July 2014
MPTs and Point Sheets

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Contents

Preface ii

Description of the MPT ii

Instructions iii

MPT-1: ***In re Kay Struckman***

FILE

Memorandum from Steve Ramirez 3
Letter from Kay Struckman 4

LIBRARY

Franklin Rule of Professional Conduct 1.8 9
Columbia State Bar Ethics Opinion 2011-91 10
Lawrence v. Walker, Franklin Court of Appeal (2006) 12
Johnson v. LM Corporation, Franklin Court of Appeal (2004) 15
Sloane v. Davis, Olympia Supreme Court (2009) 18

MPT-2: ***In re Linda Duram***

FILE

Memorandum from Henry Fines 23
Guide for drafting demand letters 24
Email correspondence 25
Affidavit of Linda Duram 27
Letter from Maria Oliver, M.D. 29

LIBRARY

Excerpts from the Family and Medical Leave Act, 29 U.S.C. § 2601 *et seq.* 33
Excerpts from Code of Federal Regulations, Title 29, Labor 34
Shaw v. BG Enterprises, U.S. Court of Appeals (15th Cir. 2011) 36
Carson v. Houser Manufacturing, Inc., U.S. Court of Appeals (15th Cir. 2013) 39

.

MPT Point Sheets

MPT-1: ***In re Kay Struckman*** 43

MPT-2: ***In re Linda Duram*** 55

Preface

The Multistate Performance Test (MPT) is developed by the National Conference of Bar Examiners (NCBE). This publication includes the items and Point Sheets from the July 2014 MPT. The instructions for the test appear on page iii.

The MPT Point Sheets describe the factual and legal points encompassed within the lawyering tasks to be completed. They outline the possible issues and points that might be addressed by an examinee. They are provided to the user jurisdictions to assist graders in grading the examination by identifying the issues and suggesting the resolution of the problem contemplated by the drafters.

For more information about the MPT, including a list of skills tested, visit the NCBE website at www.ncbex.org.

Description of the MPT

The MPT consists of two 90-minute items and is a component of the Uniform Bar Examination (UBE). It is administered by user jurisdictions as part of the bar examination on the Tuesday before the last Wednesday in February and July of each year. User jurisdictions may select one or both items to include as part of their bar examinations. (Jurisdictions that administer the UBE use two MPTs.)

The materials for each MPT include a File and a Library. The File consists of source documents containing all the facts of the case. The specific assignment the examinee is to complete is described in a memorandum from a supervising attorney. The File might also include transcripts of interviews, depositions, hearings or trials, pleadings, correspondence, client documents, contracts, newspaper articles, medical records, police reports, or lawyer's notes. Relevant as well as irrelevant facts are included. Facts are sometimes ambiguous, incomplete, or even conflicting. As in practice, a client's or a supervising attorney's version of events may be incomplete or unreliable. Examinees are expected to recognize when facts are inconsistent or missing and are expected to identify potential sources of additional facts.

The Library may contain cases, statutes, regulations, or rules, some of which may not be relevant to the assigned lawyering task. The examinee is expected to extract from the Library the legal principles necessary to analyze the problem and perform the task. The MPT is not a test of substantive law; the Library materials provide sufficient substantive information to complete the task.

The MPT is designed to test an examinee's ability to use fundamental lawyering skills in a realistic situation and complete a task that a beginning lawyer should be able to accomplish. The MPT is not a test of substantive knowledge. Rather, it is designed to evaluate six fundamental skills lawyers are expected to demonstrate regardless of the area of law in which the skills arise. The MPT requires examinees to (1) sort detailed factual materials and separate relevant from irrelevant facts; (2) analyze statutory, case, and administrative materials for applicable principles of law; (3) apply the relevant law to the relevant facts in a manner likely to resolve a client's problem; (4) identify and resolve ethical dilemmas, when present; (5) communicate effectively in writing; and (6) complete a lawyering task within time constraints. These skills are tested by requiring examinees to perform one or more of a variety of lawyering tasks. For example, examinees might be instructed to complete any of the following: a memorandum to a supervising attorney, a letter to a client, a persuasive memorandum or brief, a statement of facts, a contract provision, a will, a counseling plan, a proposal for settlement or agreement, a discovery plan, a witness examination plan, or a closing argument.

Instructions

The back cover of each test booklet contains the following instructions:

> 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.
>
> 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.

July 2014 MPT

▶ *FILE*

MPT-1: *In re Kay Struckman*

RAMIREZ & JAY LLP

Attorneys at Law
610 E. Broadway
Windsor, Franklin 33073

M E M O R A N D U M

TO: Examinee
FROM: Steve Ramirez
DATE: July 29, 2014
RE: Kay Struckman consultation

I have been retained by Kay Struckman, a local attorney. As you will see from her letter, Ms. Struckman wishes to modify her current retainer agreement to require arbitration of fee disputes. She wants to be sure that the modification of her retainer agreements with existing clients is ethical and that the arbitration provision would be legally enforceable.

I have attached some materials that bear on Ms. Struckman's question, including a judicial decision and a formal ethics opinion, both from outside of Franklin, that deal with similar issues. Franklin, Columbia, and Olympia have all adopted identical versions of Rule 1.8 of the Model Rules of Professional Conduct of the American Bar Association. There is no Franklin ethics opinion that has addressed the specific issues raised by Ms. Struckman, but there are two Franklin Court of Appeal cases that may be relevant.

I am scheduled to meet with Ms. Struckman this week to advise her on the goals set forth in her letter. To help me prepare for the meeting, please draft a memorandum to me responding to her request for advice as communicated in her letter. Your memorandum should include support for your conclusions with citation to legal authority, taking care to distinguish contrary authority, where appropriate.

I think it is possible—from both an ethics and a legal enforceability perspective—to modify her retainer agreements to require arbitration of fee disputes, but only if certain conditions are met. Be sure to set forth those conditions in your memorandum.

KAY STRUCKMAN
Attorney at Law
9300 Wisteria Boulevard, Suite 301
Brule, Franklin 33036

July 22, 2014

Steve Ramirez
Ramirez & Jay LLP
610 E. Broadway
Windsor, Franklin 33073

Re: Modification of Retainer Agreements

Dear Steve:

I am pleased that you found time to talk with me earlier today and even more pleased that you have agreed to advise me in this matter. I write to confirm the scope of advice I seek and confirm what I said during our meeting.

As I told you, the question on which I need legal advice is whether I may ethically modify retainer agreements with existing clients to include a provision requiring binding arbitration to resolve future fee disputes, and, if so, what is necessary to ensure that any resulting modification would be legally enforceable.

By way of background, I am a sole practitioner who represents small businesses and individuals. Most of my clients seek advice on small business matters including government regulation, licensing, incorporating, and related matters; family matters including adoption, divorce, custody, and guardianship; and estate planning. I do litigation as well as transactional work related to these matters. Many clients have asked me to insert arbitration clauses in the contracts I draft for their businesses. Although I haven't had any fee disputes, I've been considering adding an arbitration clause to my retainer agreements to be proactive.

My current retainer agreement allows annual increases in my fees. I would like to modify my retainer agreements with existing clients to include a provision requiring binding arbitration of

future fee disputes in exchange for forgoing annual increases in my fees for two years. The provision I would like to include is as follows:

> Any claim or controversy arising out of, or relating to, Lawyer's representation of Client shall be settled by arbitration, and binding judgment on the arbitration award may be entered by any court having jurisdiction thereof.

I request your advice on these particular issues:

First, would it be ethical for me to modify my retainer agreements with existing clients using the above language to cover future fee disputes? Is the language I've proposed above sufficient, and if not, why? What else do I need to add to make the provision comport with my ethical obligations to my clients? What process, if any, must I provide to my clients to modify their retainer agreements? In short, what steps do I need to take to ensure compliance with the Franklin Rules of Professional Conduct?

Second, assuming that it is ethical to modify my retainer agreements, would the language I propose to cover future fee disputes be legally enforceable? If not, what revisions to the language would I need to make? Is there anything else that I would need to do to ensure legal enforceability?

Although I want to do right by my clients, I do not want to impose undue burdens on myself. Fee disputes are not complicated. I would like to see fee disputes resolved quickly and with a minimum of costs to me—and to my clients.

I look forward to meeting with you to discuss these matters.

Very truly yours,

Kay Struckman

July 2014 MPT

►*LIBRARY*

MPT-1: *In re Kay Struckman*

FRANKLIN RULE OF PROFESSIONAL CONDUCT 1.8

[Franklin Rule 1.8 is identical to Rule 1.8 of the ABA Model Rules of Professional Conduct; however, the Franklin Supreme Court has added its own comments.]

Rule 1.8 Conflict of Interest: Current Clients: Specific Rules

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

. . .

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement . . . .

*   *   *

Comments

(i) The Franklin Supreme Court has ruled that although modifying a retainer agreement with an existing client amounts to a business transaction within the meaning of Rule 1.8, entering into a retainer agreement with a new client does not. *Rice v. Gravier Co.* (Fr. Sup. Ct. 1992).

*   *   *

COLUMBIA STATE BAR ETHICS COMMITTEE
ETHICS OPINION 2011-91

Question Presented and Brief Answer

May a lawyer modify a retainer agreement with an existing client to include a provision requiring binding arbitration of any future malpractice claim?

No. We do not believe that the lawyer can meet the requirements of Rule 1.8 of the Columbia Rules of Professional Conduct in making such a modification.

Discussion

Nothing in the Columbia Rules of Professional Conduct prohibits agreements requiring binding arbitration of existing malpractice claims. An agreement to modify a retainer agreement is governed by Rule 1.8 as well as by other principles discussed herein. We have a number of concerns.

