

Note: This document illustrates an example of one of the options for how you might take notes as you work through the MPT packet. With this option, you create your document as you outline. Alternatively, you may choose to create a less detailed outline on scratch paper to use as a guide when crafting your final document.

Preliminary Information from Task Memo

- **Client:** Kay Struckman
- **Task:** Memorandum
- **Issue:** Whether it is ethical for Ms. Struckman to modify current retainer agreements with existing clients to require arbitration of fee disputes; recommendation of an arbitration provision that will be legally enforceable
- **Posture:** Objective

A. Ethical Considerations for Modifying Existing Retainer Agreements	
Franklin Rules of Professional Conduct (FrRPC) 1.8	
<ul style="list-style-type: none"> • Under Rule 1.8(a), a lawyer shall not enter into a business transaction with a client unless: <ol style="list-style-type: none"> (1) the transaction and terms are fair and reasonable to the client; (2) the disclosure is provided in writing and in a manner that can be reasonably understood by the client; (3) the client is advised in writing of the desirability of seeking the advice of independent legal counsel and is given a reasonable opportunity to do so; and (4) the client gives written informed consent to the essential terms of the transaction and the lawyer’s role in the transaction. • Under Rule 1.8 cmt. i (citing Rice (Fr. Sup. Ct. 1992)), modification of a retainer agreement with existing clients is a business transaction 	
<u>Lawrence</u> (Franklin Court of Appeal 2006)	
Holding	Client did not knowingly enter into agreement with lawyer to arbitrate malpractice claims, so it is unenforceable
Rule	Attorney bears the burden of proving the good faith of any agreement with a client; clients are particularly dependent on attorneys, who are fiduciaries
Columbia State Bar Ethics Committee, Ethics Op. 2011-91 (persuasive)	
Rule	Will not enforce arbitration clauses for future attorney malpractice claims; fee disputes may be arbitrated if client receives full and fair disclosure and seeks independent legal counsel

<u>Sloane</u> (Olympia Supreme Court 2009) (persuasive)	
Holding	Retainer agreement between attorney and client requiring arbitration to resolve disputes upheld; does not prevent client from bringing a claim
Rule	<ul style="list-style-type: none"> • Under Olympia RPC 1.8 (identical to FrRPC 1.8) arbitration is fair if four elements are met: <ol style="list-style-type: none"> (1) Terms are fair and reasonable <ul style="list-style-type: none"> ○ File (Struckman letter): <ul style="list-style-type: none"> - Provision requires claim arising out of or relating to representation to be settled by arbitration; does not explain the arbitration process and requirements for arbitrators, the rights the client will waive, the types of claims to be arbitrated, or how the arbitration process differs from litigation ○ Conclusion on element (1): not met (2) Full disclosure in writing in a manner easily understandable to the client <ul style="list-style-type: none"> ○ Rule Explanation: <ul style="list-style-type: none"> - Attorney orally explained the retainer agreement and arbitration clause and mailed a copy to the client with a brochure explaining arbitration and the rights waived ○ File: <ul style="list-style-type: none"> - The term was disclosed in writing, and the language was not complicated ○ Conclusion on element (2): met (3) Client advised in writing to seek advice of independent counsel <ul style="list-style-type: none"> ○ Rule Explanation: <ul style="list-style-type: none"> - Brochure from attorney advised the client to seek advice of independent counsel and included a letter asking the client to sign and return the retainer agreement within one week if the client agreed to it ○ File: <ul style="list-style-type: none"> - No such advice given to the client ○ Conclusion on element (3): not met (4) Client must give informed written consent <ul style="list-style-type: none"> ○ Rule Explanation: <ul style="list-style-type: none"> - Element was satisfied where the client did not seek advice from an attorney and signed and returned the agreement on the day it was received ○ File: <ul style="list-style-type: none"> - Information not provided in the agreement ○ Conclusion on element (4): not met

<p>Conclusion on A: Current agreement does not include an explanation of terms or an advisement to seek independent counsel. If Ms. Stuckman makes changes noted in (1), (3), and (4), modification will meet ethical requirements</p>	
<p>B. Legal Enforceability of Arbitration Provision</p>	
<p><u>Lawrence</u></p>	
<p>Rule</p>	<ul style="list-style-type: none"> • There are two requirements for agreements for binding arbitration of malpractice claims: <ol style="list-style-type: none"> (1) The client entered into the agreement openly and fairly <ul style="list-style-type: none"> ○ Rule Explanation: <ul style="list-style-type: none"> - Not open and fair because did not specify types of disputes arbitrated - Written by the attorney; not negotiated - Language interpreted most strongly against the party who created the uncertainty (here, the attorney) ○ File: <ul style="list-style-type: none"> - No specification in agreement that it applies only to fee disputes; this should be added - The proposed additional language (i.e., that clients have the option to forego fee adjustment for two years in exchange for entering into the agreement) would make the agreement voluntary (2) The terms of the arbitration process are fair to the client
<p><u>Johnson</u> (Franklin Court of Appeal 2004)</p>	
<p>Holding</p>	<p>Employer may require employees to submit disputes to binding arbitration, but the process must be fair</p>
<p>Rule</p>	<ul style="list-style-type: none"> • To be considered fair, terms must meet five requirements: <ol style="list-style-type: none"> (1) Provide for a neutral arbitrator <ul style="list-style-type: none"> ○ Rule Explanation: <ul style="list-style-type: none"> - Franklin Arbitration Association is a good resource ○ File: <ul style="list-style-type: none"> - Not mentioned in proposed agreement (2) Provide for more than minimal discovery <ul style="list-style-type: none"> ○ Rule Explanation: <ul style="list-style-type: none"> - Reputable arbitrator should ensure this ○ File: <ul style="list-style-type: none"> - Not mentioned

<p>Rule (continued)</p>	<p>(3) Require a written, well-reasoned decision</p> <ul style="list-style-type: none"> o Rule Explanation: <ul style="list-style-type: none"> - Court assumes arbitrator will provide o File: <ul style="list-style-type: none"> - Not mentioned <p>(4) Provide for type of relief that would be available in court</p> <ul style="list-style-type: none"> o File: <ul style="list-style-type: none"> - Not mentioned <p>(5) Not require payment of unreasonable fees and costs as a condition to access the arbitration forum</p> <ul style="list-style-type: none"> o Rule Explanation: <ul style="list-style-type: none"> - Court remands because this is not clear from the facts o File: <ul style="list-style-type: none"> - Not mentioned
<p>Conclusion on B: Client should add the above to her agreement so that it is enforceable</p>	
<p>Overall Conclusion: Adding an arbitration agreement would be ethical and enforceable if it meets the criteria addressed above</p>	