Applicant Identification

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In re Hammond

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NATIONAL CONFERENCE OF BAR EXAMINERS

In re Hammond

FILE

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FILE

Spencer & Takahashi S.C.
Attorneys at Law
77 Fulton Street
Gordon, Franklin 33112

DATE: July 27, 2010
FROM: Jane Spencer
TO: Applicant
SUBJECT: In re Hammond—Carol Walker Consultation

We have been retained by Carol Walker, a local attorney, in connection with her representation of William Hammond, a local businessman. Hammond owned the Hammond Container Company and the building which housed it; the building was destroyed by a suspicious fire on May 10, 2010.

Walker has been served with a subpoena duces tecum by the Gordon County District Attorney, compelling her to appear before a grand jury convened to investigate the circumstances of the fire and to testify and produce materials relating to her communications with Hammond. She does not want to have to appear before the grand jury and divulge anything related to the case. Based on my preliminary research, I believe we can successfully move to quash the subpoena. I have prepared a draft of our Motion to Quash, which I would like to file as soon as possible.

Please draft only the "Body of the Argument" for our Motion to Quash arguing that Walker may not be compelled to give the testimony or produce the materials in question, on the grounds that 1) under the Franklin Rules of Professional Conduct, she is prohibited from disclosing client communications, and 2) she has the privilege under the Franklin Rules of Evidence not to disclose confidential communications.

In drafting the body of the argument, follow our firm's briefing guidelines and be sure to remain faithful to our obligation to preserve client confidences under the Professional Rules.

Spencer & Takahashi S.C.
Attorneys at Law

MEMORANDUM August 15, 2003

To: All Lawyers
From: Litigation Supervisor
Subject: Persuasive Briefs

All persuasive briefs shall conform to the following guidelines:

[Statement of the Case]

[Statement of Facts]

Body of the Argument

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

The firm follows the practice of breaking the argument into its major components and writing carefully crafted subject headings that illustrate the arguments they cover. Avoid writing a brief that contains only a single broad argument heading. The argument headings should succinctly summarize the reasons the tribunal should take the position you are advocating. A heading should be a specific application of a rule of law to the facts of the case and not a bare legal or factual conclusion or a statement of an abstract principle. For example, improper: IT IS NOT IN THE CHILD'S BEST INTERESTS TO BE PLACED IN THE MOTHER'S CUSTODY. Proper: EVIDENCE THAT THE MOTHER HAS BEEN CONVICTED OF CHILD ABUSE IS SUFFICIENT TO ESTABLISH THAT IT IS NOT IN THE CHILD'S BEST INTERESTS TO BE PLACED IN THE MOTHER'S CUSTODY.

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

Walker & Walker, S.C.
Attorneys at Law
112 Stanton Street
Gordon, Franklin 33111

July 26, 2010

Ms. Jane Spencer
Spencer & Takahashi S.C.
77 Fulton Street
Gordon, Franklin 33112

Dear Jane:

Thank you for agreeing to represent me. A number of difficult issues have arisen in connection with the representation of one of my clients. I am writing in response to your request that I outline the facts.

I represent William Hammond, who established the Hammond Container Company about 10 years ago. Up until May 10 of this year, the company, located on South Main Street in a building owned by Hammond, manufactured disposable food containers for restaurants. On May 10, the company was put out of business when a fire destroyed the building. Hammond requested my advice as to whether he has any criminal exposure and whether he could file an insurance claim.

Thursday, I was served with a subpoena duces tecum by the District Attorney directing me to appear before a grand jury investigating the fire. Of course, I do not want to appear, and Hammond does not want me to reveal any of our communications. I would like your advice on whether I can move to quash the subpoena so that I do not have to appear. If there are grounds for a motion to quash, I would like you to draft the motion and supporting brief.

For your review, I have enclosed (1) the subpoena duces tecum; (2) a file memo summarizing my initial interview with Hammond; (3) a file memo summarizing a telephone conversation with Ray Gomez, Hammond's friend; and (4) a police incident report provided by the District Attorney.

