationship appears much closer to that in State v. Sawyer (Columbia Sup. Ct. 2002): “While the evidence would indeed support an inference that Krause retained Novak to facilitate perjury, it supports an equally strong inference that Krause retained him to ensure that his choices were informed—and that he failed to cooperate earlier because he was afraid he might expose himself to prosecution with no countervailing benefit.”

• There is an equally strong inference that Hammond, realizing that his financial situation made him a prime suspect in an arson investigation, retained Walker to ensure that he had sound legal advice in responding to police inquiries.

• Finally, it can be argued that the same public policy underlying the existence of the attorney/client privilege—encouraging clients to fully and frankly disclose matters to their attorneys—also supports the Franklin courts adopting a probable cause standard.

• “[T]he attorney-client privilege [is] the oldest of the privileges for confidential communications known to the common law. It encourages full and frank communication between attorneys and clients…. ” Robb.

• Robb recognized that the low “some evidence” standard had the potential to lead to infringement of confidentiality between attorney and client. But the Robb court reasoned that because of the risk that a higher standard could “improperly cloak fraudulent or criminal activities,” the “some evidence” standard was appropriate. Id.

• It could be argued that the Robb standard encourages fishing expeditions into privileged communications and that it could have a chilling effect on the attorney-client relationship. Sawyer is the better approach. Franklin should join Columbia in requiring a “strong factual basis for the inference” that the crime-fraud exception applies and the privileged communications should be submitted to the court for in camera review.
Opting for the probable-cause standard, as in Sawyer, will better protect the importance of maintaining the confidentiality of attorney-client communications and yet is not an insurmountable bar to those parties who believe that there is a substantial question regarding whether such communications are entitled to the privilege.

In any event, no matter which standard the court might apply, and even if the court might end up requiring Walker to disclose her communications with Hammond about the fire so as to determine their status as privileged or nonprivileged, the result would likely be the same: The court would likely conclude that the communications were in fact privileged inasmuch as they are presumed to be such in light of their confidential character and the presumption is not rebutted by a preponderance of evidence proving the crime-fraud exception.

In light of the foregoing, applicants should argue that Walker may not be compelled to appear before the grand jury to disclose her communications with Hammond, whether by testimony or by production of materials, under the Franklin Rules of Evidence.