First, Rule 1.8 requires that the lawyer inform the client in writing of the essential terms of the agreement. We assume that lawyers will make a sincere effort to explain the arbitration process, but we question whether the client will understand the advantages and disadvantages of arbitration as well as the tactical considerations of arbitration versus litigation. We are most concerned about those small business and individual clients who lack the benefit of in-house counsel or other resources to advise them about arbitration. It is not enough to explain that arbitration differs from litigation. Clients must be told the major implications of arbitration, such as lack of formal discovery and lack of a jury or judge trial. Because the proposed agreement covers *future* malpractice claims, the client is asked to enter into the agreement without consideration of the particular facts and circumstances of a dispute that might arise at some later time.

Second, lawyers are in a fiduciary relationship with their clients. Lawyers bear the burden of demonstrating the reasonableness and good faith of the agreements they enter into with their clients. Should a client challenge the agreement requiring binding arbitration of future

malpractice claims, the court will be called upon to scrutinize the agreement carefully. The standard of good faith and reasonableness implies a heightened obligation of lawyers to be fair and frank in specifying the terms of the attorney-client relationship. Most clients will be less sophisticated than lawyers in understanding how arbitration differs from litigation. It will be very difficult for lawyers to meet their obligations as fiduciaries under these circumstances.

Third, we are concerned that a few lawyers might use mandatory binding arbitration of future malpractice claims to avoid investigations into misconduct. By doing so, a lawyer would in effect deprive the Columbia Supreme Court, and its Disciplinary Commission, of its jurisdiction to investigate and discipline lawyers who engage in misconduct. We cannot condone a tactic that undermines the authority of the Supreme Court to oversee the conduct of lawyers.

Although some courts have approved agreements requiring binding arbitration of future fee disputes, they have imposed certain conditions. A common condition is that the lawyer must urge the client to seek the advice of independent legal counsel concerning the agreement. Such a condition is consistent with our Rule 1.8(a), which requires that the lawyer advise the client to seek the advice of independent legal counsel and give the client a reasonable opportunity to do so. We are not convinced that lawyers can meet this condition with respect to an agreement requiring binding arbitration of future *malpractice* claims. It is unrealistic to expect a client to seek and pay for independent counsel in the midst of the lawyer’s representation. Moreover, the client is being told not to trust the client’s own lawyer.

Another common condition is that the lawyer must advise the client that certain legal rights, including the right to trial, may be affected. The lawyer must also explain the implications of that forfeiture of the right to a jury trial.

An agreement requiring binding arbitration of malpractice claims may be appropriate once the claim has arisen and the client is represented by new counsel who can adequately inform and advise the client about arbitration. However, we conclude that a lawyer may not modify a retainer agreement with an existing client to require binding arbitration of future malpractice claims.

Lawrence v. Walker

Franklin Court of Appeal (2006)

Gina Lawrence filed a claim for malpractice against Robert Walker, whom she had retained as her attorney in a divorce matter. Walker responded that the retainer agreement signed by Lawrence at the inception of the representation requires binding arbitration of malpractice claims. The district court denied Walker's motion to compel arbitration, and this interlocutory appeal followed.

Because arbitration is a matter of contract, the threshold issue here is whether attorney and client agreed to mandatory binding arbitration of the malpractice claim. But because clients as a class are particularly dependent on, and vulnerable to, their attorneys and therefore deserve safeguards to protect their interests, an agreement requiring binding arbitration must have been entered into openly and fairly to be legally enforceable. *Cf. Johnson v. LM Corp*. (Fr. Ct. App. 2004) (so holding as to employees vis-à-vis employers).

The retainer agreement that Lawrence signed requires the parties to submit to binding arbitration "disputes regarding legal fees and any other aspect of our attorney-client relationship." The agreement does not specify that malpractice claims are one of the matters to be arbitrated.

An agreement requiring binding arbitration effects a waiver of several rights. In rendering an award, arbitrators, unlike judges, are not required to follow the law. Awards based on an erroneous interpretation of the law or evidence cannot be overturned by the courts except in very limited instances. Because of limited judicial review, the choice of arbitrator is critical.

Further, parties may or may not have certain procedural rights in arbitration, such as the right to subpoena witnesses, to cross-examine them, or even to participate in an in-person hearing. Arbitration proceedings are often confidential. There is no reporting system that provides convenient public access to these proceedings. Therefore, it is unlikely that a client could know what to expect from an arbitration.

Because of the implications of an agreement to arbitration, courts enforce an agreement

requiring binding arbitration only where the client has been explicitly made aware of the existence of the arbitration provision and its implications. Absent notification and at least some explanation, the client cannot be said to have exercised a "real choice" in entering into the agreement.

The arbitration provision in the present case was part of a retainer agreement drafted by the attorney and presented to the client for her signature. It was not the product of negotiation.

It is undisputed that the term "malpractice" does not appear in the retainer agreement. The critical sentence reads "disputes regarding legal fees and any other aspect of our attorney-client relationship." It is more likely that Lawrence, the client, understood only that she was agreeing to mandatory binding arbitration of future fee disputes, not that her agreement also affected malpractice claims.

The language of an agreement should be interpreted most strongly against the party who created the uncertainty. This ambiguity in the language might alone be reason to conclude that Lawrence did not voluntarily agree to arbitrate malpractice claims. Moreover, where a fiduciary duty exists, as here between an attorney and a client, the attorney bears the burden of proving the good faith of any agreement the attorney enters into with the client. In such a case, the attorney is well advised to draft the agreement clearly.

We do not mean to express an opinion against arbitration of disputes between lawyers and clients. Where parties enter into an agreement openly and with complete information, arbitration represents an appropriate and even desirable approach to resolving such disputes. Arbitration affords both parties a speedier and often less costly method to reach a resolution of a dispute. It employs more flexible rules of evidence and procedure.

Having said this, we repeat that agreements requiring binding arbitration involve a waiver of significant rights, and should be entered into only after full disclosure of their consequences. Moreover, the court must carefully scrutinize agreements between clients and attorneys to determine that their terms are fair and reasonable. In *Johnson v. LM Corp.*, we examined the terms of an arbitration program for employees. We articulated the minimum requirements for

the enforceability of an agreement requiring binding arbitration in a context involving employers and employees and the latter's statutory rights. We believe that the context here, involving attorneys and clients and the former's fiduciary duties, is analogous.

In this case, the attorney has failed in his burden to show that the client knowingly entered into the agreement requiring binding arbitration of malpractice claims. Therefore, we need not consider the protections we discussed in *Johnson*.

Accordingly, we conclude that the client did not enter into an agreement requiring binding arbitration of malpractice claims that was legally enforceable. In light of that holding, we need not address the question of whether the agreement was ethically compliant.

Affirmed.

Johnson v. LM Corporation

Franklin Court of Appeal (2004)

Claire Johnson and other employees brought an action seeking a declaration that the LM Mandatory Employee Arbitration Program is contrary to public policy and therefore unlawful. The LM program requires company employees to submit employment disputes to binding arbitration, including those claims based on statutes such as the Equal Pay Act and the Human Rights Act. The district court declared the program lawful, and the employees appealed.

By agreeing to mandatory binding arbitration of a statutory claim, the parties do not forgo the substantive rights afforded by the statute. Rather, the parties submit the dispute to an arbitral, rather than a judicial, forum. The employees argue, however, that the arbitration process contains a number of shortcomings that prevent the vindication of their statutory rights.

Our Supreme Court has held that employees as a class are particularly dependent on, and vulnerable to, their employers and therefore deserve safeguards to protect their interests. *Lafayette v. Armstrong* (Fr. Sup. Ct. 1999). On the basis of that holding, the Court formulated five minimum requirements for a legally enforceable employment agreement requiring binding arbitration of statutory claims. Such an arbitration agreement must (1) provide for a neutral arbitrator, (2) provide for more than minimal discovery, (3) require a written, reasoned decision, (4) provide for all of the types of relief that would otherwise be available in court, and (5) not require employees to pay unreasonable fees or costs as a condition of access to the arbitration forum. *Id.*

Because of the limited review of arbitration decisions, the choice of arbitrator may be crucial. There is variety in how arbitrators are selected and variety in the number of arbitrators used in an arbitration. Regardless of the choices available, what is critical is that every arbitrator be neutral. To ensure neutrality, an arbitrator must disclose any grounds that might exist for a conflict between the arbitrator's interests and parties' interests. According to the LM program, the arbitrators are to be selected from the Franklin Arbitration Association (FAA), a long-standing and well-respected private nonprofit provider of arbitrators. To

maintain its reputation, the FAA requires its arbitrators to disclose any conflicts of interest that could compromise their neutrality. Assuming that the program in place requires that the arbitrators provide information about potential conflicts of interest so that the parties have the information necessary to determine whether to challenge any arbitrator assigned, the LM program passes muster as providing for neutral arbitrators.

The employees claim that the limit on the number of depositions permitted in the LM program, namely three depositions by each party, frustrates their ability to conduct discovery and thus fails to meet *Lafayette*'s second requirement that there be more than minimal discovery. While due process may not require the same degree of discovery that our courts permit, due process does require that there be a fair opportunity to be heard. Arguably, some discovery may be necessary if parties are to have a fair hearing. However, in this case, the employees' argument has no merit. Even our state rules of civil procedure limit the number of depositions that may be taken without a showing that additional discovery is needed. Depositions are not the only means of discovery useful to the parties in preparing for hearings. Often, a simple exchange of documents will assist the parties in trial preparation. We presume, because there is no evidence to the contrary, that an arbitrator would permit additional discovery if a proper showing were made.

