

FILE

State of Franklin v. Butler

State of Franklin

State's Attorney Office, County of Western
Elkhart, Franklin 33752

MEMORANDUM

To: Applicant
From: Kathy Chang, Senior Assistant State's Attorney
Re: *State of Franklin v. Butler*
Date: February 21, 2006

We have subpoenaed Flora Hernandez, a local mediator, to testify in a criminal case against John Butler, whom we have charged with unlawful disposal of hazardous waste. We've learned that while mediating a dispute with his former business partner, Lynn Long, Butler admitted to illegally dumping hazardous waste. Mediator Hernandez and Long were present when Butler admitted to the dumping. Long has since died and Hernandez is now the only witness to Butler's admission.

As you may know, mediation is a way for disputing parties to resolve their differences themselves, with the mediator acting as a third-party neutral and helping the parties communicate and consider options for settlement. Most important for our purposes, the mediator is present when the parties discuss the issues in dispute. Mediation proceedings are not taped or transcribed, nor are there any witnesses, other than the parties and the mediator.

Hernandez's attorney has filed a Motion to Quash our subpoena, asserting that the mediation privilege created by the Franklin Uniform Mediation Act (FUMA) protects Hernandez from having to testify, that there is no applicable statutory exception to the privilege, and that there are sound policy reasons for protecting statements made during mediation.

Please draft our brief to the trial court in opposition to Hernandez's Motion to Quash. In drafting our brief, be sure to follow our office guidelines.

State of Franklin

State's Attorney Office, County of Western
Elkhart, Franklin 33752

MEMORANDUM

To: Attorneys
From: George Brophy, State's Attorney
Re: Drafting Persuasive Briefs
Date: March 27, 2003

All persuasive briefs, including Briefs in Support of or in Opposition to Motions (also called Memoranda of Points and Authorities), shall conform to the following guidelines.

All briefs shall include a Statement of Facts. The aim of the Statement of Facts is to persuade the tribunal that the facts support our position. The facts must be stated accurately; however, emphasis should be placed on the material facts that best support our position. The Statement of Facts should contain the key facts necessary to inform the court of the essence of the dispute.

Our office 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 briefs that contain only a single broad argument heading. The argument heading must 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: PAST INCIDENTS ARE ADMISSIBLE TO SHOW INTENT. Proper: DEFENDANT'S THREE PRIOR CONVICTIONS FOR BATTERY ARE ADMISSIBLE TO SHOW INTENT WHERE DEFENDANT CLAIMS HIS SHOVING THE VICTIM WAS ACCIDENTAL.

The body of each argument should identify and analyze applicable legal authority and persuasively argue how the facts and law support our position. It is important to use the facts in the argument. Authority supportive of our position 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 briefs.

The attorney need not prepare a table of contents, a table of cases, a summary of argument, and the index. These will be prepared, where required, after the draft is approved.

State of Franklin

State's Attorney Office, County of Western
Elkhart, Franklin 33752

PENDING CRIMINAL INVESTIGATION FILE NOTES

Elkhart Police Department Case No. **05-7844**

Requested Charges: Unlawful disposal of hazardous waste, § 330

Assistant State's Attorney responsible for charging decision: **Kathy Chang**

September 3, 2005—Just received the notes of an interview of Lynn Long by Police Officer Kelly regarding Long's former business partner in B & L Disposal, John Butler. In her interview, Long alleged that during a mediation conference Butler admitted that, in July of this year, he dumped toxic chemical waste into the Green River at the south footbridge on the outskirts of Elkhart. Such dumping violates § 330 of the Franklin Criminal Code. Only last year the river was successfully restocked with native bluefish, and it is a popular recreational site for kayaking, fishing, and swimming.

October 8, 2005—Reviewed records from the Department of Natural Resources concerning tests routinely done on local waterways. Test samples from the Green River showed elevated levels of several toxic chemicals just down river from the alleged dumping site (the Elkhart south footbridge) during July and August 2005. The DNR has also forwarded to me a copy of a report, dated August 15, 2005, that an unusually large number of dead bluefish had been observed floating in the river in the vicinity of the Elkhart south footbridge. Current water samples show chemical levels have returned to normal in that area of the Green River.

