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1)

Memorandum Evaluation of the Merit of Phoenix's Argument for Disqualification of Amber & Lewis:

The following arguments must be considered in determining the position Amberg and Lewis.

I. The Court should not disqualify Amberg & Lewis from representing Biogenesis Because Amberg and Lewis Violated No Ethical Rules in its Handling of the Unauthorized Document it was Sent Anonymously and Because Biogenesis will Suffer Incurable Prejudice if its Attorneys are Disqualified at this Late Date in Proceedings.

1. Amberg and Lewis Violated No Ethical Rules in its Handling of the Unauthorized Document through an Unauthorized Disclosure, for which a Court should determine the Appropriate Use or Disposal.

Rule 4.4 of the Franklin Rules of Professional Conduct, set in place by the Supreme Court of Franklin, require that an attorney who inadvertently receives a document promptly notify the sender in order to permit that person to take protective measures, but need do no more. This rule supersedes *Indigo v. Luna*, which had concluded that a requirement that an attorney inadvertently receiving such a document had to "resist the temptation to examine the document." While there is no clear precedent established as to the procedure that should be followed when an attorney receives a document sent without authorization, a decision at the appellate court level, *Mead v. Conley*, concluded that an attorney should examine such a document only to the degree necessary to determine how to proceed, and abide by or refrain from using the document until a court disposed of the matter. The Franklin Supreme Court has declined to adopt an ethical rule establishing an ethical obligation in such a matter.

2. In this case, Amberg received the document anonymously, through no action of its own.

The document was not inadvertently disclosed, as in *Luna*, but an unauthorized disclosure as in

Mead. Because of the brevity of the document and the manner in which it was received, there was no opportunity for Amberg to do more than to note the existence of the document and its contents. Phoenix became aware that Amberg has the document the very same day, when its president overheard two staffers discussing the situation at lunch. Any failure to notify the opposing party that it had received the document was merely a matter of hours, and the facts disclosed in the very short document were such as to raise serious questions of previous disclosure sufficiency by the other party and other matters. A document of only three sentences in length may be perused in a matter of seconds, and there is no question but that the need to look at the document in order to identify its nature required reading it in its entirety. Moreover, the appropriate determination as to what should be done with the document is not up to Phoenix, but rather a matter to be submitted to the Court, as observed in *Mead v. Conley*.

II. Amberg & Lewis Should Not be Disqualified From Representation of Biogenesis Even if the Court Determines that Amberg Should Return Or Not Make Use of the Document Because Biogenesis Would Suffer Incurable Prejudice.

The general rule is that a trial court may disqualify an attorney in the interests of justice (In re Klein, 1947). In *Mead*, the Ct. of Appeals of Franklin held that the trial court had not abused its discretion by disqualifying an attorney simply because the attorney had not violated a rule of professional conduct, holding that a trial court may disqualify an attorney with or without a specific rule. Conflict between a client's right to an attorney of his choice and the need to maintain ethical standards of professional responsibility, the client's rights may have to yield to the importance of the scrupulous administration of justice and integrity of the bar. (*Indigo v. Luna*, 1998). In this case, however, the clients' needs seriously outweigh any interest of Phoenix in the matter, and will serve rather than harm the interests of justice.

A court may make a decision to disqualify an attorney who has received an unauthorized document on the following bases established in *Mead*: after a consideration of all the relevant facts and circumstances of a case, including (1) the attorney's actual or constructive knowledge of the materials' privileged status, (2) the promptness with which the attorney notified the opposing

side that he had received the material, and (3) the extent to which the attorney reviewed the material, (4) the significance of the material and the extent to which it might prejudice the party, (5) the extent to which the party moving for disqualification may be at fault for the unauthorized disclosure, and (6) the extent to which the party opposing disqualification would suffer prejudice from the disqualification of his attorney. Of these, the court in Mead held that "incurable prejudice was the most decisive.