Thank you for your attention to this matter. I look forward to meeting with you soon.

Very truly yours,

Carol Walker

enc.

Walker & Walker, S.C.
Attorneys at Law
112 Stanton Street
Gordon, Franklin 33111

Date: May 12, 2010
From: Carol Walker
Memo to file of WILLIAM HAMMOND/HAMMOND CONTAINER COMPANY FIRE

Today I had a confidential meeting with William Hammond and agreed to represent him. On May 10, a fire destroyed a building he owned, housing the Hammond Container Company. He wanted advice as to whether he had any criminal exposure and whether he could file an insurance claim.

Hammond estimated the total value of the building as approximately $500,000, although it was encumbered by a mortgage with an outstanding balance of $425,000. The building was a total loss. It was insured in the amount of $500,000 under a policy issued by Mutual Insurance Company. Hammond claimed he was up-to-date on his premiums and said he had called Mutual for information about his coverage and the requirements for filing a claim.

Hammond said that he had been having financial difficulties in the past six months. He had lost two big accounts and did not have sufficient cash on hand to make the next payroll or mortgage payment. He said that a police officer contacted him on May 11, that he was too upset to talk at the time, and that the officer said he would contact him again soon. Hammond asked if he had to speak with the police—it seemed clear he wanted to avoid doing so—and I told him that he did not and that he should refer any questions to me. I also told him that if he was involved in any way in the fire, he could not collect on the insurance policy and could face criminal charges. I told him to contact me again within the week to allow me time to investigate the matter further.

Hammond appeared nervous during the meeting. He did not explicitly admit or deny involvement in the fire, nor did I explicitly ask about any involvement on his part. He did say that on the date of the fire he was with a friend, Ray Gomez, fishing at Coho Lake, about 60 miles from Gordon.

Walker & Walker, S.C.
Attorneys at Law
112 Stanton Street
Gordon, Franklin 33111

Date: May 17, 2010
From: Carol Walker
Memo to file of WILLIAM HAMMOND/HAMMOND CONTAINER COMPANY FIRE

Today I received a telephone call from a man who identified himself as Ray Gomez. He said he had been a friend of William Hammond for several years and was calling me at Hammond's request. He said he wanted to help but didn't know what he could do. Hammond had called him on May 13 and asked him to say that the two of them were together on May 10 fishing at Coho Lake. Gomez said he was surprised at the request given that they hadn't been together that day. The police called Gomez on May 14 and asked if he was with Hammond on May 10, and he replied that he wasn't. He didn't tell the police that Hammond had called him earlier. He said he knew nothing about the fire and wanted to help Hammond, but he didn't want to get into trouble himself. When I pressed him, he said he was afraid and probably should seek legal advice. I informed him that I represented Hammond and could not represent him as well. He said he knew that and had already set up an appointment with another attorney.

GORDON POLICE DEPARTMENT INCIDENT REPORT

Date of Report: 5/16/2010 **Case No. 2010-57**

OFFENSE(S): Suspected arson of building, 5/10/2010
ADDRESS OF INCIDENT: 20 South Main Street, Gordon
REPORTING OFFICER: Detective Frank O'Brien
SUSPECT: William Hammond, W/M, D.O.B. 11/5/1959

On 5/10/2010, a fire destroyed the building housing the Hammond Container Company.

On 5/11/2010, I contacted the owner, William Hammond, at his home at 815 Coco Lane, Gordon, at approximately 9:30 a.m. He identified himself and confirmed that he was the owner of the building destroyed in the fire. He stated he was too upset to talk, but did say he had been out of town the day of the fire with a friend and did not return to Gordon until late in the evening at which time he learned of the fire. He confirmed that the building was insured through Mutual Insurance Company but declined to talk further. I left my card and said I would re-contact him.

