Contents

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

FILE

LIBRARY

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.