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In re Kay Struckman



Applicant Number

MPT-1
714

In re Kay Struckman

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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.

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 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 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.

MEMORANDUM

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

RAMIREZ & JAY LLP
Attorneys at Law
610 E. Broadway
Windsor, Franklin 33073

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

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

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.

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.

Dear Steve:

Re: Modification of Retainer Agreements

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

July 22, 2014

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

Kay Struckman



Very truly yours,

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

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.

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?

Franklin Rules of Professional Conduct? 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

I request your advice on these particular issues:

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.

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:

* * *

(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).

Comments

* * *

(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

(h) A lawyer shall not:

...

(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.

(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

(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;

(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:

Rule 1.8 Conflict of Interest: Current Clients: Specific Rules

[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.]

FRANKLIN RULE OF PROFESSIONAL CONDUCT 1.8

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.

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

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-a-vis employers).

The retainer agreement that Lawrence signed requires the parties to submit to binding arbitration “disputes regarding legal

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

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.

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)

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

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. On the basis of that holding, the Court

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 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.

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

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

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.

MULTISTATE PERFORMANCE TEST DIRECTIONS

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 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.

1) MPT1 - Please type your answer to MPT 1 below

A

When finished with this question, click A to advance to the next question.
(Essay)

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Start of Answer #1 (1214 words) =====

MEMORANDUM

TO: Steve Ramirez

FROM: Examinee

DATE: July 29, 2014

RE: Kay Struckman consultation

1. Would a modification of a retainer agreement requiring arbitration of fee disputes be ethical under the Franklin Rules of Professional Conduct?

First, a modification of the retainer agreement requiring arbitration of fee disputes

would fall under FRPC 1.8(a). That rule states that "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

For Ms. Struckman's proposed provision to comply with the ethical rules, it must be altered. As proposed, the provision reads, "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." Struckman letter July 22, 2014. As written, it could be interpreted that the clause does not fully disclose the nature of the interest affected, because it covers any claim or controversy. Other authorities outside of Franklin have frowned upon ambiguous language modifying the rights of the client. In Columbia, an attorney may not modify a retainer agreement with an existing client to require binding arbitration of

should comply with the three requirements set out above.

signed a consent letter to that effect. Therefore, Ms. Struckman's proposed modification understood that she could and should seek independent legal counsel, and the client attorney made full disclosure in writing in a manner easily understood, the client was valid, so long as the terms of the transaction were fair (the arbitration process), the binding arbitration clause to resolve any disputes covering the client's representation Court ruled in Sloane v. Davis (2009) that a retainer agreement entered into with a meaning of Rule 1.8. In a sister state interpreting the same Rule, the Olympia Supreme retainer agreement with an existing client amounts to a business transaction within the in Rice v. Gravier Co (1992), the Franklin Supreme Court ruled that modifying a including whether the lawyer is representing the client in the transaction." FRPC 1.8(a). client, to the essential terms of the transaction and the lawyer's role in the transaction, on the transaction; and (3) the client gives informed consent, in a writing signed by the

By adding a clause or separate document which includes the consequences of binding transaction, including whether the lawyer is representing the client in the transaction. the client, to the essential terms of the transaction and the lawyer's role in the between the client and attorney must include informed consent, in a writing signed by informed consent to the binding arbitration. As explained above, a business transaction Finally, the modification needs to include a separate clause for the client to give

client, Ms. Struckman will comply with the second prong of 1.8(a). transaction. If language to that effect is added to the modification, and explained to the reasonable opportunity to seek the advice of independent legal counsel on the (a) requires that the client be advised of the desirability of seeking and is given that the client seek independent legal counsel. For any business transaction, FRPC 1.8 Also, to comply with FRPC 1.8(a), Ms. Struckman must include in the writing advice the effects of binding arbitration, such as the lack of a jury or judge trial.

fairness and reasonableness of the modification by including terms that explicitly state reasonably understood by the client. Ms. Struckman may also wish to improve the construing the modification as not being transmitted in a manner that can be instead of any claim or controversy, Ms. Struckman may avoid the risk of a court disputes). By narrowing the scope of the modification to include only fee disputes, modifications that require binding arbitration for future malpractice claims (not fee 91. It is important to note that the Columbia opinion only applied to the validity of future malpractice claims. Columbia State Bar Ethics Committee, Ethics Opinion 2011-

If Ms. Struckman follows the recommendations given above in altering the modification, she will satisfy the threshold issue because such modifications would give

Franklin Supreme Court.

access to the arbitration forum. Johnson 2004, citing Lafayette v. Armstrong 1999 and (5) not require employees to pay unreasonable fees or costs as a condition of decision, (4) provide for all types of relief that would otherwise be available in court, arbitrator, (2) Provide for more than minimal discovery, (3) require a written, reasoned client. Lawrence 2006. An arbitration agreement must (1) provide for a neutral arbitration provision is enforceable with regard to an attorney's fiduciary duties to the incorporate the minimum requirements of Johnson v. LM Corp. to determine whether an its implications." Lawrence 2006. Once the threshold issue is addressed, the Court will client has been explicitly made aware of the existence of the arbitration provision and to arbitration, courts enforce an agreement requiring binding arbitration only where the binding arbitration of the particular claim. "Because of the implications of an agreement contract, the threshold issue is whether the attorney and client agree to mandatory Under Lawrence v. Walker (Franklin C.o.A. 2006), because arbitration is a matter of

disputes be legally enforceable under Franklin law?

2. Would a modification of the retainer agreement to require binding arbitration in fee

effectively comply with the FRPC.

arbitration and the desirability of independent legal counsel, Ms. Struckman will

the client explicit awareness of the meaning of the clause and would require explicit consent. To satisfy the remainder of the requirements to be enforceable, Ms. Struckman should include more details about the arbitration process to satisfy the requirements of Johnson. In Johnson, the Franklin Court of Appeal found that the Franklin Arbitration Association provides guarantees of a neutral arbitrator. The arbitration agreement should also include a clause that states the arbitrator is permitted to allow additional discovery if a proper showing is made. To be safe, the arbitration agreement should also include statements that require written reasoned decisions and consideration of all remedies available at law. Finally, the arbitration agreement should include specific language dictating how fees will be shared among the parties, and it should avoid any language that might permit the attorney to force the client to pay unreasonable fees or costs as a condition of accessing arbitration. If the arbitration agreement includes these terms, it would satisfy the requirements of Franklin.