On 5/12/2010, I confirmed that Hammond was insured by Mutual Insurance Company for $500,000. Claim Manager Betty Anderson said that Hammond had requested claim forms and information but had not yet filed anything. She agreed to let me know when she had further contact with Hammond.

On 5/13/2010, I contacted Bob Thomas, manager of Gordon Savings & Loan, who said that six weeks ago Hammond had sought a business loan. The loan committee denied the loan after reviewing Hammond Container Company's financial condition.

On 5/14/2010, I again contacted Hammond. He identified Ray Gomez as the friend he claimed to have been with on 5/10/2010, but he referred all other questions to Attorney Carol Walker, claiming that she had advised him to do so.

Also on 5/14/2010, I contacted Gomez. He acknowledged that he knew Hammond but denied spending time with him on 5/10/2010.

On 5/15/2010, the Fire Marshal released a report finding no specific evidence of a cause but classifying the fire as suspicious and referring it to us for further investigation of arson. At this time, Hammond is a possible suspect.

cc: Gordon County District Attorney

STATE OF FRANKLIN
GORDON COUNTY DISTRICT COURT

In re Grand Jury Proceeding 11-10,
Hammond Container Company

SUBPOENA DUCES TECUM

TO: Carol Walker
Walker & Walker, S.C.
112 Stanton Street
Gordon, Franklin 33111

YOU ARE COMMANDED to appear in the Gordon County District Court, State of Franklin, at 9:00 a.m. on August 3, 2010, before the Grand Jury convened in that Court to investigate the circumstances of the fire on May 10, 2010, that destroyed the building that housed the Hammond Container Company, located at 20 South Main Street, Gordon, Franklin, and to testify regarding your communications with William Hammond concerning the fire, and to produce all materials constituting or reflecting such communications.

This subpoena duces tecum shall remain in effect until you are granted leave to depart by order of the Court.

Dated this 22 day of July, 2010.

Shirley S. Grant

Shirley S. Grant
Gordon County District Attorney

DRAFT

STATE OF FRANKLIN
GORDON COUNTY DISTRICT COURT

In re Grand Jury Proceeding 11-10, **Hammond Container Company**	**MOTION TO QUASH SUBPOENA DUCES TECUM**

Carol Walker, by and through her attorney, Jane Spencer, moves to quash the subpoena served on her in this matter. In support of this motion, Attorney Walker states the following:

1. Attorney Carol Walker has been subpoenaed to testify regarding her communications with William Hammond, her current client, concerning the fire that occurred at the Hammond Container Company and to produce all materials constituting or reflecting such communications.

2. To the extent that the State seeks to compel the testimony of Attorney Walker and the production of any materials regarding her communications with her client, Mr. Hammond, Attorney Walker asserts that she may not be compelled to appear or produce materials under the Franklin Rule of Professional Conduct 1.6.

3. To the extent that the State seeks to compel the testimony of Attorney Walker and the production of any materials regarding her communications with her client, Mr. Hammond, Attorney Walker asserts that she may not be compelled to appear or produce materials under the Franklin Rules of Evidence.

4. Attorney Walker thus refuses to testify or to produce materials in accordance with the subpoena.

WHEREFORE, Attorney Walker asks this Court to quash the subpoena that seeks to compel her to testify and produce materials in this matter, and for any and all other relief appropriate.

Signed: _____
Jane Spencer
Attorney for Carol Walker
Date:

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FRANKLIN RULES OF PROFESSIONAL CONDUCT

Rule 1.6 Confidentiality of Information

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

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

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

(2) . . . ;

(3) 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;

…

FRANKLIN RULES OF EVIDENCE

Rule 513 Lawyer-Client Privilege

…

(b) General rule of privilege. 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 professional legal services to the client . . . .

…

(3) Who may claim the privilege. The privilege may be claimed by the client . . . . The person who was the lawyer . . . at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the client.

…

(d) Exceptions. There is no privilege under this rule:

(1) Furtherance of crime or fraud. If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud.

