Use this Grid to self-assess your MPT response. Award your response a 0 or 1 depending on whether your answer includes the statement in each box below. Your statements do not need to exactly match the statements provided here. Instead, award your response a "1," if your response does the following:

- Identifies the legal buzz word(s) in the rule and provides a general definition(s); and
- Explains how the facts match with the rule statement(s) using explicit links (i.e., rule + "is satisfied/not satisfied" + because + facts).

Type of MPT: Objective Memo

Issue A: Ethical Consideration		**0 or 1**
Rules	The modification of a retainer agreement with existing clients amounts to a business transaction. Franklin Rules of Professional Conduct Rule ("Fr.R.P.C.") § 1.8 comment citing *Rice v. Gravier Co*.	
	The Fr.R.P.C. § 1.8 states that a lawyer shall not enter into a business transaction with a client unless (1) the transaction and terms are fair and reasonable to the client, (2) the disclosure is provided in a manner that can be reasonably understood by the client, (3) the client must be advised in writing of the desirability of seeking the advice of independent legal counsel and is given a reasonable opportunity to seek independent counsel, and (4) the client gives informed consent, in writing, to the essential terms of the transaction and the lawyer's role in the transaction.	
	The Olympia Supreme Court in *Sloane v. Davis (Sloane)* has addressed the issue with respect to Olympia Rule of Professional Conduct (O.R.P.C.) § 1.8, which is identical to Fr.R.P.C. § 1.8.	
	Courts and State Bars have valid concerns about safeguarding the rights of clients because clients are a vulnerable group and are particularly dependent on attorneys. *Lawrence v. Walker (Lawrence)* citing *Johnson v. LM Corp*.	
	A fiduciary relationship exists between an attorney and client; therefore, the attorney bears the burden of proving good faith of any agreement the attorney and client enters into. *Lawrence*.	
	Courts and State Bars are also concerned that lawyers who engage in misconduct will use binding arbitration as a means to deprive courts and disciplinary committees of its jurisdiction to investigate discipline issues. *Columbia State Bar Ethics Committee Ethics Opinion 2011-91*.	
Rule Explanations	In *Sloane*, the client signed a retainer agreement that provided that the parties would use binding arbitration to resolve "any disputes" concerning the attorney's representation.	
	The court held that the binding arbitration clause was enforceable because the attorney met her obligation under O.R.P.C. § 1.8. *Sloane*.	

Rule Explanations *(continued)*	The attorney made full disclosure in writing by mailing a copy of the retainer agreement with a brochure explaining arbitration. The brochure explained the arbitration process, the right the client would waive, the types of claims that could be arbitrated, and how the arbitration process differed from a litigation experience. The brochure also explained that arbitrators are required to disclose any conflict of interests, follow the law, award remedies available under the law, and issue a written decision explaining the basis for the arbitrator's decision. Finally, the attorney explained that the client could and should seek independent legal advice before signing the retainer agreement. *Sloane*.	
	In turn, the client signed the retainer agreement after receiving informed consent. *Sloane*.	
	The concerns weigh so strongly on the Columbia Ethics Committee that it has decided not to enforce arbitration clauses for future malpractice claims. Notwithstanding its aversion against enforcing arbitration clauses for future malpractice claims, the Committee stated that fee disputes may be appropriate for arbitration so long as the client receives full and fair disclosure and seeks independent legal counsel. Ethics Opinion.	
Application	Here, Ms. Struckman wishes to include an arbitration provision in a new retainer agreement for her existing clients that enables fee disputes to be resolved in an efficient and fair manner. Hence, Ms. Struckman's retainer agreements must comply with the requirements discussed above.	
	Each will be discussed in detail as applied to the provision Ms. Struckman provided for us to review: "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."	
Sub-Issue 1: Transaction and terms are fair and reasonable		**0 or 1**
Application/ Conclusion	As written, the provision does not provide assurances that the terms are fair and reasonable. The provision provides a general statement about arbitration, without explaining the arbitration process and requirements for arbitrators, the rights the client will waive, the types of claims to be arbitrated, and how the arbitration process differs from that of litigation.	
	Ms. Struckman can satisfy this requirement if she revises her provision to include this information as well as provide her clients with a brochure or similar print material, such as the brochure used in Sloane, that fully informs the client of the arbitration process.	
Sub-Issue 2: Disclosure can be reasonably understood		**0 or 1**
Application/ Conclusion	Here, arguably the provision can be reasonably understood by Ms. Struckman's clients. However, the provision does not include the detail required to meet Fr.R.P.C. § 1.8 as explained in (1).	