Finally, the modification would be valid because it would be given in consideration for forgoing annual increases in her fees. As stated above, the modification is a matter of contract. Ms. Struckman wants to modify the retainer agreements with existing clients to include a binding arbitration provision for future fee disputes in exchange for forgoing annual increases in her fees for two years. Struckman letter July 22, 2014. This bargained for exchange by both parties would satisfy the requirements for consideration, and therefore the modification would be valid if accepted by the other party.

=====
End of Answer #1 =====

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(Question 1 continued)

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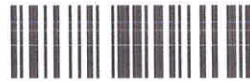
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In re Linda Duram

MULTISTATE PERFORMANCE TEST

THE
MPT[®]

Applicant Number



07711

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In re Linda Duram

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LIBRARY

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FILE

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.

- 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

Affidavit of Linda Duram

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

Linda Duram

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

Jane Mirren

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.
Maria A. Oliver, M.D.

LIBRARY

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.).

* * *

(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

(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;

§ 825.302 Employee notice requirements for foreseeable 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;

§ 825.303 Employee notice requirements for unforeseeable 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

(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)

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

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

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.

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,

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

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

MULTISTATE PERFORMANCE TEST DIRECTIONS

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 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.

I am writing on behalf of Linda Duram concerning your denial of her Family Medical Leave Act ("FMLA" or "the Act") request and subsequent termination warning. Our law firm will be representing Ms. Duram on this matter. I am writing to request that you reverse your decision denying Ms. Duram FMLA leave and that you retract your threat of termination. As I will explain, Ms. Duram

Dear Mr. Glenn,

Date: July 29, 2014

Re: Linda Duram FMLA Request

To: Steven Glenn, Vice President, Human Resources

From: Examinee, Burton and Fines LLC

=====
Start of Answer #2 (1429 words) =====

2) MPT2 - Please type your answer to MPT 2 below (Essay)

requested leave to care for her grandmother who stands in loco parentis to her and who has a serious health condition. Ms. Duram provided you with the requisite notice and her situation meets the standards set out in the FMLA and corresponding Code of Federal Regulations ("CFR") provisions.

As you know, the FMLA entitles an eligible employee who gives proper notice to take leave to care for a parent who has a serious health condition. First, although Ms. Batson is Ms. Duram's grandmother, she stands in loco parentis to her and therefore meets the definition of "parent:"

Although neither the Act nor corresponding CFR explicitly defines "parent," the US Court of Appeals recognized in the Carson case that the definition of parent includes those who stand in loco parentis as defined by state law.

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." In deciding whether a person stands in loco parentis, the court looks at the child's age, the child's degree of dependence, and/or the amount of support provided by the person. In this case, Ms. Batson has clearly stood in loco parentis to Ms. Duram since the age of six. As detailed in her affidavit, Ms. Batson and her husband, Bill, provided Ms. Duram with care from the age of six through college while her parents were in and out of jail due to drug addiction. Ms. Duram and her brother moved into their home for months and years at a time, during which they would provide all care for the Duram children, feeding

them, clothing them, taking them to school, celebrating holidays and birthdays, and providing financial support. For significant periods of their childhood and adolescence, Ms. Duram and her brother were completely dependent on the Durams for care and support. Ms. Batson's care of Ms. Duram meets the standard of in loco parentis, as Ms. Batson cared for her since a young age, she was totally dependent on her for much of that time, and the Batsons provided both financial and psychological support to her as a parent would do. Ms. Duram's case is more similar to that of the Phillips case described in the Carson case than it is to the Carson case itself. Ms. Duram did not simply visit Ms. Batson on weekends and during summers like Mr. Carson; she provided her with total support for significant periods of time, more like the

support Mr. Phillips provided to his orphaned grandson. For all these reasons, Ms. Batson stands in loco parentis to Ms. Duram and as such, qualifies as a parent within the meaning of the Family Medical Leave Act.

Second, Ms. Duram suffers from a "serious medical condition" as required by the FMLA and defined in the corresponding CFR provisions. Under the FMLA, a serious medical condition is one includes "continuing treatment by a healthcare provider." The CFR defines "treatment" as including not only in-patient care, but also an outpatient "continuing treatment" including "prescription medication" and "therapy requiring special equipment to resolve or alleviate the health condition." Such a condition is more than a common cold; it is a course of treatment under the supervision of a doctor that

requires special medication and/or equipment. In this case, Ms. Batson suffers from a serious medical condition as she is in the end-stage of congestive heart failure, which requires prescribed medications and therapies including an oxygen tank and heart pump. Dr. Maria Oliver of Swansea Cardiology Center has confirmed, as Ms. Batson's treating physician, that she suffers from the conditions just outlined and has iterated that she requires special care and assistance to meet her medical needs. Further, she confirms that Ms. Batson would have been unable to attend her sister's funeral without being accompanied by Ms. Duram because Ms. Duram knows how to transport Ms. Batson with her wheelchair, administer her medications properly, and administration her oxygen and operate the heart pump. Ms. Batson

clearly suffers from a serious medical condition as required by the FMLA and outlined in the corresponding CFR.

Third, Ms. Duram was "caring" for Ms. Batson as required by the FMLA. The phrase "to care for" is not defined in the FMLA nor in the corresponding CFR, but it has been defined by the US Court of Appeals in the Shaw case. The Court outlined that "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." In this case, Ms. Duram was clearly "caring for" Ms. Batson when she accompanied her to her sister's funeral. She was in close and continuing proximity to Ms. Batson during their five day trip, as was necessary in order for Ms. Duram to

administer the care Ms. Batson required. Further, not only did she offer psychological comfort to Ms. Batson, which is not necessarily included in the definition of care, but she provided actual physical care in administering her medications, operating the oxygen and heart pump, and transporting her by wheelchair. Ms. Duram's care is distinguishable from the care described in the Shaw case and corresponding Tellis and Roberts cases, as her care was not secondary, like retrieving a car or building a ramp or attending the relative's own funeral, but rather, was necessary actual physical care required for Ms. Batson to travel. Ms. Duram's care meets the definition of "care for" as set as in the Shaw case.