The employees argue that the LM program provides no assurance that arbitrators will issue a written decision stating the reasons for their decisions, and no assurance that arbitrators will be aware that they may award all the relief available under the statute. The employees further argue that because review is limited, they will have no means of determining whether the arbitrators followed the law unless they issue written decisions giving reasons for the decision. Our Supreme Court has already ruled on the necessity of a written decision giving reasons for the decision in arbitration proceedings. *Lake v. Whiteside* (Fr. Sup. Ct. 1994). While the procedures in the case at bar do not require a written, reasoned decision, this court must assume that the arbitrators will follow the law and produce such a decision. By reviewing the reasons given for the arbitrators' written decisions, the employees will be able to determine whether the arbitrators considered all the remedies available.

Finally, the employees argue that the LM program violates the requirement that the parties not be required to pay unreasonable fees or costs as a condition of accessing the arbitral forum. They point to provisions in the LM program that each party to the arbitration shall pay a pro rata share of the fees of the arbitrators, together with other costs of the arbitration incurred or approved by the arbitrators.

Unfortunately, in this case, the record is unclear as to what the fees and costs are. The parties are in dispute as to how the arbitration expenses will be divided between the employees and the employer. It is possible that exorbitant fees and costs will frustrate the employees' ability to pursue their statutory claims. If so, the program may be unlawful. Because the record here is unclear, we vacate the judgment of the district court and remand for further proceedings.

Vacated and remanded.

Sloane v. Davis

Olympia Supreme Court (2009)

Attorney Margit Davis and her client, Liam Sloane, entered into a retainer agreement that provided that the parties would use binding arbitration to resolve any disputes concerning Davis's representation. Sloane later sued Davis for negligence in representing him in a business matter. Davis moved to compel arbitration, which the trial court granted. The court of appeals affirmed.

Sloane concedes that he voluntarily agreed to the arbitration clause in the retainer agreement, concedes that the arbitration process was generally fair, and concedes that if this agreement applied to any issue other than attorney malpractice, it would be legally enforceable. He simply argues that, as a matter of public policy, attorneys should not be permitted to use arbitration to avoid litigation of an attorney malpractice matter.

This court has previously found that attorneys must adhere to certain standards when entering into business transactions with their clients. These standards include ensuring that the terms of the transaction are fair and are fully disclosed in writing and in a manner reasonably understandable to the client. The attorney must also advise the client in writing of the desirability of seeking independent legal advice about the transaction. The client must then give informed consent in writing. *Olympia Rule of Professional Conduct 1.8*

Davis more than met her obligations under Rule 1.8. First, the terms of the business transaction, here the arbitration process, were fair. Since Sloane concedes that the arbitration process Davis uses is fair, we need not further consider that issue.

Second, Davis made a full disclosure in writing in a manner that was easily understandable to the client. When Davis met with Sloane, she orally explained the retainer agreement, including the arbitration clause. Davis then mailed a copy of the retainer agreement to Sloane along with a brochure explaining arbitration. The brochure explained that by agreeing to arbitrate, Sloane would waive his right to a jury trial. The brochure explained the types of matters that might be arbitrated, including malpractice claims, and also provided examples of arbitration procedures that might be different from those Sloane would experience in litigation. It also explained

that the arbitrators would be required to disclose any conflicts of interest, follow the law, award appropriate remedies available under the law, and issue a written decision explaining the basis for the decision.

Further, the brochure sent to Sloane explained that Sloane could and should seek the advice of another attorney before signing the retainer agreement. The accompanying letter asked Sloane to sign and return the retainer agreement within one week, if Sloane agreed to it. In fact, Sloane did not seek independent legal advice but signed the retainer agreement and returned it to Davis on the same day he received it.

Sloane's argument that Davis failed to meet her obligations under Rule 1.8 is without merit. Likewise, Sloane's argument that he was unaware of the ramifications of the arbitration process is without merit.

Sloane also argues that, as a matter of public policy, even if the requirements of Rule 1.8 were met and even if the agreement to arbitrate was legally enforceable, attorneys should not be permitted to use arbitration to avoid litigation of a dispute with a client. We disagree.

By agreeing to use arbitration rather than litigation to resolve an attorney malpractice claim, the client does not give up the right to sue. The client simply shifts determination of the dispute from the courtroom to an arbitral forum. In doing so, the client and the attorney often benefit from a process that can be speedier and more cost-effective than litigation. The arbitration process can offer a more informal means of resolution and provides a private forum, often more attractive to client and attorney alike.

Sloane is correct that the attorney cannot prospectively limit liability to the client. But this retainer agreement contains no limit on liability. Rather, where the arbitrator is bound to follow the law and to award remedies, if any, consistent with the law, there does not appear to be any limit.

Sloane also argues that the attorney cannot limit the ability of the Olympia Supreme Court to discipline attorneys who violate the norms of practice. But nothing in this retainer agreement prevents Sloane or anyone from filing a charge with the Board of Attorney Discipline.

Affirmed.

July 2014 MPT

►*FILE*

MPT-2: *In re Linda Duram*

BURTON AND FINES LLC
Attorneys at Law
963 N. Oak Street
Swansea, Franklin 33594

MEMORANDUM

TO: Examinee
FROM: Henry Fines
DATE: July 29, 2014
RE: Linda Duram FMLA matter

Our client, Linda Duram, is a graphic artist employed by Signs Inc. She applied for leave under the Family and Medical Leave Act (FMLA) from her employer; this was her first request for FMLA leave. The employer denied her request. Despite the denial, Linda traveled with her grandmother, Emma Baston, to attend the funeral of Emma's sister. Because Linda left town without an approved leave, Signs Inc. placed her on probation and threatened termination should another incident occur. Linda is particularly concerned about a threat of termination because she will almost certainly need to take additional leave in the future to care for her grandmother.

We have been retained to persuade Signs Inc. to reverse its earlier decision denying FMLA leave and retract the threat of termination.

Please prepare a letter for my signature addressed to Mr. Steven Glenn, Vice President of Human Resources for Signs Inc., arguing that Linda is entitled to leave under the FMLA. Follow the firm's attached guidelines for demand letters. Signs Inc.'s legal department will be reviewing the letter, so we need to provide a persuasive legal argument, including citing relevant authority. Your letter should also respond to the arguments raised by Mr. Glenn. I will submit the letter along with the medical evidence I have just received from Ms. Baston's doctor and Linda's affidavit describing her relationship with her grandmother.

There is no dispute that Signs Inc. is a covered employer under the FMLA. Nor is there a dispute that Linda, a full-time employee for the required number of weeks, is a covered employee. Do not address those issues.

BURTON AND FINES LLC
Attorneys at Law
963 N. Oak Street
Swansea, Franklin 33594

OFFICE MEMORANDUM

TO: All Attorneys
FROM: Managing Partner
DATE: November 3, 2012
RE: Guide for Drafting Demand Letters

A demand letter is a letter in which an attorney or party states a legal claim and demands that the recipient take or cease taking a certain action. Demand letters are designed to advocate a position and persuade the reader. A well-written demand letter can promote a favorable resolution of the claim without the time or costs involved in litigation.

A demand letter typically includes (1) a brief statement identifying the sender and, if appropriate, identifying the attorney-client relationship; (2) a brief statement of the purpose of the letter; (3) a brief description of the situation; (4) a thorough analysis of the basis for the client's claim, including a response to arguments raised against the claim; and (5) a specific settlement demand.

When discussing the basis for the client's claim, you should thoroughly analyze and integrate both the facts and applicable law in making your arguments, with appropriate citations to the law. You should respond to arguments that have been made against our client's position.

Use language appropriate to the recipient, but assume that the letter will be read by an attorney. Use a tone that is convincing but not insulting. Do not overstate or exaggerate the facts or the law, because doing so can undermine the strength of our client's position.

Email Correspondence

From: Linda Duram, Art Department
To: Steven Glenn, Vice President, Human Resources
Re: Request for Family and Medical Leave
Date: July 7, 2014, 9:15 a.m.

I request five days' leave under the Family and Medical Leave Act to accompany my grandmother to her sister's funeral. She died yesterday, and the funeral is Wednesday, July 9th. My grandmother has only a few months to live because of her heart disease. My grandmother raised me; she cannot travel by herself. She needs me to care for her and to give her medications and therapies. She has been depressed because of her health, and now with losing her only sister, she is very distraught. So am I. I just learned of her sister's death yesterday and I could not sleep last night. Please approve this request as soon as possible—we have to leave tomorrow.

From: Steven Glenn, Vice President, Human Resources
To: Linda Duram, Art Department
Re: Your request for Family and Medical Leave
Date: July 7, 2014, 3:30 p.m.

Dear Ms. Duram,

Signs Inc. denies your request for FMLA leave because (1) the Act does not apply to care for grandparents; (2) even if it did, the Act only applies to care provided in a home, hospital, or similar facility, not to travel; (3) the Act does not apply to funerals; and (4) you failed to give the requisite 30 days' notice.

I am sorry to learn of the death of a family member. You may take the two days of vacation time that you have accrued. Absence without approved vacation time or other leave is grounds for discipline up to and including discharge.

Steven Glenn
Vice President of Human Resources, Signs Inc.

From: Steven Glenn, Vice President, Human Resources
To: Linda Duram, Art Department
Re: Your request for Family and Medical Leave
Date: July 16, 2014, 8:30 a.m.

Dear Ms. Duram,

As you know, we denied your request for leave under the FMLA for reasons previously stated in my email of July 7, 2014. Despite that denial, you left the office for five days. You had two days accrued vacation time, so we have allowed two days as vacation time. However, there was no approval for the remaining three days, and you will not be paid for these three days. Therefore, you were absent from your position without approved leave for three days.

In accordance with our Employee Policy 12.7, you are placed on probation. Any future unapproved absence will be grounds for immediate termination.

Steven Glenn
Vice President of Human Resources, Signs Inc.

Affidavit of Linda Duram

Upon first being duly sworn, I, Linda Duram, residing in the County of Vilas, Franklin, do state:

1. My maternal grandparents, Emma and Bill Baston, raised me for many years since I was six years old, due to my parents having drug abuse problems.