Our investigators have uncovered discrepancies in the amount of waste collected and the amount for which B & L Disposal had disposal permits, but Butler claims those discrepancies are due to sloppy bookkeeping. Police can't find any witnesses to the alleged dumping.

December 9, 2005—Butler was charged today under § 330 for felony unlawful disposal of hazardous waste.

February 1, 2006—Just learned that Long died last week of a massive heart attack. This puts a hole in our proof because she would have testified that Butler admitted to the illegal dumping. The records we have create suspicion about what Butler did with the waste and suggest that Butler may be responsible

for the elevated chemical levels, but without Long's testimony, we won't have enough evidence to convict Butler. Trial is set for week of March 6, 2006.

February 3, 2006—Have subpoenaed Flora Hernandez, the mediator in the business dispute between Long and Butler, to testify as to what Butler said during mediation. Hernandez has been on the court-approved mediator roster for over five years.

February 17, 2006—Hernandez just filed a Motion to Quash the subpoena, asserting that anything Butler said during the August 2005 mediation session is privileged under FUMA § 4. Appears this is the first time the privilege has been invoked under FUMA, but the state of Columbia has dealt with this issue under its Uniform Mediation Act, which is identical to ours.

Notes of interview of Lynn Long by Police Officer Kevin Kelly

September 2, 2005

Lynn Long called the Elkhart Police Department yesterday requesting to speak to an officer regarding the practices of her former business partner, John Butler. I met with Long this morning and the following are my notes from her interview:

Long stated that she and Butler were business partners for about three years. He started a waste disposal business several years ago, needed help, and convinced Long to join him. They became equal partners in the business, and called it B & L Disposal. Butler performed the lion's share of the waste removal and disposal and kept the books; Long solicited the business, worked on customer relations, and was involved in some of the waste removal. At first, all was well. But after a while, Long stated that she became nervous—she was never sure exactly why. Some of their customers made comments about Butler but would never be specific. Another business opportunity came along and Long stated that she decided to split up with Butler. She says he wasn't happy about it, but realized things wouldn't work if she wanted to leave, but stayed on. They disagreed over the value of the business and how Long should be paid for her share. Finally, they entered into an Agreement to Mediate with Flora Hernandez, a local mediator specializing in business disputes, in an effort to resolve their differences without going to court.

Long stated that she and Butler met with Hernandez on August 15 for about five hours, discussing various ideas on how to equitably dissolve the business. It was just the three of them, no court reporter or anyone else. After about three hours, Long said something about wondering if Butler had been honest about their profits—in other words, she wondered whether Butler had been straight with the books. Butler got mad that Long was suggesting that he had withheld any profits.

Then Butler said Long should be happy with what she had earned from the business because if it weren't for him (Butler) she never would have made so much money. Long said she asked Butler what he meant by that and he said that he had saved them "a bunch of money on the last couple jobs" they had in July by dumping half of the collected chemicals into the Green River near the Elkhart south footbridge rather than disposing of them at the approved site with formal permits. Long says all three of them were seated around a table when Butler said that. She says that she could see that he was getting angry because his face was red and he was almost yelling. Long said that even Hernandez seemed taken aback by Butler's statement. She (Hernandez) said

something about preferring to focus on dividing B & L's assets and not on discussing the business practices used to maximize profits. (Long explained that in Franklin, waste disposal companies are supposed to have separate permits to dispose of materials for each job and that these permits are expensive; they are based on how much is taken to the site and how much treatment the waste needs at the site.)

Ever since the mediation, Long said, she has been thinking about what Butler said and all that toxic stuff that he claimed to have dumped into the river. She said that even if he dumped only half of the chemicals from two jobs, that was easily several hundred gallons—so she decided to tell the police.

STATE OF FRANKLIN
DISTRICT COURT OF WESTERN COUNTY

State of Franklin)	
v.)	Case No. CF-06-057
John Butler)	

MOTION TO QUASH SUBPOENA

Flora Hernandez, by and through her attorney, Jill Knutson, moves to quash the subpoena served on her in this matter. In support of this motion, Hernandez states the following:

1. Flora Hernandez has been subpoenaed to testify in this criminal matter against John Butler regarding statements he allegedly made in an August 2005 mediation between Mr. Butler and his former business partner, Lynn Long, which Ms. Hernandez conducted. The only contact Ms. Hernandez had with and the only knowledge she has of John Butler is in regard to that mediation.