Fourth, Ms. Duram gave the requisite notice required by the FMLA and detailed in the corresponding CFR. It is true

that the FMLA requires 30 days notice in the event of a "foreseeable" event, but it does not require 30 days notice when such notice is impracticable. In the case of an unforeseeable event, the employee is required to supply notice "as soon as practicable under the facts and circumstances of the particular case" and should include the basis for the requested leave. In this case, Ms. Duram requested five days notice in writing, stating the basis for her leave, as soon as she learned that she would need to accompany Ms. Batson to the funeral. The need for Ms. Batson to travel, her sister's death, was an unforeseeable event and 30 days notice would not have been practicable. Ms. Batson included in her request the reason for her leave: that Ms. Batson's terminal heart condition required Ms. Duram to accompany her in order to provide

care, specifically "to give her medications and therapies."
Clearly, Ms. Duram complied with the FMLA and
corresponding CFR in requesting FMLA leave.

Lastly, I hope you have noted in this discussion that each
of your four concerns outlined in your letter to Ms. Duram
dated July 7 have been addressed. First, although the Act
does not apply to grandparents, it does apply to those
standing in loco parents, which includes grandparents
who meet that definition, which Ms. Batson does. Second,
the Act not only applies to care provided in a home or
hospital, but rather, applies to "continuing treatment" as
well, which includes the treatment Ms. Duram provided.
Third, although the Act does not apply to funerals, Ms.
Duram did not request FMLA leave to attend the funeral;
rather, she requested leave to provide essential, actual

medical care to Ms. Batson during her journey. Fourth, Ms. Batson gave the notice required by the statute in the case of an unforeseeable event, which was as soon as was practicable, given the unforeseeable nature of a funeral.

Thank you for your understanding in this matter. I hope

you now understand why Ms. Duram's request meets the requirements set out in the Family Medical Leave Act. We request that you promptly reverse your decision denying Ms. Duram leave and rescind your threat of termination. Please contact me directly should you have further

inquiries regarding this matter.

Sincerely,

Examinee

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End of Answer #2
=====

END OF EXAM

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(Question 2 continued)

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MULTISTATE ESSAY EXAMINATION

**THE
MEE[®]**

Applicant Number



07711

MFE Question 1

While on routine patrol, a police officer observed a suspect driving erratically and pulled the suspect's car over to investigate. When he approached the suspect's car, the officer detected a strong odor of marijuana. The officer immediately arrested the suspect for driving under the influence of an intoxicant (DUI). While the officer was standing near the suspect's car placing handcuffs on the suspect, the officer observed burglary tools on the backseat.

The officer seized the burglary tools. He then took the suspect to the county jail, booked him for the DUI, and placed him in a holding cell. Later that day, the officer gave the tools he had found in the suspect's car to a detective who was investigating a number of recent burglaries in the neighborhood where the suspect had been arrested.

At the time of his DUI arrest, the suspect had a six-month-old aggravated assault charge pending against him and was being represented on the assault charge by a lawyer.

Early the next morning, upon learning of her client's arrest, the lawyer went to the jail. She arrived at 9:00 a.m., immediately identified herself to the jailer as the suspect's attorney, and demanded to speak with the suspect. The lawyer also told the jailer that she did not want the suspect questioned unless she was present. The jailer told the lawyer that she would need to wait one hour to see the suspect. After speaking with the lawyer, the jailer did not inform anyone of the lawyer's presence or her demands.

The detective, who had also arrived at the jail at 9:00 a.m., overheard the lawyer's conversation with the jailer. The detective then entered the windowless interview room in the jail where the suspect had been taken 30 minutes earlier. Without informing the suspect of the lawyer's presence or her demands, the detective read to the suspect full and accurate Miranda warnings. The detective then informed the suspect that he wanted to ask about the burglary tools found in his car and the recent burglaries in the neighborhood where he had been arrested. The suspect replied, "I think I want my lawyer here before I talk to you." The detective responded, "That's up to you."

After a few minutes of silence, the suspect said, "Well, unless there is anything else I need to know, let's not waste any time waiting for someone to call my attorney and having her drive here. I probably should keep my mouth shut, but I'm willing to talk to you for a while." The suspect then signed a Miranda waiver form and, after interrogation by the detective, made incriminating statements regarding five burglaries. The interview lasted from 9:15 a.m. to 10:00 a.m.

In addition to the DUI, the suspect has been charged with five counts of burglary.

The lawyer has filed a motion to suppress all statements made by the suspect to the detective in connection with the five burglaries.

The state supreme court follows federal constitutional principles in all cases interpreting a criminal defendant's rights.

1. Did the detective violate the suspect's Sixth Amendment right to counsel when he questioned the suspect in the absence of the lawyer? Explain.
2. Under Miranda, did the suspect effectively invoke his right to counsel? Explain.
3. Was the suspect's waiver of his Miranda rights valid? Explain.

1) Please type your answer to MEE 1 below

A

A

When finished with this question, click A to advance to the next question. (Essay)

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Start of Answer #1 (952 words) =====

Question 1:

1. Sixth Amendment Right to Counsel

The detective did not violate the suspect's 6th Amendment right to counsel. The issue here is whether formal charges had been brought against the suspect with the

DUI booking.

Generally, the 6th Amendment right to counsel attaches once formal charges have

been filed. The underlying policy of the 6th Amendment right to counsel is to ensure

that the suspect receives fair representation throughout the judicial process of charges against him. Generally for the formal charges to attach is when the government has

taken action that is clear of its intention to prosecute on the charge. Generally, once the 6th Amendment right to counsel attaches, the suspect must have an attorney

present at any post-charge line-ups, hearings, questioning, or other components of the process of the charge against the suspect that attached the right to counsel. That being

said, the 6th Amendment right to counsel is charge-specific, meaning, that it applies

only to the charges that have been formally brought either through arraignment or other

court charge, so, police cannot question the suspect or continue with any adversarial proceedings without his lawyer present for said charge.