2. When I was in grade school, one of my parents was usually in jail, so my brother and I lived with our grandparents off and on for months at a time. When I was 12, our parents were sent to prison, so my brother and I moved in with our grandparents for 18 months.

3. When our parents got out of prison, they moved into an apartment and took us back. Six months later they entered rehab and we stayed with our grandparents for three months. When they got out of rehab, they lived with us in our grandparents' home until I was in high school. In my junior year of high school, our parents went to prison again for three more years.

4. Grandpa Bill and Grandma Emma never adopted us because our parents were gone only for short terms. Our parents were afraid to sign any legal papers giving our grandparents custody because they did not know how that would affect their other legal problems.

5. When our parents were gone, our grandparents took care of us, fed us, clothed us, gave us gifts at holidays and birthdays, took us to school and the doctor, things like that. Even when one or both of our parents were living with us, it was our grandparents who fed us and saw that we got to school and did homework, that sort of thing. They came to our games and band performances, even when our parents were back home. Our grandparents paid for summer baseball and soccer camps. When we went to college, our parents were home and getting "clean" from drugs, but our grandparents loaned us the money to get a car to go to school.

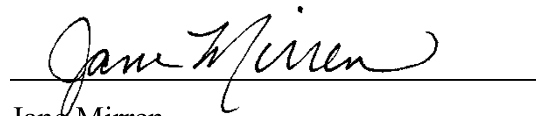
6. Grandpa Bill died a few years ago, and Grandma has been steadily declining in health. My parents—they moved to their own home a few years ago—are too caught up in their own problems to help care for Grandma. There is now a team of people who care for her in her

home. I take care of her every Sunday. Grandma told me that I was the only one who could care for her on this difficult trip to her sister's funeral.

Signed and sworn this 22nd day of July, 2014.

Linda Duram

Signed before me this 22nd day of July, 2014.



Jane Mirren

Notary Public, State of Franklin

SWANSEA CARDIOLOGY CENTER
43 Hospital Drive, Suite 403
Swansea, Franklin 33596

July 24, 2014

To whom it may concern:

I have treated Emma Baston for the past 10 years for issues related to her cardiac condition and high blood pressure. Two months ago, I diagnosed Ms. Baston with end-stage congestive heart failure which will lead to her death, likely in a few months. Ms. Baston cannot walk, bathe herself, take her medications, feed herself, dress, or perform similar functions of daily life without assistance. She uses a wheelchair and oxygen. She needs to have fluids pumped from her heart. I have prescribed medication and therapies to be provided for Ms. Baston at home. These will not cure her but will relieve her suffering and make her comfortable as she lives her final months. Ms. Baston also suffers from depression. I ordered Home Health Services and chore services to assist her with daily functioning. I monitor her condition weekly.

Ms. Baston was able to travel to Franklin City to attend the funeral of her sister, which I understand required her to be gone a week. Ms. Baston had to be accompanied by someone familiar with her condition and her personal needs and able to attend to her and assist her as outlined above.

Her granddaughter, Linda Duram, has the power of attorney over her health care decisions and attends to Ms. Baston along with other family members and home health care workers. Linda has cared for her grandmother for the past two months. Linda has learned how to transport Ms. Baston into and out of the wheelchair, administer oxygen, operate the heart pump, administer the medications, and provide the personal care Ms. Baston requires. Ms. Duram needed to be absent from work for five days to make this trip.

If you need any further information, please do not hesitate to contact me.

Maria A. Oliver, M.D.

July 2014 MPT

►*LIBRARY*

MPT-2: *In re Linda Duram*

The Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 *et seq.*

29 U.S.C. § 2611 Definitions

. . .

(7) Parent. The term "parent" means the biological parent of an employee or an individual who stood in loco parentis to an employee when the employee was a son or daughter.

. . .

(11) Serious health condition. The term "serious health condition" means an illness, injury, impairment, or physical or mental condition that involves—

(A) inpatient care in a hospital, hospice, or residential medical care facility; or

(B) continuing treatment by a health care provider.

29 U.S.C. § 2612 Leave requirement

(a) In general

(1) Entitlement to leave. . . . [A]n eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following:

(A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.

(B) Because of the placement of a son or daughter with the employee for adoption or foster care.

(C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.

(D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

. . .

(e) Foreseeable leave

(1) Requirement of notice. In any case in which the necessity for leave under subparagraph (A) or (B) of subsection (a)(1) of this section is foreseeable based on an expected birth or placement, the employee shall provide the employer with not less than 30 days' notice, before the date the leave is to begin, of the employee's intention to take leave under such subparagraph, except that if the date of the birth or placement requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable.

Code of Federal Regulations
Title 29. Labor

§ 825.112 Qualifying reasons for leave, general rule.

(a) Circumstances qualifying for leave. Employers covered by FMLA are required to grant leave to eligible employees: . . .

> (3) To care for the employee's spouse, son, daughter, or parent with a serious health condition . . . ;

§ 825.113 Serious health condition.

(a) For purposes of FMLA, "serious health condition" entitling an employee to FMLA leave means an illness, injury, impairment or physical or mental condition that involves inpatient care . . . or continuing treatment by a health care provider as defined in § 825.115.

. . .

(c) The term "treatment" includes (but is not limited to) examinations to determine if a serious health condition exists and evaluations of the condition. Treatment does not include routine physical examinations, eye examinations, or dental examinations. A regimen of continuing treatment includes, for example, a course of prescription medication (e.g., an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition (e.g., oxygen). A regimen of continuing treatment that includes the taking of over-the-counter medications such as aspirin, antihistamines, or salves; or bed-rest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider, is not, by itself, sufficient to constitute a regimen of continuing treatment for purposes of FMLA leave.

(d) . . . Ordinarily, unless complications arise, the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc., are examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave. . . .

*　　*　　*

§ 825.115 Continuing treatment.

A serious health condition involving continuing treatment by a health care provider includes any one or more of the following:

. . .

(c) Chronic conditions. Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one which:

(1) Requires periodic visits (defined as at least twice a year) for treatment by a health care provider, or by a nurse under direct supervision of a health care provider;

(2) Continues over an extended period of time (including recurring episodes of a single underlying condition); and

(3) May cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.).

* * *

§ 825.302 Employee notice requirements for foreseeable FMLA leave.

(a) Timing of notice. An employee must provide the employer at least 30 days advance notice before FMLA leave is to begin if the need for the leave is foreseeable based on an expected birth, placement for adoption or foster care, planned medical treatment for a serious health condition of the employee or of a family member, . . . If 30 days' notice is not practicable, such as because of a lack of knowledge of approximately when leave will be required to begin, a change in circumstances, or a medical emergency, notice must be given as soon as practicable . . . .

§ 825.303 Employee notice requirements for unforeseeable FMLA leave.

(a) Timing of notice. When the approximate timing of the need for leave is not foreseeable, an employee must provide notice to the employer as soon as practicable under the facts and circumstances of the particular case. . . .

(b) Content of notice. An employee shall provide sufficient information for an employer to reasonably determine whether the FMLA may apply to the leave request. Depending on the situation, such information may include that a condition renders the employee unable to perform the functions of the job; that the employee is pregnant or has been hospitalized overnight; whether the employee or the employee's family member is under the continuing care of a health care provider; . . . .

Shaw v. BG Enterprises

United States Court of Appeals (15th Cir. 2011)

Gus Shaw requested leave under the Family and Medical Leave Act (FMLA), 29 U.S.C. § 2601 *et seq.,* from BG Enterprises. When that leave was denied, Shaw sued, alleging interference with FMLA leave. The district court entered judgment for BG Enterprises after a bench trial. Shaw appeals. We affirm.

Congress enacted the FMLA to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, to promote national interests in preserving family integrity, and to entitle employees to take reasonable leave to care for the serious health conditions of specified family members. 29 U.S.C. § 2601(b). The FMLA entitles eligible employees of covered employers to take unpaid, job-protected leave for specified family and medical reasons, such as a serious health condition, the birth or adoption of a child, or the care of a child, spouse, or parent who has a serious health condition. *Id*. § 2612.

To succeed on a claim of interference with FMLA leave, a plaintiff must show that he was eligible for FMLA protections, that his employer was covered by the FMLA, that he was entitled to take leave under the Act, that he provided sufficient notice of his intent to take leave, and that his employer denied the FMLA benefits to which the employee was entitled. The only issue here is whether the employee was entitled to take leave.

Shaw, a managerial employee for BG Enterprises, sought leave to care for his daughter, who was seriously injured in an auto accident and subsequently died. On Saturday, May 10, 2008, Shaw learned that his daughter Janet had been seriously injured in a car accident in Franklin City, where she attended Franklin State University. Shaw and his wife immediately left for the hospital where Janet was being treated, some 200 miles away. On Monday, May 12, Shaw informed BG that he would not be at work because of his daughter's accident.

On May 19, Shaw submitted written documentation supporting his prior request under the FMLA for leave to care for his daughter and also to attend her funeral. He attached a medical certification from the hospital stating that Janet had suffered traumatic injuries as a result of the accident, was in a coma, and was unable to care for herself. Shaw stated that he had spent the initial weekend by Janet's bedside and had

then returned to his home in High Ridge while his wife stayed at the hospital. While at home, he arranged for Janet to be transferred to a rehabilitation facility, regularly called the hospital and talked with his wife about Janet, and spent the remainder of the time performing repairs to the Shaw home so that Janet could be cared for at home. He also attached a copy of the death certificate indicating that Janet had died on May 16, while still hospitalized.

BG denied Shaw's request for FMLA leave, arguing that the FMLA's use of the term "care for" does not include hospital visits, doing home repairs, arranging for transfer to another facility, or attending the funeral. Shaw asked BG to reconsider its denial of FMLA leave. BG refused and Shaw sued.