Sub-Issue 3: Full disclosure and independent legal advice		**0 or 1**
Application/ Conclusion	As written, the provision does not provide sufficient disclosure. The provision must clearly explain the differences between the arbitration process and litigation; and must apprise the client of rights that will be waived, highlighting the waiver of the right to a trial by judge or jury.	
	Furthermore, the provision does not stress the importance of Ms. Struckman's clients obtaining independent legal advice.	
	Therefore, the inclusion of a brochure, such as the brochure used in *Sloane*, will ensure that Ms. Struckman meets the full disclosure requirement as well.	
	Ms. Struckman could also include a separate brochure explaining retainer agreements that clearly informs clients of the importance of seeking independent legal advice and their opportunity to do so.	
Sub-Issue 4: Informed consent		**0 or 1**
Application/ Conclusion	Here, as written, the provision does not inform the client that informed consent in writing to the modification must be provided.	
	Therefore, Ms. Struckman should make it a mandatory practice not to have clients sign the retainer agreement until (1) and (3) have occurred.	
Conclusion on Issue	In conclusion, if Ms. Struckman makes the suggested changes provided in (1), (3), and (4), her arbitration modification will meet the ethical considerations of Fr.R.C.P. § 1.8.	
Issue B: Legality and Enforceability		**0 or 1**
Rule	The Franklin Supreme Court has not stated where it stands in relation to the legality and enforceability of an agreement to arbitrate future disputes with an attorney. However, the Franklin Court of Appeal has provided threshold requirements. *Lawrence*.	
	The first is that the retainer agreement be entered into openly and fairly. *Lawrence*.	
	The second is that the terms of the arbitration process are fair to the client. *Lawrence*.	
Sub-Issue 1: Open and Fair		**0 or 1**
Rule Explanation	In *Lawrence*, the court did not enforce the arbitration provision of the retainer agreement because the attorney failed to meet his burden to show that the client knowingly entered into the agreement requiring binding arbitration of malpractice claims.	
	The portion of the provision at issue stated that all "disputes regarding legal fees and any other aspect of our attorney-client relationship" would be decided by binding arbitration. *Lawrence*.	
	The attorney had the client sign the retainer agreement containing the arbitration provision at the inception of the representation. Further, the agreement was drafted by the attorney and was not the product of an attorney-client negotiation. *Lawrence*.	

Rule Explanation *(continued)*	As such, the court interpreted the language in the agreement most strongly against the party who created the uncertainty which, here, was the attorney. *Lawrence*.	
	The court noted that "[w]here parties enter into an agreement openly and with complete information, arbitration represents an appropriate and even desirable approach to resolving [fee] disputes." *Lawrence*.	
Application/ Conclusion	Here, by Ms. Struckman complying with the ethical requirements discussed above, she will be able to sufficiently demonstrate that her clients openly and fairly entered into the retainer agreement after receiving informed consent.	
	In fact, since Ms. Struckman intends on offering her existing clients an option to choose to accept the modified retainer agreement in exchange for a forfeiture of fee adjustments for two years emphasizes the fact that Ms. Struckman's clients are able to agree to the modification voluntarily, an important distinction from *Lawrence* where the client did not negotiate the agreement at issue.	
	Therefore, Ms. Struckman should add clear language to her provision stating that binding arbitration applies only to attorney-client fee disputes and that all other judicial remedies remain available to the client for matters outside of fee disputes.	
Sub-Issue 2: Fair Terms		**0 or 1**
Rules	The Franklin Court of Appeal formulated five threshold requirements to ensure an arbitration agreement is fair and reasonable. Such an agreement must: (1) provide a fair and neutral arbitrator, (2) provide for more than minimal discovery, (3) require a written, well-reasoned decision, (4) provide for all types of relief that would otherwise be available in court, and (5) not require employees to pay unreasonable fees and costs as a condition to access the arbitration forum. *Johnson v. LM Corporation (Johnson)*.	
Rule Explanation	First, neutrality requires that arbitrators disclose conflicts of interest. *Johnson*.	
	Second, although a reasonable amount of discovery should be permitted, unlimited discovery is not a requirement. *Johnson*.	
	Third, the Franklin Supreme Court has ruled that all arbitrators are required to issue written and reasoned decisions. *Johnson citing Lake v. Whiteside*.	
	Fourth, a written and reasoned decision will provide parties with sufficient information to determine whether arbitrators followed the law. *Johnson*.	
	Finally, the court did not have sufficient information to determine whether the fees and costs were reasonable; therefore, the case was remanded for that determination. *Johnson*.	
	However, it was noted that "exorbitant fees" would frustrate employees' ability to bring claims. *Johnson*.	

Application/ Conclusion	Here, Ms. Struckman's provision does not refer to these threshold requirements. The following are some recommendations for Ms. Struckman regarding each threshold requirement:	
	Ms. Struckman should assure her clients that any residing arbitrator will be neutral and is required to disclose any conflicts of interest. If Ms. Struckman uses a reputable and respected organization such as the Franklin Arbitration Association, she can also include brochures and print materials providing this information.	
	Ms. Struckman should ensure that the terms allow for more than minimal discovery with the ability to request more upon a proper showing to the arbitrator.	
	Ms. Struckman should ensure that the terms require the arbitrator to produce a well-written and reasoned decision.	
	Ms. Struckman should ensure and inform her clients that all types of relief that would be available in court are available and must be considered by the arbitrator.	
	Ms. Struckman should inform her clients that they may be required to pay reasonable fees and costs associated with the arbitration process.	
	However, the fees and costs should not be "exorbitant" so that their ability to bring the claim will be frustrated.	
Conclusion on Issue	As long as Ms. Struckman adds the above information to her arbitration agreement, then the terms will be fair and reasonable, making it legally enforceable.	

Organization and Structure	**0 or 1**
Response organized in IR(RE)AC format with separate headings and separate paragraphs.	
Response responds to the task laid out in the Task Memo appropriately, making case comparisons as appropriate.	
Response includes adequate spacing (white space), or Paragraphs are indented or set off by extra space.	
Response has an introduction outlining the response's overall organization/discussion points.	
Response has an overall conclusion, which follows logically from the discussion(s) in the response.	

[54] Points Total	
[1 - 15] = Level 1 below passing	
[16 - 29] = Level 2 near passing	0
[30 - 54] = Level 3 passing or above passing	