Here, the suspect's 6th Amendment right to counsel attached before the DUI

charge or the burglary charges. His 6th Amendment right to counsel attached initially to the aggravated assault charge. His 6th Amendment right to counsel had not attached yet to the DUI booking, nor the questioning concerning the burglaries. While the suspect may argue that the booking for DUI constituted a charge, thus, his 6th

Amendment right to counsel attached, he would not win this argument because a

booking does not equal a formal adversarial proceeding against the suspect. Further,

the questioning regarding the burglaries did not invoke any formal adversarial

proceedings against the suspect since it was merely questioning, and since the 6th

Amendment is charge-specific, the police were not precluded under his 6th Amendment

right to counsel to question him. Therefore, the detective did not violate the suspect's

6th Amendment right to counsel.

2. Miranda - Invoke Right to Counsel

The suspect did not effectively invoke his right to counsel under the 5th

Amendment. The issue is whether the suspect clearly and unambiguously invoked his

right to counsel after given Miranda warnings.

Under the 5th Amendment to the Constitution, a suspect is afforded the right to

be free of self-incrimination from testimonial evidence. Under case law, the Supreme

Court developed the scope of this 5th Amendment right as afforded under Miranda

warnings. Miranda warnings must be given, and are triggered when a person is in

custodial interrogation. For a person to be in "custody," a reasonable person standard of "feel free to leave" is applied to the circumstances in each case. "Interrogation" can be in form of statements or questions that the police may say in order to elicit an

incriminating response from the suspect. The Miranda rights include that a person has a (1) right to counsel and (2) the right to remain silent, and anything can be used

against them in a court of law. Generally, for a person to validly invoke the right to

counsel or right to silence, the invocation must be clear and explicit. Once the right to

an attorney has been clearly and unambiguously invoked, any and all interrogations must stop immediately, and the police must scrupulously honor the invocation by not

questioning the suspect without his attorney present.

Here, the suspect saying, "I think I want my lawyer here before I talk to you"

does not qualify as an effective invocation of his right to counsel under the Miranda.

His invocation must be unambiguous, and "I think" does not unambiguously invoke his

right to an attorney. It must be very clear. Nonetheless, the suspect also said "let's not

waste time" to wait for the attorney to get there that further illustrates the lack of

unambiguity in his statements. Therefore, the suspect did not effectively invoke his

right to counsel under the 5th Amendment.

3. Miranda - Valid Waiver

The suspect validly waived his Miranda rights. The issue is whether the suspect

knowingly and voluntarily waived his rights to counsel and silence under Miranda.

In general, the Due Process clause requires that a person's waiver of Miranda rights be made both knowingly and voluntarily. The purpose of the law is to ensure the reliability of the person's confessions or incriminating statements so as to avoid the pressure of the custodial environment. The court will consider factors like how long the suspect was held in a cell, or the length and types of questioning made by the police to the suspect in order to determine if there was undue pressure put on the suspect by the police. Also, the person's ability to comprehend the charges at hand as well as his capacity to understand the waiver of rights will be taken into account by the court.

Here, the suspect, did not clearly invoke his rights. There are no facts to suggest that he did not understand the charges against him, or what he was being questioned about. He also seemed to understand his rights under Miranda. He had only been waiting in the holding cell for 30 minutes. While the police did not tell him, even after one overhearing that his attorney was present, the police did not have a duty to inform the suspect that his attorney was present in the building. This is not considered undue pressure by the police, nor does it affect the validity of his waiver of his rights. When the suspect said, "let's not waste any more time" he volunteered this information. Therefore, the suspect validly waived his rights both knowingly and voluntarily.

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End of Answer #1 =====

MFE Question 2

A music conservatory has two concert halls. One concert hall had a pipe organ that was in poor repair, and the other had no organ. The conservatory decided to repair the existing organ and buy a new organ for the other concert hall. After some negotiation, the conservatory entered into two contracts with a business that both repairs and sells organs. Under one contract, the business agreed to repair the existing pipe organ for the conservatory for \$100,000. The business would usually charge a higher price for a project of this magnitude, but the business agreed to this price because the conservatory agreed to prepay the entire amount. Under the other contract, the business agreed to sell a new organ to the conservatory for the other concert hall for \$225,000. As with the repair contract, the business agreed to a low sales price because the conservatory agreed to prepay the entire amount. Both contracts were signed on January 3, and the conservatory paid the business a total of \$325,000 that day.

Two weeks later, before the business had commenced repair of the existing organ, the business suffered serious and unanticipated financial reversals. The chief financial officer for the business contacted the conservatory and said,

Bad news. We had an unexpected liability and as a result are in a real cash crunch. In fact, even though we haven't acquired the new organ from our supplier or started repair of your existing organ, we've already spent the cash you gave us, and we have no free cash on hand. We're really sorry, but we're in a fix. I think that we can find a way to perform both contracts, but not at the original prices. If you agree to pay \$60,000 more for the repair and \$40,000 more for the new organ, we can probably find financing to finish everything. If you don't agree to pay us the extra money, I doubt that we will ever be able to perform either contract, and you'll be out the money you already paid us.

After receiving this unwelcome news, the conservatory agreed to pay the extra amounts, provided that the extra amount on each contract would be paid only upon completion of the business's obligations under that contract. The business agreed to this arrangement, and the parties quickly signed documents reflecting these changes to each contract. The business then repaired the existing organ, delivered the new organ, and demanded payment of the additional \$100,000.

The conservatory now has refused to pay the business the additional amounts for the repair and the new organ.

1. Must the conservatory pay the additional \$60,000 for the organ repair? Explain.
2. Must the conservatory pay the additional \$40,000 for the new organ? Explain.