The critical issue here is what is meant by FMLA's use of the term "care for." We have not faced this issue until now. Neither the Act nor the regulations promulgated pursuant to the FMLA define the term "care for." Our sister circuits have attempted to define the term.

In *Tellis v. Alaska Airlines* (9th Cir. 2005), the Ninth Circuit held that the FMLA required that there be "some actual care," some level of participation in ongoing treatment of a serious health condition. In that case, an employer terminated an airline mechanic based in Seattle after the employee used FMLA leave to fly to another state to retrieve his car rather than staying with his wife during her high-risk pregnancy. Because the employee had left his wife's side for four days, instead of participating in her ongoing treatment, the Ninth Circuit held that he was not "caring for" her as required to invoke the protections of the FMLA. The court found that the person giving the care must be in "close and continuing proximity to the ill family member."

In a Twelfth Circuit case, *Roberts v. Ten Pen Bowl* (12th Cir. 2006), Sara Roberts sought FMLA leave to relocate her son to another state to live with an uncle. Roberts claimed that her son had a psychological condition that caused him to be easy prey for bullying by other students, and she wanted to move him to a safer location. She claimed that the relocation was treatment for his psychological condition. The Twelfth Circuit court upheld the denial of leave under the FMLA. The court found that relocating a child to a safer location, however admirable that may be, was in no

way analogous to treatment for a serious health condition, a necessary requirement under the FMLA.

Roberts also argued that the FMLA allows leave to provide comfort or reassurance to a family member, citing its legislative history:

> The phrase "to care for," in [§ 2612(a)(1)(C)], is intended to be read broadly to include both physical and psychological care. Parents provide far greater psychological comfort and reassurance to a seriously ill child than others not so closely tied to the child. In some cases there is no one other than the child's parents to care for the child. The same is often true for adults caring for a seriously ill parent or spouse. S. Rep. No. 103-3, at 24 (1993), U.S. Code Cong. & Admin. News 1993, pp. 3, 26.

While a parent may offer comfort and reassurance to a child who has a serious health condition, the FMLA requires that there be treatment provided for that serious health condition. Roberts failed to show that her son was receiving any treatment.

These cases are helpful in attempting to define the term "care for." They point to the need for the employee seeking leave (1) to be in close and continuing proximity to the person being cared for, and (2) to offer some actual care to the person with a serious health condition. If the employee seeks leave to offer psychological care to the person with a serious health condition, the ill person must be receiving some treatment for a physical or psychological illness.

Here, Shaw was not in close and continuing proximity to his daughter while she was in the hospital and he was at home in High Ridge. His wife may have been in proximity to Janet, but she is not the employee seeking leave. Nor was Shaw providing care to Janet or offering her psychological comfort. Arguably, he provided comfort while he was at her bedside during the May 10 weekend, but that weekend did not constitute work time for which he needed leave. His actions may have been helpful to his daughter's situation, but they are not activities within the meaning of the term "care for" under the FMLA. He is also not entitled to leave to attend his daughter's funeral. The FMLA contemplates that the care must be given to a living person.

Affirmed.

Carson v. Houser Manufacturing, Inc.

United States Court of Appeals (15th Cir. 2013)

Plaintiff Sam Carson appeals from a judgment of the district court holding that he does not meet the definition of "parent" as provided in the Family and Medical Leave Act (FMLA), 29 U.S.C. § 2601 *et seq*. We affirm.

The FMLA creates an employee's right to take unpaid leave to care for a son or daughter who has a serious health condition. *Id*. § 2612(a)(1)(C). Under the FMLA, the term "son or daughter" means "a biological . . . child . . . , or a child of a person standing in loco parentis, who is (A) under 18 years of age; or (B) 18 years of age or older and incapable of self-care because of a mental or physical disability." *Id*. § 2611(12). Here, Carson's employer denied his request for two weeks of FMLA leave to care for his grandson, who was recovering from abdominal surgery.

The plain language of the FMLA does not authorize FMLA leave for the care of grandchildren. The plaintiff can only be entitled to FMLA leave to care for his grandson if he stands *in loco parentis* to the grandson. The FMLA does not define the term *in loco parentis,* a term typically defined by state law.

Under the law of the State of Franklin where Carson resides, the term *in loco parentis* refers to a person who intends to and does put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation without going through the formalities of legal process (such as guardianship, custody, or adoption). The court may consider such factors as the child's age, the child's degree of dependence, or the amount of support provided by the person claiming to be *in loco parentis*.

Carson relies on the case of *Phillips v. Franklin City Park District* (Fr. Ct. App. 2006). Phillips was the paternal grandmother of Anthony Phillips, whose father died when Anthony was three years old. Anthony's mother became depressed and unable to care for Anthony but did not relinquish parental rights over Anthony, nor did Phillips seek to adopt Anthony. From the time Anthony was

four, he lived in Phillips's home, and it was Phillips who enrolled Anthony in school, took him to medical appointments, provided for his day-to-day financial support, attended parent-teacher conferences, and even served as driver for Anthony's Boy Scout troop. That was sufficient proof to meet the *in loco parentis* standard.

The evidence in this case is not similar to that of *Phillips*. Carson is the grandfather of David Simms. David lived with his parents until his parents died in a car accident when David was 15 years old. David moved in with his older brother and lived with his brother until he left for college. During the time after his parents were deceased, David did spend some weekends and extended vacations with Carson. While in college, he returned often to his brother's home and often to Carson's home during summers and holidays. Carson claims that he provided David with financial support while he was in college, gave him financial and moral advice, and attended David's graduation from college.

While these efforts by Carson likely guided and aided David at a critical time in his life, they are not that dissimilar from what many grandparents do without assuming a parental role. The trial court was correct in finding that the proof offered by Sam Carson was insufficient to meet the standard of one who is *in loco parentis*.

Affirmed.

July 2014 MPT

►*POINT SHEET*

MPT-1: *In re Kay Struckman*

DRAFTERS' POINT SHEET

The task for examinees in this performance test is to draft a memorandum to prepare Steve Ramirez, the supervising attorney, to advise Kay Struckman, a local attorney, about a modification she proposes to make in her retainer agreements that would require the use of binding arbitration for fee disputes. Struckman asks whether she may ethically seek to modify her retainer agreements with existing clients to include a provision requiring the use of binding arbitration to resolve future fee disputes, and whether any resulting modification using the language she proposes would be legally enforceable.

The File contains the instructional memo from Ramirez and a letter from Struckman. The Library contains Franklin Rule of Professional Conduct 1.8 (Franklin RPC 1.8); a Columbia State Bar Ethics Opinion (Ethics Opinion); *Lawrence v. Walker* and *Johnson v. LM Corporation*, two cases from the Franklin appellate court; and *Sloane v. Davis*, an Olympia Supreme Court case.

The following discussion covers all the points the drafters of the item intended to raise in the problem.

I. Overview

Examinees are directed to two issues:

1. Whether Struckman may ethically seek to modify her retainer agreements with existing clients to include a provision requiring the use of binding arbitration to resolve future fee disputes; and what, if any, revisions to the proposed language she would need to make; and what, if any, requirements she would need to meet.
2. Whether the proposed modification would be legally enforceable; what, if any, revisions are needed to the proposed language; and what, if any, requirements must be satisfied.

No organizational format is specified, but examinees should follow a clear pattern in analyzing the ethical and legal issues. This point sheet will address the issue of requirements within the discussion of the two major issues — ethics and legal enforceability. Alternatively, an examinee may discuss the requirements necessary for an ethical and legally enforceable

arbitration agreement in a third, separate section, or may incorporate that discussion into the two main sections.

An examinee could also organize the memo around the requirements Struckman should follow, noting which are required by Rule 1.8 and which are required for legal enforceability.

Examinees should also analyze the effect of the option Struckman is offering her clients—agree to arbitration in exchange for ensuring no annual increase in fees for two years or not agree to arbitration and maintain the existing retainer agreement which provides for annual increases in fees.

While there can be disagreement concerning the use of binding arbitration to resolve disputes between lawyers and clients, examinees have been instructed to help Struckman achieve her goals, if possible. They should conclude that arbitration agreements regarding future fee disputes are likely to be ethical and legally enforceable if certain requirements are met. Examinees should identify those requirements.

II. Overview of the Law

The Franklin Supreme Court has ruled that modifying a retainer agreement with an existing client amounts to a business transaction within the meaning of Rule 1.8. Franklin Rule of Professional Conduct, cmt.1. This Rule is identical to the ABA Model Rule of Professional Conduct 1.8. Therefore, examinees must conclude that to be ethical, any provision Struckman drafts must comply with the terms of Rule 1.8. The requirements of Rule 1.8 are discussed in the Columbia State Bar Ethics Opinion 2011-91 and the *Sloane v. Davis* case.

In its opinion, the Columbia Bar Ethics Committee, examining its Rule 1.8 (also identical to the ABA Rule), concluded that lawyers may not modify retainer agreements with existing clients to include a provision requiring binding arbitration of any future malpractice claims. The Committee identified challenges and conditions that examinees should consider. The issues are the requirement for the client's voluntary consent, the requirement that the transaction be fair and done in good faith due to the fiduciary relationship between lawyer and client, and the absence of any attempt to undermine the court's ability to investigate any claims of lawyer misconduct. The following conditions must be met: the lawyer must tell the client of the advisability of seeking the advice of independent legal counsel and give the client the opportunity to do so, and, the

lawyer must advise the client of the rights affected or forfeited by opting for arbitration, rights which include the right to a jury trial.