This case offers certain similarities to Luna, but there are also distinguishing elements. In Luna, the attorney who received the unauthorized document did not notify the opposing attorney not only failed to notify the opposing attorney, she also used the document in trial in a manner damaging to the other party without that notice. In this case, Phoenix had constructive notice of Amberg's receipt within a few hours. On objection, the attorney in Luna failed even to return the document to the attorney from whom it had come. Amberg and Lewis are requesting that the court dispose of this matter in the way it sees fit, as established in Mead, and waits on the court's decision rather than taking one on its own.

- (1) Actual or constructive knowledge of the material's privileged status. Amberg acknowledges that the privileged nature of the letter is obvious on its face, but since the letter is so short and its arrival so obscure, there was no way of identifying it without reading it.
- (2) Promptness of return. There was little or no opportunity for Amberg to return the document prior to Phoenix's discovery that Amberg had possession, since Amberg only had possession for a matter of hours before Phoenix was aware of it.
- (3) Review of the material. The extent to which the attorney reviewed the admissions in the letter was necessarily in its complete form, since it was only a few sentences long.
- (4) Significance of the material. Although brief, the material in the letter is certainly significant in Phoenix' eyes, perhaps of damning significance, and constitutes an admission by Phoenix of substantial harm to its case. However, the letter is unquestionably authentic, and there is ample opportunity at trial to determine if it is relevant to the case. Phoenix cannot ask that it be excluded on the basis of the interests of justice, and will have a full and fair opportunity to address the meaning of the letter in court.

(5) Fault for disclosure. In this case there is not fault to be attributed to Amberg for disclosure of the letter. On the contrary, it appears to have been sent to Amberg in the interests that there be full and fair disclosure of Phoenix's motives in claiming additional royalties, simple greed rather than a legitimate desire for their due.

(6) Biogenesis would suffer incurable prejudice if their attorneys were disqualified. This is the real crux of the matter. Biogenesis would suffer severe prejudice and would have to incur tremendous costs if it were forced to substitute new attorneys. It would also suffer substantially in terms of trial readiness because the case is enormously complicated and that delay in itself would place a burden on the justice system, especially since trial in this case is imminent. The case involves many hundreds of attorney-hours and substantial research into highly technical documents. Phoenix's demands for additional royalties have already placed enormous legal demands on a company whose focus and efforts are better directed to the development of important new technologies for the betterment of society.

Conclusion:

The argument both for retention of the letter until such time as a court may decide its disposal, and the argument that Amberg and Lewis should continue to serve as attorneys for Biogenesis are strongly supported by the holding in Mead and the determination of the Franklin Supreme Court to leave Rule 4.4 in its current form. Amberg was at no fault in receipt of the document, and Biogenesis would suffer incurable prejudice were it to have to change attorneys at this time. The appropriate remedy is to submit the dispute to the court, as noted in Mead. This case offers certain similarities to Luna, but there are also distinguishing elements. In Luna, the attorney who received the unauthorized document did not notify the opposing attorney not only failed to notify the opposing attorney, she also used the document in trial in a manner damaging to the other party without that notice. In this case, Phoenix had constructive notice of Amberg's receipt within a few hours. On objection, the attorney in Luna failed even to return the document to the attorney from whom it had come. Amberg and Lewis are requesting that the court dispose of this matter in the way it sees fit, as established in Mead, and waits on the court's decision rather than taking one on its own.

We believe that by submitting the issue fairly to the court, that Amberg will be vindicated, at least for the most part, both by the existing law and by letting the court deal with the difficulties in determining whether to return the letter or not in view of the obvious practical problems in doing so at this point, since the knowledge cannot be erased, and since the letter presents Phoenix in such a culpable light. The scrupulous administration of justice requires the fullest possible disclosure of the facts as well as the most professional actions of the Bar, and according to the Franklin Rules, the appropriate decision maker with respect to return of the document, as established by law, is the court, not Amberg and Lewis who have done all they should in this instance by presenting the court with the circumstances relevant to its decision.

END OF EXAM