2) Please type your answer to MEE 2 below

A

A

When finished with this question, click A to advance to the next question.
(Essay)

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Start of Answer #2 (891 words) =====

1. No, the conservatory does not need to pay the extra \$60,000 for the repair of the pipe organ. The issue here is whether an amendment to an existing contract can be modified without consideration. The parties in this problem signed two separate contracts. Although the parties are the same, the nature of the contracts involved differ significantly. The first contract was a contract for services, i.e. the repair of a pipe organ. Contracts for services are covered by the common law. The Common law requires that any

modification of an existing contract be supported by separate consideration on the part of both parties. In the eyes of the common law, the creation of a contract with supporting legal detriments on both sides creates a pre-existing legal obligation that the parties must fulfill. Here, the parties agreed that the conservatory would pay \$100,000 up front for the company to repair the organ. Both parties accepted legal detriments, and agreed to perform

contingent upon the other's performance. We have an enforceable contract whereby the conservatory agrees to pay \$100,000 in return for the business repairing its organ. The business has subsequently asked for an amendment to that contract, citing unexpected financial problems on its end. The company has asked for an increase in the amount it is to be paid for the service of fixing the organ in the amount of \$60,000. The conservatory has not incurred any additional legal detriment or accept any different performance. The only difference is that the company has asked that it be allowed to pay later, as opposed to up front, but that is not sufficient consideration to support the amendments proposed by the business. Instead this appears to be an amendment of an existing contract which is not supported by the additional consideration required under the common law. Thus, the conservatory need not pay the additional amount sought by the business.

In addition, it's worth noting here that the conservatory had already completely performed its side of the bargain when the business asked for an amendment. Pre existing obligations can be discharged or waived only if legal detriments remain on both sides of the contract. Here, the only

remaining obligation was on the business, which is another reason why they should not be able to amend.

The business may try to argue that the amendment was justified by unforeseen necessity which would otherwise discharge the contract. However, no such necessity is apparent from these facts. Necessity which discharges a contract must be such that the fundamental nature of the contract can no longer be performed and the purpose of the contract has been frustrated. Here, the necessity is merely that the business is losing money. Nothing from these facts suggests that the organ cannot be repaired or that a new organ cannot be installed. A threat of ongoing bankrupt will not be sufficient necessity to discharge the contract. Thus, the conservatory need not pay the \$60,000 required by the business to complete the service.

It could also be argued that the subsequent amendment to the contract was an accord and satisfaction, meaning a separate contract, that is supported by separate consideration, and which suspends performance on a preexisting agreement. Upon completion of the accord,

merchant for purposes of the UCC, i.e. one whose business is in the sale or applies. The business is one that repairs and sells organs, meaning it is a good, even if it isn't all that mobile. Since the organ is a good, the UCC modified without additional consideration from both parties. An organ is a moveable. As with question 1, the issue here is whether a contract can be for purposes of the UCC, which defines goods as basically anything that is 2. The second contract here is a contract for an organ. An organ is a good situation.

for a contract and this is not an accord and satisfaction
detriment that a party must incur to provide consideration
performance is complete. This is not the sort of legal
conservatory's request to hold off on payment until
the accord. The only change in circumstances is the
consideration on the part of the conservatory to support
problem is that, as noted above, we have no separate
both contracts are considered to have been satisfied. The

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End of Answer #2
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trade of the goods in question. The UCC does not follow the pre-existing legal duty standard established in common law. Instead, under the UCC, existing contracts can be modified with only a showing of good faith on both sides. Good faith under the UCC is honesty in fact and adherence to reasonable commercial standards. The standard requires both a subjective analysis of the party's conduct to determine if it is indeed honest and an objective analysis to determine if their conduct follows commercial standards. Here, nothing suggests that the business was not acting in good faith, although the veiled threat of suggesting that refusing to pay the additional money will mean they lose the money already spent isn't really very nice. I'm not sure it rises to the level of bad faith however. In the absence of any evidence showing bad faith, then the subsequent agreement of the parties to modify the contract, as evidenced in the writing subsequently signed, is enforceable and the conservatory will be required to pay the \$40,000 for the new organ.

MEE Question 3

In 1994, a man and a woman were married in State A.

In 1998, their daughter was born in State A.

In 2010, the family moved to State B.

In 2012, the husband and wife divorced in State B. Under the terms of the divorce decree:

- (a) the husband and wife share legal and physical custody of their daughter;
- (b) the husband must pay the wife \$1,000 per month in child support until their daughter reaches age 18;
- (c) the marital residence was awarded to the wife, with the proviso that if it is sold before the daughter reaches age 18, the husband will receive 25% of the net sale proceeds remaining after satisfaction of the mortgage on the residence; and
- (d) the remaining marital assets were divided between the husband and the wife equally.

Six months ago, the husband was offered a job in State A that pays significantly less than his job in State B but provides him with more responsibilities and much better promotion opportunities. The husband accepted the job in State A and moved from State B back to State A.

Since returning to State A, the husband has not paid child support because, due to his lower salary, he has had insufficient funds to meet all his obligations.

One month ago, the wife sold the marital home, netting \$10,000 after paying off the mortgage. She then moved to a smaller residence. The husband believes that he should receive more than 25% of the net sale proceeds given his financial difficulties.

Last week, when the wife brought the daughter to the husband's State A home for a weekend visit, the husband served the wife with a summons in a State A action to modify the support and marital-residence-sale-proceeds provisions of the State B divorce decree. The husband brought the action in the State A court that adjudicates all domestic relations issues.

1. Does the State A court have jurisdiction to modify
- (a) the child support provision of the State B divorce decree? Explain.
 - (b) the marital-residence-sale-proceeds provision of the State B divorce decree? Explain.

2. On the merits, could the husband obtain
- (a) retroactive modification of his child support obligation to the daughter? Explain.
 - (b) prospective modification of his child support obligation to the daughter? Explain.
 - (c) modification of the marital-residence-sale-proceeds provision of the State B divorce decree? Explain.

1b. State A does have jurisdiction to modify the marital residence sale proceeds provision of the state B divorce decree. To modify the divorce decree, a decree from the granting state may be registered in another state and enforced under the uniform interstate family support act UIFSA; also divorce decrees are given full faith and credit under the constitution if they were valid in the original state and the issuing state had

issues.