The *Sloane* case from the Olympia Supreme Court addresses the requirements of that state's Rule 1.8, which, too, is identical to the ABA Rule. *Sloane* involved an agreement between the client and the attorney to arbitrate future malpractice claims. The client argued that, as a matter of public policy, attorneys should not be permitted to use arbitration to avoid litigation of attorney malpractice claims. Although *Sloane* is from another jurisdiction and deals with malpractice claims and not fee disputes, the court approved the use of arbitration. Thus, *Sloane* presents the examinees with a model of an agreement to arbitrate that meets the requirements of Rule 1.8. Examinees should discuss each of the challenges presented in *Sloane*.

First, under Rule 1.8, the business transaction, here the arbitration agreement, must be fair. The fairness issue in *Sloane* was conceded. The fairness issue will be further discussed below as a matter of legal enforceability. Fairness requires that the attorney advise the client as to the arbitration process. In *Sloane*, the attorney explained the retainer agreement, including the arbitration provision during a meeting with the client. The attorney then mailed a copy of the agreement along with a brochure explaining arbitration to the client. The brochure explained that by agreeing to arbitration, the client would waive the right to a jury trial. The brochure explained the types of matters that might be arbitrated and provided examples of arbitration procedures that might be different from those in litigation; it also explained that arbitrators would be required to disclose conflicts of interest, follow the law, award appropriate remedies available under the law, and issue a written decision explaining the basis of the decision.

Second, under Rule 1.8, the attorney is also required to advise the client to seek the advice of independent counsel before signing the agreement. In *Sloane*, the brochure sent to the client gave that advice and the accompanying letter gave the client one week to seek that advice and sign and return the agreement.

Last, the *Sloane* case makes the point that attorneys cannot prospectively limit their liability to a client*, see also* Rule 1.8(h), nor limit the ability of the Supreme Court to discipline attorneys who violate the norms of practice. Because arbitration is a matter of contract law, Struckman must not only meet the ethical requirements of Rule 1.8; she must also ensure that her retainer agreement is legally enforceable. Some of the steps she must take to be ethical will

overlap with the requirements of legal enforceability. The *Lawrence v. Walker* and *Johnson v. LM Corporation* cases address the legal requirements of agreements to arbitrate future disputes.

Lawrence is the only Franklin case to address the issue of binding arbitration of attorney disputes, and it deals with an attorney malpractice claim. Although it concludes that the agreement in *Lawrence* was not legally enforceable, it sets out the requirements for legal enforceability. The first requirement is that the client and attorney agreed to the arbitration. Because of the nature of the attorney-client relationship, the agreement must have been entered into openly and fairly. One aspect of openness and fairness is that the agreement specify the types of disputes to be arbitrated. Another aspect of openness is that the client must be made aware of the existence of the arbitration provision and its implications, specifically the differences between litigation and arbitration, to ensure that the client had a real choice in entering into the agreement. Language that is vague will be interpreted against the drafter (namely, the lawyer).

The second requirement for legal enforceability is that the terms of the arbitration process must be fair. The fairness requirement is a result of the fiduciary relationship between the lawyer and client. The minimal requirements of fairness of the arbitration process are discussed in the *Johnson* case, which arose in the employment context. The *Johnson* case identifies the minimal requirements of fairness: a neutral arbitrator; more than minimal discovery; a written, reasoned decision; availability of all types of relief otherwise available in a court; and no unreasonable fees or costs as a condition of access to arbitration.

The discussion below sets forth how examinees should analyze the law and advise Struckman.

III. Discussion

A. Arbitration of future fee disputes — ethical issues

May Struckman ethically seek to modify her retainer agreements with existing clients to require binding arbitration of future fee disputes? Examinees should answer yes to the ethical question, but only if certain conditions, as described below, are met.

Attorneys are encouraged to use informal means of resolving disputes with clients concerning fees. Arbitration provides prompt and cost-effective resolution of disputes. *Lawrence v. Walker*.

Franklin RPC 1.8(a) prohibits lawyers from entering into business transactions with clients unless certain conditions are met.

- Modification of a retainer agreement with an existing client amounts to a business transaction between lawyer and client within the meaning of Franklin RPC 1.8. *Rice v. Gravier Co.* (Fr. Sup. Ct. 1992), cited in cmt. (i) to Franklin RPC 1.8.
- Attorneys may enter into business transactions with clients within the meaning of Franklin RPC 1.8 if they meet the rule's requirements:
  - The transaction and its terms must be fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client. Franklin RPC 1.8(a)(1); *see also Sloane v. Davis*.
    - As proposed, Struckman's arbitration provision does not meet this requirement because it does not fully disclose its terms.
    - Struckman could satisfy this requirement by adding related text to the modified retainer agreements. The addition should explain that agreeing to arbitration is an agreement to forgo litigation and that arbitration may have different procedures and rules from those of litigation.
    - Struckman could use a brochure such as that used in *Sloane* to fully disclose and explain the terms of the arbitration process.
  - The transaction and its terms must be fair and reasonable to the client. The attorney, because of the fiduciary relationship, bears the burden of showing that the terms are fair and reasonable. Franklin RPC 1.8; *see also* Ethics Opinion.
    - Struckman could meet this standard if the terms of her proposed arbitration provision and the modified retainer agreements as a whole are reasonable and in good faith. If the provision is legally enforceable and the arbitration process itself meets the minimal requirements of fairness as outlined in *Johnson* and discussed below, Struckman should satisfy the requirement of reasonableness and good faith.
    - Use of a brochure explaining the arbitration process such as that used in *Sloane* would help Struckman meet her burden.

- The client must be advised in writing of the desirability of seeking the advice of independent legal counsel on the transaction and must be given a reasonable opportunity to do so. Franklin RPC 1.8(a)(2).
    - Struckman's proposed arbitration provision does not meet this requirement because it is silent on this score and hence does not give the client any opportunity to seek the advice of independent legal counsel.
    - Struckman could satisfy this requirement by adding related text to the modified retainer agreements specifying that the client is being given an opportunity to seek independent legal counsel.
    - Struckman could use a brochure to advise the client of the desirability of seeking independent legal counsel. *See Sloane*.
- The client must give informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction. Franklin RPC 1.8(a)(3).
    - The arbitration provision proposed by Struckman does not meet this requirement because it is silent on this score.
    - Struckman could satisfy this requirement by adding related text to the modified retainer agreements that includes a signature line for the client and a statement that Struckman is not representing the client in entering into the arbitration provision.
    - Struckman could give clients a week's time to consider this choice and provide written consent, as was done in *Sloane.*

Attorneys may not use arbitration to deter investigation of alleged misconduct. *Sloane.*

- There is no indication that the arbitration process Struckman proposes would prevent the client from filing any allegations of misconduct or would prevent the Supreme Court from investigating any such allegations or disciplining Struckman. For example, there is no language purporting to bar any client from complaining to the appropriate disciplinary authorities. Nor is Struckman seeking to require existing clients to arbitrate future *malpractice* claims, as was prohibited in the

Columbia Ethics Opinion. Also, Struckman does not limit her liability to clients in any way, as might be done in an agreement to arbitrate malpractice claims.

In sum, if Struckman meets the requirements discussed above by fleshing out her proposed modification, she may ethically seek to modify her retainer agreements with existing clients to require binding arbitration of future fee disputes.

B. Arbitration of fee disputes — legal enforceability issues

Next, examinees should answer yes to the legal question (whether any resulting modification in the agreements to use binding arbitration would be legally enforceable) but only if certain conditions, as described below, are met.

- Agreements to arbitrate must be voluntary.
  - Because clients are particularly dependent on and vulnerable to their attorneys, a question arises as to whether they may truly be able to give consent. *Lawrence.* Examinees should note that this issue is especially of concern where the client is already in a relationship with the attorney.
  - But Struckman could ensure that the provision requiring binding arbitration of future fee disputes in the modified retainer agreements would be voluntary by meeting the ethical requirements specified above, which should adequately inform existing clients of the nature and consequences of the provision, and by *not* requiring assent as a condition for continuing representation.
  - Further, Struckman intends to offer her existing clients a benefit in exchange for the provision requiring binding arbitration of future fee disputes in the modified retainer agreements—a forfeiture of her right to adjust fees for two years. The clients could choose not to enter into the modification and instead to face the possible fee adjustments. The fact that clients have this option supports the argument that the agreement to arbitrate is voluntary.
- The agreement to arbitrate must be informed. An agreement to arbitrate may effect a waiver of the right to a trial by judge or jury. A client forfeiting such a significant right should be made aware by the attorney of the existence of the arbitration provision and its implications. *Lawrence*

    - As described above, Struckman must inform the client about the arbitration process. If she follows the advice given above in regard to explaining the arbitration process and how it differs from litigation, she should be able to show that the client gave informed consent to arbitrate.
    - *Lawrence* rejected a provision purporting to require binding arbitration of future malpractice claims where the provision failed to explicitly refer to "malpractice."
    - The provision proposed by Struckman ("any claim . . . arising out of . . . Lawyer's representation of Client") does not refer to "fees." To meet the standard in *Lawrence*, Struckman must rewrite the clause to specify fee disputes as the type of disputes to be arbitrated.
- To be lawful, arbitration must be fundamentally fair. There are some concerns that, because the arbitral forum does not provide the same protections as the judicial forum, arbitration may lack fairness.
    - There is limited review of arbitration decisions. *Lawrence.*
    - Arbitrators need not follow the law, and discovery may be limited. *Id*.
    - Parties may not have the right to subpoena or cross-examine witnesses or even to participate in an in-person hearing. *Id*.
    - The choice of arbitrators may be critical. *Id*.
    - Because arbitration decisions are not reported, the client may not have access to such decisions to learn about the process. *Id*.
- Arbitration, however, is fair if it meets five criteria. *Johnson v. LM Corp*.
    - First, the arbitrators must be neutral. *Id*.
        - The arbitration provision proposed by Struckman, however, is silent on this score.
        - At a minimum, any agreement to arbitrate must provide that the arbitrators must disclose any conflicts of interest that would compromise neutrality.
        - Examinees should underscore for Struckman the need to ensure arbitrator neutrality, especially regarding the need to disclose conflicts of interest.
        - In *Johnson*, the court observed that the Franklin Arbitration Association (which was to conduct the arbitration in that case) was well-respected and required its arbitrators to disclose any conflicts of interest. Examinees

might encourage Struckman to designate the Franklin Arbitration Association as the arbitrator in fee disputes.