. . .

Official Advisory Committee Comments

. . .

[3] A communication made in confidence between a client and a lawyer is presumed to be privileged. A party claiming that such a communication is not privileged bears the burden of proof by a preponderance of the evidence. The party claiming that such a communication is privileged must nevertheless disclose the communication to the court to determine the communication's status if the 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 in question is not privileged, *see*, *e.g.*, *State v. Sawyer* (Columbia Sup. Ct. 2002), or whether there must be "some evidence" to that effect, *see*, *e.g.*, *United States v. Robb* (15th Cir. 1999).

FRANKLIN CRIMINAL CODE

§ 3.01 Arson of Building

Whoever, by means of fire, intentionally damages any building of another without the other's consent may, upon conviction, be imprisoned for not more than 15 years, or fined not more than $50,000, or both.

§ 3.02 Arson of Building with Intent to Defraud an Insurer

Whoever, by means of fire, intentionally damages any building with intent to defraud an insurer of that building may, upon conviction, be imprisoned for not more than 10 years, or fined not more than $10,000, or both.

. . .

§ 5.50 Fraudulent Claims

Whoever knowingly presents or causes to be presented any fraudulent claim for the payment of a loss or injury, including payment of a loss or injury under a contract of insurance, may, upon conviction, be imprisoned for not more than 5 years, or fined not more than $10,000, or both.

United States v. Robb

United States Court of Appeals (15th Cir. 1999)

John Robb appeals his conviction for mail fraud in the sale of stock of Coronado Gold Mines, Inc. The indictment alleged that Robb caused Coronado's stock to be sold on misrepresentations that the company was producing gold and earning money, that the price of the stock on the New York Mining Exchange was manipulated through such misrepresentations, and that the mails were used to facilitate the scheme.

Robb acquired a gold mine in Idaho that did not produce any ore that could be mined at a profit. The ore extracted contained only an average of $2.00 to $2.50 of gold per ton, with a cost of mining of at least $7 per ton. Robb claimed through advertisements and stockholder reports that the mine was yielding "ore averaging $40 of gold per ton." Robb caused Coronado's stock to be distributed to the public by high-pressure salesmanship, at prices that netted a $158,000 profit.

The sole error alleged on appeal is the district court's decision to admit the testimony of Ralph Griffin, a former attorney for Robb. At trial, Griffin's testimony for the Government showed that Robb controlled all mining operations and that Robb knew that the public information disseminated was false. Robb claims that allowing such testimony violated the attorney-client privilege. We disagree and affirm the conviction.

We have long recognized the attorney-client privilege as the oldest of the privileges for confidential communications known to the common law. It encourages full and frank communication between attorneys and clients. But because the privilege has the effect of withholding information from the fact finder, it should apply only where necessary.

The purpose of the crime-fraud exception to the attorney-client privilege is to lift the veil of secrecy from lawyer-client communications where such communications are made for the purpose of seeking or obtaining the lawyer's services to facilitate a crime or fraud.

To release an attorney from the attorney-client privilege based on the crime-fraud exception, the party seeking to overcome the privilege must do more than merely assert that the client retained the attorney to facilitate a crime or fraud. Rather, there must be some evidence supporting an inference that the client retained the attorney for such a purpose.

Once such evidence is presented, the district court must review, *in camera* (in chambers,

without the parties being present), the attorney-client communications in question to determine their status. The court may properly admit the disputed communications into evidence if it finds by a preponderance of evidence that the allegedly privileged communications fall within the crime-fraud exception.

Contrary to Robb's claim, the Government satisfied the "some evidence" standard here, thereby triggering *in camera* review of the attorney-client communications and ultimately resulting in a decision that the communications were within the crime-fraud exception. The Government's evidence raised an inference that Robb retained Griffin in the midst of a fraudulent scheme; that during this time, Griffin was the primary source of legal advice to Robb, had access to all of Coronado's information, and had regular contact with Robb; and that records of the actual mining results demonstrated misrepresentations in the publicly disseminated information.