1a. State A Does not have jurisdiction to modify the child support provision of the state B divorce decree. Under UIFSA and UCCJEA (for child custody), The child's home state has continuing jurisdiction to hear child support disputes. A child's home state is the state where the child has continuously lived the 6 months immediately proceeding the action. The home state has a relationship with the custodial parent and has the most evidence related to the child's needs. Here, the facts make it appear as if the husband had weekend visitation, and thus the child had spent the majority of the time in state and could be said to live in state A continuously. Another state may determine child support issues if the child no longer lives in the state or has no connection with the state, such as no parent with the state or no evidence relating to the child in the state. Here, the child lived in state B and state B has continuing juris to hear the child custody matter and remains the most appropriate court to determine child support

Question 3

=====**Start of Answer #3 (607 words)**=====

3)

jurisdiction. Further, to have jurisdiction as to property, the state would need personal jurisdiction over the parties. the husband could have state B register the divorce decree with A and it could be modified by state A. Both the husband and wife were subject to state A's jurisdiction because the wife was subject to personal service in the state and state A was the husband's domicile. Further, the divorce decree is entitled to full faith and credit because state B had proper jurisdiction over the divorcing parties as both were domiciled there at the time of the divorce.

Z&B. The husband could not have retroactive modification of his child support obligation to his daughter. A child support order is modifiable upon a substantial and material change of circumstances of the child's needs or the paying spouses ability to pay. Additionally, the change in the paying spouse's circumstances must be unanticipated. Further, Child support obligations are due when current and can't be retroactively modified. However, non-payment of child support does not affect visitation rights. Here, the husband is obligated by law to meet all past and unpaid child support obligations. Past and unpaid child support obligations can be enforced by garnishing wages, attaching property, and are punishable by contempt of court.

The court can consider prospectively modifying the husband's support obligation based on his changed job circumstances, but will likely refuse to modify his obligation because the change in circumstances was intentional and voluntary. The husband knew when taking the lower paying job that he would be obligated to pay the ordered sum and the court will order him to pay the sum or he could be subject to contempt or wage garnishment.

2c. The husband will not be able to obtain modification of the marital residence sale proceeds of the state B divorce decree. Property distribution agreements, and orders are final and are not subject to modification, especially when they are fair, reasonable, and voluntarily consented to. Despite the husband's unfavorable financial status, he voluntarily entered into the property settlement agreement, and thus is bound by state B's decree.

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End of Answer #3
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MEE Question 4

The United States Forest Service (USFS) manages public lands in national forests, including the Scenic National Forest. Without conducting an environmental evaluation or preparing an environmental impact statement, the USFS approved a development project in the Scenic National Forest that required the clearing of 5,000 acres of old-growth forest. The trees in the forest are hundreds of years old, and the forest is home to a higher concentration of wildlife than can be found anywhere else in the western United States.

The USFS solicited bids from logging companies to harvest the trees on the 5,000 acres of forest targeted for clearing, and it ultimately awarded the logging contract to the company that had submitted the highest bid for the trees. However, the USFS has not yet issued the company a logging permit. Once it does so, the company intends to begin cutting down trees immediately.

A nonprofit organization whose mission is the preservation of natural resources has filed suit in federal district court against the USFS. The nonprofit alleges that the USFS violated the National Environmental Policy Act (NEPA) by failing to prepare an environmental impact statement for the proposed logging project. Among other remedies, the nonprofit seeks a permanent injunction barring the USFS from issuing a logging permit to the logging company until an adequate environmental impact statement is completed. The nonprofit believes that the logging project would destroy important wildlife habitat and thereby cause serious harm to wildlife in the Scenic National Forest, including some endangered species.

Assume that federal subject-matter jurisdiction is available, that the nonprofit has standing to bring this action, and that venue is proper.

1. If the logging company seeks to join the litigation as a party, must the federal district court allow it to do so as a matter of right? Explain.

2. What types of relief could the nonprofit seek to stop the USFS from issuing a logging permit during the pendency of the action, what must the nonprofit demonstrate to obtain that relief, and is the federal district court likely to grant that relief? Explain.

4) Please type your answer to MEE 4 below

A

A

When finished with this question, click A to advance to the next question.
(Essay)

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Start of Answer #4 (1110 words) =====

1. Yes, if the logging company seeks to join the litigation as a party, the federal district court must allow it to intervene as a matter of right. The issue is whether this act would qualify as a permissive intervention or an intervention as a matter of right.

A federal court can permit a party to intervene in an action if the party has an interest in the litigation and wants to be a party to the litigation. Courts often permit interested parties to join to promote judicial economy and prevent a person or entity from being subjected to multiple lawsuits regarding the same issue. However, in these cases the court can decide to allow the intervention or deny it.

intervention as of right is different. A party has the right to intervene when his interest in the litigation is so strong that his rights are going to be impacted by the outcome of the litigation, no other party to the lawsuit is protecting his interest, and the result of the lawsuit will decide his fate with regard to this interest. The court cannot deny such a

As such, the logging company should be permitted to intervene as a matter of right because of its extreme financial stake in the litigation and the fact that no other party is

while waiting for the permit issuance. The logging company will be forced to seek logging contracts elsewhere, and lose the time and money it spent preparing its bid and preparing for the clearing of the forest. Additionally, if the non-profit succeeds in obtaining a permanent injunction, the logging company will have no way to protect its financial venture at this point. It will be too late. Additionally, the non-profit succeeds in obtaining a permanent injunction, the logging project to go through at this point, but their like-minded view is for different reasons.

company. Both the USFS and the logging company may both want this development consider the interest of the national lands, not the financial stake of this logging company; however, this argument is not persuasive. The USFS has the obligation to The non-profit will likely argue that the USFS is looking out for the rights of the logging public lands, and approved a development project in this area.

financial stake in the venture as does the logging company. It simply seeks to manage needs of the logging company. Specifically, the USFS does not have the same company in this litigation. Additionally, no other party is looking out for the rights and fulfill its contract with USFS. Thus, extreme financial rights are at stake for the logging Here, if the permanent injunction is awarded, the logging company will not be able to

party the right to join.

looking out for its interests.

2. The non-profit can seek a Temporary Restraining Order ("TRO") and a Preliminary Restraining Order ("PRO"), the court is likely to grant both orders due to the finality of the logging activity and the quickness at which tress can be cut down.

A TRO is a restraining order that lasts fourteen days after its issuance, until the parties have time to have a hearing before the court on the issuance of a preliminary restraining order. The temporary restraining, if issued, would keep the USFS from acting within those 14 days. To receive this relief, the non-profit must demonstrate there is no time to notify the other party and have a hearing; the interest at stake is great and irreversible; and will cause great, irreparable harm if permitted.