2. To the extent that the State seeks to compel the testimony of Ms. Hernandez in regard to anything Mr. Butler said during the mediation, Ms. Hernandez invokes the mediation privilege under which the mediator may refuse to disclose any mediation communication pursuant to the Franklin Uniform Mediation Act (FUMA) § 4(b)(2).

3. This privilege applies to mediations in which the parties agree to mediate in a record that demonstrates an expectation that mediation communications will be privileged against disclosure. FUMA § 3(b). By signing the Agreement to Mediate (*see* attached), in which the parties and the mediator agreed to be bound by FUMA, they thus had the expectation that mediation communications would be privileged. Therefore, the FUMA privilege applies to this mediation.

4. FUMA's privilege protects mediation communications—any statement made during mediation or for the purpose of participating in the mediation—from being disclosed in judicial proceedings. FUMA § 2(b) & (g), § 4. Thus, the privilege protects statements allegedly made by Mr. Butler during the mediation from being disclosed in this criminal proceeding against him.

5. Ms. Hernandez invokes the privilege and refuses to testify in this case against Mr. Butler, and asserts that there is no applicable statutory exception to the privilege.

6. Strong public policies support this privilege, including the promotion of private settlements through mediation, the encouragement of party honesty, and the protection of mediator impartiality. *See Retail Store Employees Union Local 79 v. National Labor Relations Board* (15th Cir. 2004). These important policies will be eviscerated, and the viability of mediation as an alternative to litigation severely threatened, should Ms. Hernandez be forced to violate the privilege.

7. Furthermore, the State, with its considerable resources and power, should not be permitted to force Ms. Hernandez to violate the confidentiality agreement that all parties involved in the mediation relied upon, and which the law purports to protect.

WHEREFORE, Flora Hernandez asks this court to quash the subpoena that seeks to compel her to testify in this matter, and for any and all other relief appropriate.

Signed: 

Jill Knutson

Attorney for Flora Hernandez

Date: February 17, 2006

AGREEMENT TO MEDIATE

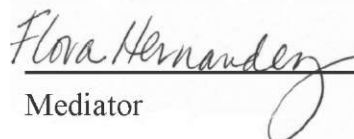
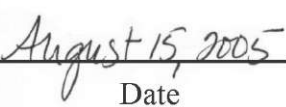

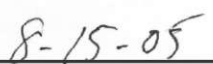
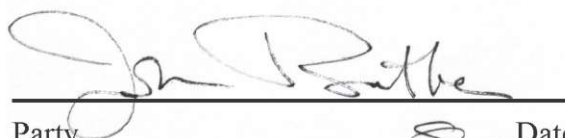
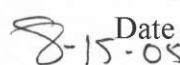
This is an agreement between Flora Hernandez ("Mediator") and John Butler and Lynn Long ("Parties") in which the Mediator agrees to provide mediation services to the Parties. The goal in mediation is to obtain a settlement agreement to which both Parties consent.

Mediators are impartial. The Mediator will not take sides. The Mediator will not advise any Party to accept or reject an agreement. The Parties should each consult an attorney regarding any question of law or regarding the content of any proposed settlement agreement.

Confidentiality. Confidentiality is necessary for honest discussion of the issues and for open exchange of ideas for resolution. The Mediator agrees to treat all mediation communications as confidential pursuant to the Franklin Uniform Mediation Act. The Parties agree that, in any court or agency proceeding, neither of them will subpoena or otherwise compel the testimony of the Mediator concerning any matter discussed in mediation nor will they subpoena the records of the Mediator.

Fees. The Parties agree to pay the Mediator \$200 per hour, the total fees to be divided evenly between the Parties.

We, the undersigned Mediator and Parties, agree to mediate according to the above terms and guidelines.

 _____ Mediator	 _____ Date	 _____ Party	 _____ Date
		 _____ Party	 _____ Date