- Second, arbitration must provide for more than minimal discovery.
    - Struckman's proposed arbitration provision, however, is silent on this score, too.
    - Examinees should state that the arbitration to be used by Struckman must contain a provision for some form of discovery, though it need not provide for the full panoply of discovery offered by the courts. It will be sufficient if the parties can engage in some form of discovery sufficient to prepare for the arbitration hearing and have the ability to ask for additional discovery if they can demonstrate the need for it. *Johnson.*
- Third, the arbitrators must issue a written, reasoned decision. *Id*.
    - The arbitration provision proposed by Struckman does not address this.
    - Examinees should advise Struckman that her proposed arbitration provision must require a written decision giving reasons for the decision. The fact that Franklin law requires a written decision may be enough to ensure that such a decision will be issued. *Id.*
- Fourth, the arbitrators must be authorized to award any relief available through the courts and must be aware of such authority. *Id.*
    - Struckman's proposed arbitration provision, however, is silent on this score too.
    - Examinees should advise Struckman that either the retainer agreement or the materials describing the arbitration procedure should specify that the arbitrator is authorized to award the same relief that would be available through the courts.
- Fifth, the client may not be required to pay unreasonable fees or costs as a condition of access to the arbitral forum. *Id*.
    - The arbitration provision proposed by Struckman does not mention fees.
    - Examinees should conclude that Struckman's proposed arbitration should require existing clients to pay moderate fees and costs.

More observant examinees may note that Struckman desires a dispute resolution process that is quick and has minimal costs for her and her clients. With regard to fee disputes, in discussing the requirements to be fair and reasonable, examinees should avoid the tendency to recommend procedures that more than satisfy the fairness part, but are also costly or time-consuming. They should, instead, identify those that meet the requirements while being cost- and time-effective.

III. Conclusion

Examinees should conclude that Struckman may ethically seek to modify her retainer agreements with existing clients to include a provision requiring binding arbitration of future fee disputes in exchange for forgoing annual increases in fees for two years as currently provided for in the retainer agreement, but only if certain conditions are met. Examinees should similarly conclude that any resulting modification would be legally enforceable, but again, only if certain conditions are met.

July 2014 MPT

►*POINT SHEET*

MPT-2: *In re Linda Duram*

DRAFTERS' POINT SHEET

The task for examinees in this performance test is to draft a letter to the Human Resources office of Signs Inc. to persuade Signs Inc. to reverse its earlier decision denying the application of Linda Duram for leave under the Family and Medical Leave Act (FMLA) and to persuade Signs Inc. to retract the threat of termination. The client is Linda Duram, an employee of Signs Inc. Duram sought FMLA leave to care for her grandmother, Emma Baston, while she and her grandmother traveled out of town to the funeral of her grandmother's sister. The employer, Signs Inc., denied the request. Duram left town anyway to attend the funeral with her grandmother. Soon after her return, she received an email from Signs Inc. docking her pay for the three days of unauthorized leave, placing her on probation, and stating that "[a]ny future unapproved absence will be grounds for immediate termination."

Examinees' demand letter to Signs Inc., specifically to Steven Glenn of its Human Resources office, will likely be shared with its attorney. Examinees should argue that Duram is entitled to FMLA leave and respond to the four objections raised by Signs Inc.

The File contains the instructional memo from the supervising attorney, the firm's guide for drafting demand letters, the emails between Duram and Glenn, Duram's affidavit, and a letter from the physician treating Duram's grandmother. The Library contains excerpts from the Family and Medical Leave Act and the Code of Federal Regulations implementing the FMLA, and two cases.

The following discussion covers all the points the drafters of the item intended to raise in the problem.

I. Overview

Examinees are told not to address the issues that Signs Inc. is an employer covered by the FMLA and that Duram worked the requisite number of weeks; those facts are undisputed.

In drafting the demand letter, examinees must

1. show that Duram is entitled to leave under the FMLA.
2. respond to the four objections raised by Signs Inc.

Examinees are to follow the directions in the firm's Guide for Drafting Demand Letters: (1) a brief statement identifying the sender and, if appropriate, identifying the attorney-client relationship; (2) a brief statement of the purpose of the letter; (3) a brief description of the

situation; (4) a thorough analysis of the basis for the client's claim, including a response to arguments raised against the claim; and (5) a specific settlement demand.

When discussing the basis for Duram's claim, they should thoroughly analyze and integrate both the facts and applicable law in making their arguments, with appropriate citations to the law. Examinees should use language appropriate to the recipient but assume that the letter will be read by an attorney. The letter's tone should be convincing but not insulting, without overstatements or exaggerations of the facts or the law because these can undermine the strength of the demand.

II. Review of Facts and Law

Facts

The client, Linda Duram sought FMLA leave to care for her grandmother, Emma Baston, while she and her grandmother traveled out of town to the funeral of her grandmother's sister. Duram made the leave request by email to Steven Glenn, the Vice President of Human Resources, the day after learning of the death. Signs Inc., denied the request because, according to Glenn's email, the FMLA does not entitle an employee to leave to care for a grandparent; applies only to caring for someone in the person's home, a hospital, or a similar facility, not to travel; does not apply to funeral leave; and requires 30 days' notice. The leave was denied; Duram left town with her grandmother to attend the funeral. After her return, she received an email from the Human Resources office docking her pay for the three days of unauthorized leave and stating that "[a]ny future unapproved absence will be grounds for immediate termination."

Duram claims that her grandmother stands in the role of a parent and will use her affidavit to establish that the grandparents cared for Duram and her brother for several long periods of time. The grandparents provided Duram with a home, food, clothes, and gifts. They took her to school, medical appointments, and extracurricular activities, assuming responsibility for her day-to-day activities. Duram's parents were absent from the home for long periods, during which her grandparents were the only caregivers. (Her grandfather has since died.)

Duram has also supplied a letter from Dr. Oliver, who is treating Ms. Baston for terminal heart disease. Dr. Oliver has prescribed a course of medications and therapies which Ms. Baston needs along with assistance with daily activities such as bathing, dressing, eating, etc. Dr. Oliver states that Ms. Baston is able to travel only if cared for by someone familiar with her medications and trained to administer the therapies. Duram has been so trained.

The Law

The FMLA entitles employees who present a qualifying reason for leave to up to 12 weeks of unpaid leave for specific reasons, the relevant one being to care for the parent of an employee if the parent has a serious health condition. 29 U.S.C. § 2612. A parent is defined as "the biological parent of an employee or an individual who stood in loco parentis to an employee when the employee was a son or daughter." 29 U.S.C. § 2611(7).

Here Duram sought leave to care for her grandmother, not her parent, so she must show that the grandmother stood *in loco parentis* to her when she was young. She will rely on the definition given in *Carson v. Houser Manufacturing, Inc.*, that the grandparent put herself in the situation of a lawful parent, "assuming the obligations incident to the parental relation without going through the formalities of legal process."

The person being cared for must have a serious health condition, which is defined as an "illness . . . that involves . . . inpatient care in a hospital, hospice, or residential medical care facility[,] or . . . continuing treatment by a health care provider." 29 U.S.C. § 2611(11). The regulations further explain that treatment "includes (but is not limited to) examinations to determine if a serious health condition exists and evaluations of the condition." 29 C.F.R. § 825.113(c). "A regimen of continuing treatment includes, for example, a course of prescription medication . . . or therapy requiring special equipment to resolve or alleviate the health condition . . . ." *Id*. A serious health condition includes a chronic condition, defined as "[a]ny period of incapacity or treatment for such incapacity due to a chronic serious health condition." A chronic health condition is one that requires periodic visits for treatment by a health care provider, that continues over a period of time, and that may cause episodic rather than a continuing period of incapacity. 29 C.F.R. § 825.115(c).

Neither the Act nor the regulations define what is meant by "care for." Some courts have required that the person seeking leave be in "close and continuing proximity to the ill family member" and offer "some actual care" for the person with a serious health condition. *Shaw v. BG Enterprises* and cases cited therein. The *Shaw* court upheld an employer's denial of leave when the employee whose child had been seriously injured made arrangements for transfer to another facility and made repairs to the home so that the child could be brought home. Implicit in this denial is that making arrangements for a child does not constitute "caring for." Here, examinees must argue that Duram participated in the ongoing treatment of her grandmother's serious health condition.

Courts have denied leave for traveling with a relative when there is no proof that the employee was caring for the relative. *Roberts v. Ten Pen Bowl* (cited in *Shaw*). Examinees must show that Duram did not seek leave to travel, but rather sought leave to care for her grandmother while her grandmother traveled.

Signs Inc. also claims that the care must be given in the home or in a hospital or similar facility. Neither the Act nor the regulations impose this requirement. While the Act refers to inpatient care in a hospital, hospice, or similar facility, that is only one part of the definition of "serious health condition"; the second part refers to continuing treatment by a health care provider and makes no limitation as to where the care is given. 29 U.S.C. § 2611(11).

Courts have also denied leave for funerals because the FMLA contemplates that the care must be given to a living person. *Shaw.* Thus, examinees should point out that Duram did not seek FMLA leave to attend the funeral but to *care for* her grandmother, who attended a funeral.

Finally, Signs Inc. states that Duram failed to give 30 days' notice of the need for FMLA leave. The statute does require 30 days' notice when the need for the leave is foreseeable, such as the birth/adoption of a child or planned medical treatment. 29 U.S.C. § 2612(e)(1), 29 C.F.R. § 825.302. However, when the need for the leave is not foreseeable, the regulation requires only that the notice be given "as soon as practicable," as was the case here. 29 C.F.R. §§ 825.302, 825.303(a).

