MEMORANDUM

TO: Steve Ramirez

FROM: Examinee

DATE: July 29, 2014

RE: Kay Struckman Consultation – Modification of Retainer Agreements

You asked me to draft a memorandum that responds to Ms. Struckman's questions regarding whether she may ethically modify retainer agreements with existing clients to include a provision requiring binding arbitration to resolve fee disputes. The advice contained in this memorandum addresses this issue in a manner that enables Ms. Struckman to achieve the goals she communicated to us:

(1) Ensure modification of current retainer agreements with existing clients to require arbitration of fee disputes is ethical, and

(2) Recommend an arbitration provision that will be legally enforceable.

The advice that follows also includes safeguards to protect and advance the interests of Ms. Struckman as well as her clients.

A. Ethical Considerations

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 writing and 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.

Franklin courts have not stated where they stand in relation to the arbitration of future disputes. However, 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. 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. 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. In turn, the client signed the retainer agreement after receiving informed consent. Because the arbitration clause complied with O.R.P.C. § 1.8, the court held that it applied to the client's legal malpractice claim. Sloane.

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. Moreover, 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 (Ethics Opinion). 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.

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."

(1) Transaction and terms are fair and reasonable

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.

Therefore, 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.

(2) Disclosure can be reasonably understood

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).

(3) Full disclosure and independent legal advice

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.

(4) Informed consent

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.

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.

B. Legality and Enforceability

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. (1) The first is that the retainer agreement be entered into openly and fairly. (2) The second is that the terms of the arbitration process are fair to the client. Lawrence.

(1) Open and Fair

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. 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. As such, the court interpreted the language in the agreement most strongly against the party who created the uncertainty which, here, was the attorney. 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.

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, this 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.

(2) Fair Terms

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). First, neutrality requires that arbitrators disclose conflicts of interest. Second, although a reasonable amount

of discovery should be permitted, unlimited discovery is not a requirement. 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. However, it was noted that "exorbitant fees" would frustrate employees' ability to bring claims. Johnson.

Here, Ms. Struckman's provision does not refer to these threshold requirements. The following are some recommendations for Ms. Struckman regarding each threshold requirement: (1) 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. (2) 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. (3) Ms. Struckman should ensure that the terms require the arbitrator to produce a well-written and reasoned decision. (4) 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. (5) 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. 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.

C. Conclusion

In conclusion, Ms. Struckman can modify her retainer agreement with existing clients to include a provision that requires binding arbitration for future fee disputes. So long as she follows and implements the recommendations included herein, her modified retainer agreements should be ethically sound and legally enforceable.