Subsequently, Robb had an opportunity to present evidence that he retained Griffin for proper purposes, but he failed to do so. Instead, the Government presented further evidence which was sufficient to enable it to carry its burden to prove by a preponderance of the evidence that Robb retained Griffin for *improper* purposes. As a result, the district court properly ruled that the communications between Robb and Griffin were not privileged.

We understand that the modest nature of the "some evidence" standard could lead to infringement of confidentiality between attorney and client. At the same time, a higher standard could improperly cloak fraudulent or criminal activities. On balance, we are confident that the "some evidence" standard achieves an appropriate balance between the competing interests and that the district courts may be relied upon to keep the balance true.

Affirmed.

State v. Sawyer

Columbia Supreme Court (2002)

Mark Sawyer appeals his conviction after a jury trial for bribery of a public official. Sawyer claims that the trial court erred in excluding the testimony of Attorney Anthony Novak regarding Novak's conversations with his client Connor Krause, the alderman whom Sawyer was convicted of bribing. The court of appeals affirmed Sawyer's conviction. We agree with the court of appeals that the trial court properly excluded the testimony.

Sawyer owned an automobile dealership in the City of Lena, Columbia, which was located on property to which the city had taken title in order to widen the street. As first proposed, the plan required razing Sawyer's business. The plan was later changed so that Sawyer's business would be untouched. A corruption investigation of the City Council led to charges against Sawyer for bribing Krause to use his influence to change the plan.

Before trial, Sawyer subpoenaed Krause's attorney, Novak, to testify. When Novak refused to testify, Sawyer moved the court to compel him to do so, claiming that (i) Krause was currently in prison having been convicted of taking bribes while he was an alderman; (ii) Krause initially told police that Sawyer had not bribed him; (iii) Krause retained and met with Novak, his attorney; and (iv) Krause later agreed to testify against Sawyer in exchange for a reduced prison sentence. On those facts, Sawyer argues that Krause planned to testify falsely to obtain a personal benefit; that he retained Novak to facilitate his plan; and that, as a result, Krause's communications with Novak were not privileged.

Although the attorney-client privilege has never prevented disclosing communications made to seek or obtain the attorney's services in furtherance of a crime or fraud, in Columbia the mere assertion of a crime or fraud is insufficient to overcome the presumption that such communications are privileged. Rather, the moving party must present evidence establishing probable cause to believe that the client sought or obtained the attorney's services to further a crime or fraud.

Upon presentation of such evidence, the party seeking to establish the attorney-client privilege must disclose the allegedly privileged communications to the judge for a determination of whether they fall within the crime-fraud exception. The judge's review of the communications is conducted *in camera* to determine if the moving party has established that the communications fall within the crime-fraud exception.

Some courts have required disclosure of the disputed communications to the court upon the presentation merely of "some evidence" supporting an inference that the client sought or obtained the attorney's services to further a crime or fraud. *See, e.g., United States v. Robb* (15th Cir. 1999). We believe Columbia's "probable cause" standard strikes a more appropriate balance than the "some evidence" test because it protects attorney-client communications unless there is a strong factual basis for the inference that the client retained the attorney for improper purposes.

Applying the "probable cause" standard here, the trial court concluded that Sawyer failed to present evidence establishing probable cause to believe that Krause sought or obtained Novak's services to facilitate any plan to commit perjury. We agree. 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. A greater showing of the client's intent to retain the attorney to facilitate a crime or fraud is needed prior to invading attorney-client confidences.

Affirmed.

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INSTRUCTIONS

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

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 taking the examination on a laptop computer, 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 be sure to allocate ample time (about 45 minutes) to reading and digesting the materials and to organizing your answer before you begin writing it. You may make notes anywhere in the test materials; blank pages are provided at the end of the booklet. You may not tear pages from the question booklet.

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.