III. Discussion

The introductory paragraph of the letter should identify the sender as the attorney for the client Linda Duram and should state the purpose of the letter, which is to demand that Signs Inc. reverse its earlier decision denying Duram's request for leave under the FMLA and retract its threat of terminating her should she have another unauthorized leave. The letter should also state that its purpose is to show how she is qualified for that leave and to respond to Signs Inc.'s objections. The letter should then briefly recap the situation: that Duram requested leave to care for her grandmother while her grandmother traveled to a funeral, and that the leave was denied because Signs Inc. claimed that the FMLA does not entitle an employee to care for a grandparent; applies only to care in a home, hospital, or similar facility; does not apply to funerals; and requires 30 days' notice.

The letter should next set out a thorough analysis of the basis for Duram's claim and respond to the objections raised by Signs Inc. The analysis should cover the following issues:

Entitlement. The letter should argue that Duram is entitled to leave under the FMLA to care for her grandmother, who suffers from a serious health condition. The examinee should then show how each of these requirements is met.

In loco parentis. The FMLA does not provide leave to care for grandparents, but it does provide leave to care for a parent or one who stood *in loco parentis* to the employee when she was a child. The FMLA does not define in loco parentis; examinees must use state law to argue that Baston stood in loco parentis to Duram.

The *Carson* case defines the term *in loco parentis* as "a person who intends to and does put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation without going through the formalities of legal process (such as guardianship, custody, or adoption)." The court may consider such factors as the child's age, the child's degree of dependence, and the amount of support provided by the person claiming to be *in loco parentis*. *Id*.

The *Phillips* case cited in *Carson* provides an example of a grandparent who stood *in loco parentis* to the grandson. The grandparent in *Phillips* provided a home for the grandchild from the time the child was four years old, enrolled the child in school, took him to medical appointments, provided for his day-to-day financial support, attended parent-teacher conferences, and even served as driver for his Boy Scout troop. In contrast, the court refused to find that Carson, a grandfather, stood *in loco parentis* where, after the death of the grandson's parents, the grandson moved in with his brother but spent weekends and extended vacations with his grandfather. *Carson.* Examinees should show how Duram's situation is more like that of *Phillips* and less like that of *Carson*.

Arguing by analogy, examinees should argue that Duram lived in her grandparents' home for several periods of time: on and off for a few months at a time when she was 6 years old, 18 months beginning when she was 12, three months when her parents were in rehab, and from her junior year of high school, as well as a period of time when her parents lived in the home with the grandparents and the children. While Duram lived with her grandparents, they provided the home, food, clothing, and gifts. Later, they loaned her money for a car to use at college. In other words, they assumed responsibility for the day-to-day financial and personal care of Duram and

her brother. Even though Duram's parents were alive, they were absent from the home for long periods, during which her grandparents were the only caregivers.

Even when Duram's parents were out of prison and rehabilitation, the parents and children lived in the grandparents' home, and the grandparents continued to have a role in caring for the children. Although the length of time Duram lived with her grandparents and had them as the only caregivers is not as long as the time in the *Phillips* case, the cases are analogous because the grandparents took over the day-to-day parenting decisions as well as the day-to-day personal care and financial support of Duram for substantial periods of time. Had the grandparents not taken the children into their home and assumed responsibility for their care, the children would have been unable to care for themselves or support themselves. Examinees might note that the grandparents failed to pursue legal procedures such as adoption, but that adoption is not required under the Franklin state law analysis of *in loco parentis*.

Serious health condition. A serious health condition is one for which the person is under continuing treatment by a health care provider. 29 C.F.R. § 825.113(a). Treatment includes examinations and evaluations of the condition and a regimen of continuing treatment such as prescription medications or therapies to alleviate the condition. 29 C.F.R. § 825.113(c).

A serious health condition involving continuing treatment by a health care provider includes a chronic condition, defined as any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one which requires periodic visits for treatment by a health care provider, continues over an extended period of time, and may cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy). 29 C.F.R. § 825.115(c).

Examinees must use the letter from the grandmother's treating physician, Dr. Oliver, to show that the grandmother has a chronic serious health condition for which continuing treatment is needed. The letter states that Duram's grandmother is incapacitated and cannot perform the functions of daily life because she suffers from end-stage congestive heart failure and depression. The heart condition is monitored weekly by the doctor and extends over a period of time; the doctor diagnosed this condition two months ago and expects it to end in a few months with the grandmother's death. Ms. Baston has been prescribed medications as well as oxygen and heart-pump therapy. Dr. Oliver states that the purpose of the medications and therapies is to make her as comfortable as possible during her last months. Dr. Oliver states that Ms. Baston needs daily

assistance with personal care as well as with her medications and therapy. This letter substantiates the argument that, as required by the regulations, Duram's grandmother has a serious health condition, is under the continuing care of a health care provider, and needs someone to attend to her personal care and medical needs. 29 C.F.R. §§ 825.113(c), 825.115(c).

What is the meaning of "care for"? The term to "care for" is not defined in the FMLA nor in its regulations. In *Shaw*, the Fifteenth Circuit reviewed decisions by other circuits and determined that for FMLA purposes, the person giving the care must be in "close and continuing proximity to the ill family member" and offer "some actual care." Examinees should explain how Duram's situation is unlike those in the cases where leave was denied. In *Roberts*, there was no care, only travel. In *Shaw*, the employee was not in close proximity to the family member. In contrast, as described in Dr. Oliver's letter, Duram was in close and continuing proximity to her grandmother; she traveled with her. She provided actual care: feeding, bathing, dressing, and administering medications and therapies. In fact, Duram was the sole care giver during the trip. Dr. Oliver also states that Ms. Baston could not have traveled to the funeral unless accompanied by someone who could assist her with these tasks and that Duram has been trained to provide this care to her grandmother.

Additionally, the term "care for" includes providing psychological care. Ms. Baston suffers from depression, has just lost her sister, and is nearing the end of her life; she has stated that Duram is the only one who could care for her on this trip. (Affidavit). A Senate report about the FMLA states that "[t]he phrase 'to care for,' in [§ 2612(a)(1)(C)], is intended to be read broadly to include both physical and psychological care. Parents provide far greater psychological comfort and reassurance to a seriously ill child than others not so closely tied to the child. In some cases there is no one other than the child's parents to care for the child. The same is often true for adults caring for a seriously ill parent or spouse." S. Rep. No. 103-3, at 24 (1993), U.S. Code Cong. & Admin. News 1993, pp. 3, 26 (cited in *Shaw*).

By traveling with her grandmother and providing assistance in dressing, feeding, bathing, use of the wheelchair, and administration of medications and therapies, Duram provided physical and psychological care. Congress believed that psychological comfort and reassurance were part of the Act's coverage. The care that Duram offered her grandmother while her grandmother traveled to the funeral of her sister offered psychological comfort as well, care which is within the meaning of the FMLA.

Objections. Examinees must also address the other objections raised by Signs Inc. One objection—that the grandmother is not covered by the Act—has been addressed above.

Care in the hospital, etc. Signs Inc. also claims that the care must be given in the home or in a hospital or similar facility. There is no such requirement in the Act or the regulations. While the Act refers to inpatient care in a hospital, hospice, or similar facility, that is only one part of the definition of "serious health condition"; the second part refers to continuing treatment by a health care provider and makes no limitation as to where the care is given. 29 U.S.C. § 2611(11). Examinees must explain that there is no such limitation in the Act.

No leave to travel. Another objection is that the FMLA does not provide leave for travel. Here, the demand letter should distinguish *Roberts v. Ten Pen Bowl* (cited in *Shaw*), in which the denial of FMLA leave was upheld. Roberts sought leave to travel to relocate her son, who suffered from a psychological condition, to a safer location where he would not be harmed. The denial of leave was upheld because the travel did not involve care. Unlike the facts in that case, Duram did not seek leave to travel, but rather to care for her grandmother while her grandmother traveled.

Funeral leave. The next objection is that the requested leave was for a funeral. In *Shaw*, the denial of leave was upheld, in part, because the employee sought to use part of the leave to attend his daughter's funeral. The court observed that the FMLA contemplates that care must be given to a living person. The examinee should distinguish that case by showing that Duram did not seek leave to attend a funeral. Rather, she sought leave to care for her grandmother while her grandmother traveled to a funeral.

30 days' notice. The employer also objects to the request for FMLA leave because of Duram's failure to give 30 days' notice. Presumably, this objection is based on 26 U.S.C. § 2612(e)(1), which requires that an employee give the employer "not less than 30 days' notice, before the date the leave is to begin." Signs Inc. overlooks the rest of the statute and regulations. Thirty days' notice is required when the need for the leave is foreseeable, in matters such as the birth or adoption of a child. 29 U.S.C. § 2612(e)(1). The regulation expands the scope of this statutory requirement to cover situations involving planned medical treatment. 29 C.F.R. § 825.302. When the need for the leave is not foreseeable, the regulation requires that the notice be given as soon as "practicable." 29 C.F.R. §§ 825.302 and 825.303(a). Examinees must argue, first, that the leave was not foreseeable and so is not covered by the statute cited, and second,

that Duram asked for the leave within one day of learning of the death, within the "as soon as practicable" requirement. 29 C.F.R. § 825.303(a).

Closing: The letter should conclude with a specific settlement demand: that Signs Inc. reverse its earlier decision denying Duram's request for leave, grant the leave, and retract the July 16 email in which Duram was informed that if she was absent without leave in the future, she would be terminated. Perceptive examinees will recognize that because FMLA leave is unpaid, Duram's losing three days' pay is still appropriate for the time she was away from work.

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