The non-profit organization will likely be able to demonstrate these facts to the court. Specifically, the USFS could issue the license at any moment, and the logging company could begin cutting down trees. As such, there is no time to notify the USFS and schedule a hearing. Additionally, logging companies can cut down trees quickly, and this logging company has stated that it will begin "immediately" after receiving the license. Once the trees have been cut, there is no going back. The trees are hundreds of years old, and replacing new ones will take hundreds of years. Finally, not only are the trees at stake, endangered species live in these trees. If their habitats are destroyed, the harm could be great and irreparable.

merits.

The federal district court would be likely to grant non-profits PPO for several reasons. First, the burden on the USFS is outweighed by the harm to the non-profit if the injunction is not issued. Specifically, if the license is issued during the pendency of the trial and all the trees are cut down, it will be too late. Non-profit will no longer be able to protect its mission in preserving the natural resources of this region. Second, the likely has an interest in seeing this national forest preserved in its natural state. Very few places still exist where trees hundreds of years old house endangered species, and much of the public would likely want it to be preserved. However, without knowing the nature of the development on cannot say for sure what the public would desire.

Because the TRO only lasts 14 days, the harm to the USFS will not be too great. It has not yet issued the license, so it is obviously not in too big of a hurry. The USFS will be able to plead its case after the 14 days at a PPO hearing.

In addition to the TRO, the non-profit could also seek a PPO. A PPO is restraining order keeps a party from acting during the pendency of a suit, and will either cease to exist at the end of the litigation or become a permanent injunction. A PPO is issued after a hearing with the parties, and the court weighs the following facts: (1) the burden on the injured party if the injunction is issued versus the harm on the requesting party if the PPO is denied; (2) the interests of the public; (3) the irreparable nature of the possible harm; and (4) the likelihood the requesting party has in succeeding on the merits.

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===== End of Answer #4 =====

likely to side with the non-profit organization.
preservation of the national forests is an important interest to protect, and the court is
impact statement, the court will not look favorably on this failure. Additionally,
supposed to conduct an environmental evaluation and prepare an environmental
Finally, the non-profit is likely to succeed on its merits. If in fact the USFS was
endangered species.

have been cut down. Additionally, you cannot just go create new habitats for
irreparable. One cannot just go out and plant new hundred year old trees once they
Third, the harm the non-profit could suffer if the PRO is not granted would be

MBE Question 5

A prison inmate has filed a civil rights lawsuit against a guard at the prison, alleging that the guard violated the inmate's constitutional rights during an altercation. The inmate and the guard are the only witnesses to this altercation. They have provided contradictory reports about what occurred.

The trial will be before a jury. The inmate plans to testify at trial. The guard's counsel has moved for leave to impeach the inmate with the following:

- (a) Twelve years ago, the inmate was convicted of felony distribution of marijuana. He served a three-year prison sentence, which began immediately after he was convicted. He served his full sentence and was released from prison nine years ago.
- (b) Eight years ago, the inmate pleaded guilty to perjury, a misdemeanor punishable by up to one year in jail. He paid a \$5,000 fine.
- (c) Seven years ago, the inmate was convicted of felony sexual assault of a child and is currently serving a 10-year prison sentence for the crime. The victim was the inmate's daughter, who was 13 years old at the time of the assault.

The inmate's counsel objects to the admission of any evidence related to these three convictions and to any cross-examination based on this evidence.

The guard also plans to testify at trial. The inmate's counsel has moved for leave to impeach the guard with the following:

Last year, the guard applied for a promotion to prison supervisor. The guard submitted a résumé to the state that indicated that he had been awarded a B.A. in Criminal Justice from a local college. An official copy of the guard's academic transcript from that college indicates that the guard dropped out after his first semester and did not receive a degree.

The guard's counsel objects to the admission of this evidence and to any cross-examination based on this evidence.

The transcript and the résumé have been properly authenticated. The trial will be held in a jurisdiction that has adopted all of the Federal Rules of Evidence.

1. What evidence, if any, proffered by the guard to impeach the inmate should be admitted? Explain.

2. What evidence, if any, proffered by the inmate to impeach the guard should be admitted? Explain.

1. Evidence proffered by the guard

The inmate's conviction for felony distribution of marijuana is admissible if the judge determines that its probative value outweighs the prejudice to the inmate. In a criminal case, the prosecution may impeach the defendant-witness with a felony conviction, not involving dishonesty, only if the trial judge determines its probative value outweighs the danger of unfair prejudice. In addition, the conviction must not be too remote in time. Generally, a conviction is too remote if more than ten years has elapsed since either the conviction was entered or the convict was released from prison.

Here, the inmate was convicted of felony distribution of marijuana, which is not a crime involving dishonesty. Although the conviction was entered twelve years ago, the inmate was released from prison only nine years ago. Measured from the date of release, the conviction is not too remote. Hence, the conviction is admissible if the judge determines that its probative value outweighs the prejudice to the defendant. This determination could go either way; however, the standard favors admission, given that the evidence need only be slightly more

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Start of Answer #5 (671 words) =====

(Essay)
When finished with this question, click A to advance to the next question.

A

A

5) Please type your answer to MEE 5 below

probative than prejudicial to be admissible. And because the inmate is bringing a claim as an inmate, it probably will not prejudice him in the eyes of the jury. The inmate's conviction for perjury should be admitted. Under the Federal Rules of Evidence, a witness may be impeached by a prior conviction. A witness may be impeached by a crime involving dishonesty, regardless of whether it was a felony or misdemeanor conviction. The trial judge generally has no discretion whether to admit this type of impeachment evidence. Here, the inmate pleaded guilty to a misdemeanor charge of perjury. Perjury is the taking of a false oath (lying) about a material matter while under a legal duty to tell the truth (i.e. in a court proceeding). Perjury is a crime that is inherently dishonest--in fact that is the essence of the crime. It is irrelevant that crime was only a misdemeanor under the Federal Rule. As such, the inmate's conviction for perjury should be admitted. The inmate's conviction of felony sexual assault should probably be excluded. Again, a felony conviction offered against a criminal defendant for impeachment purposes is admissible if the judge determines that its probative value outweighs the prejudice to the inmate and it is not too remote in time. Here, the conviction is not too remote--it was entered seven years ago. However, the prejudice to the defendant probably outweighs its probative value. A sexual assault is inherently personal and likely to evoke an emotional response from the jury. This is especially true given that the victim was the defendant's daughter. The probative value of this crime in light of the lawsuit (a civil rights action) is

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End of Answer #5

examination.

that the guard did in fact lie. He is limited to what he can elicit on cross-

witnesses, such as the registrar of the college or the guard's supervisor, to prove

offer the resume or the transcript into evidence. And, he may not call other

local college on your resume but never in fact completed college?). He may not

guard about on cross-examination (i.e. "Isn't it true that you listed a BA from the

for the inmate's attorney on cross-examination. However, he can only ask the

can be construed as a prior bad act. Thus, it is a permissible line of questioning

Here, the guard's act of lying on his resume as to his BA in Criminal Justice

is permissible for this type of impeachment.

may not reference any of the consequences of the bad act. No extrinsic evidence

evidence can only be elicited on cross-examination and the impeaching attorney

Evidence, a witness can be impeached by a prior bad act. However, such

transcript but it should not be admitted into evidence. Under the Federal Rules of

The inmate's attorney should be allowed to question the guard as to his

2. Evidence proffered by the inmate

likely little. Thus, the conviction should probably be excluded by the judge.

MEE Question 6

Mega Inc. is a publicly traded corporation incorporated in a state whose corporate statute is modeled on the Model Business Corporation Act (MBCA). Mega's articles of incorporation do not address the election of directors or amendment of the bylaws by shareholders. Well within the deadline for the submission of shareholder proposals for the upcoming annual shareholders' meeting, an investor, who was a large and long-standing shareholder of Mega, submitted a proposed amendment to Mega's bylaws. The proposal, which the investor asked to be included in the corporation's proxy materials and voted on at the upcoming shareholders' meeting, read as follows:

Section 20: The Corporation shall include in its proxy materials (including the proxy ballot) for a shareholders' meeting at which directors are to be elected the name of a person nominated for election to the Board of Directors by a shareholder or group of shareholders that beneficially have owned 3% or more of the Corporation's outstanding common stock for at least one year.

This Section shall supersede any inconsistent provision in these Bylaws and may not be amended or repealed by the Board of Directors without shareholder approval.

Mega's management decided to exclude the investor's proposal from the corporation's proxy materials and explained its reasons in a letter to the investor:

The investor's proposed bylaw provision would be inconsistent with relevant state law because the Board of Directors has the authority to manage the business and affairs of the Corporation. Generally, shareholders lack the authority to interfere with corporate management by seeking to create a method for the nomination and election of directors inconsistent with the method chosen by the Board of Directors.

Furthermore, at its most recent meeting, the Board of Directors unanimously approved an amendment to the Corporation's bylaws that provides for proxy access for director nominations by a shareholder or a group of shareholders holding at least 10% of the Corporation's voting shares for at least three years. This procedure takes precedence over any nomination methods that might be sought or approved by shareholders.

The investor is considering bringing a suit challenging management's refusal to include the investor's proposed bylaw provision and challenging the board's amendment of the bylaws at its recent meeting.

1. Is the investor's proposed bylaw provision inconsistent with state law? Explain.

2. If the investor's proposed bylaw provision were approved by the shareholders, would the bylaw amendment previously approved by the board take precedence over the investor's proposed bylaw provision? Explain.

3. Must the investor make a demand on Mega's board of directors before bringing suit? Explain.

6) Please type your answer to MEE 6 below
(Essay)

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Start of Answer #6 (563 words) =====

(1) The investor's proposed by-laws are not inconsistent with state law. Because the state has adopted the MBCA, the MBCA provides the governing law. At issue is whether a shareholder's proposed by-laws can provide for the nomination and election of directors when the corporation's articles of incorporation are silent. Generally, a corporation's articles of incorporation provide for matters governing the nomination and election of directors. However, if the articles of incorporation contain nothing about this area, a corporation may enact by-laws governing the area. Moreover, if there are no by-laws providing otherwise, shareholders are free to amend by-laws providing for the nomination and election of directors. This is reflective of the basic structure of corporate law: shareholders elect directors

Here, Mega Inc's articles of incorporation do not provide for the nomination and election of directors. Moreover, none of Mega Inc's by-laws state that shareholders cannot amend by-laws relating to the nomination and election of directors. Although the bylaw passed by the Board of Directors conflicts with the investor's proposed by-laws, this does not mean that the investor's proposal violates state law. Rather, the Board's bylaws are subject to amendment by shareholders. Thus, the investor's proposed by-laws are not inconsistent with state law.

(2) The investor's proposed bylaw provision would take precedence over the Board's

(3) The investor does not have to make a demand on Mega's board before bringing suit. At issue is whether a demand is required when a shareholder is suing a corporation because the corporation has interfered with the shareholder's rights in some manner. A shareholder is directly harmed when his or her power to vote or enact bylaws is directly harmed by the corporation. In a direct suit, the shareholder need not notify the corporation's directors before bringing suit. In contrast, a shareholder must notify the corporation's directors before bringing a derivative action. A derivative action is present when a shareholder sues a corporation's directors for breaching their duties of loyalty and care to the corporation. In such an action, the shareholder's rights are not harmed; they are merely unsatisfied with the manner in which the corporation is being

precedence.

shareholders are charged with this matter. Thus, the investor's proposed bylaws take are to be nominated and elected. As such, the default rule governs, and the the Board's because Mega Inc's articles do not specify the manner in which directors In this instance, the investor's proposed bylaw provision takes precedence over

the articles on this matter means that the MBCA's default rules govern.

corporation's articles of incorporation may provide for a different result, the silence of with electing directors and voting on fundamental corporate policies. Although a with setting corporate policy and hiring officers. In contrast, shareholders are charged nomination and election of the corporation's directors. Generally, directors are charged prior bylaw amendment. At issue is whether the Board of Directors can provide for the

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End of Answer #6 =====

Here, the investor's suit against the corporation is a direct action. His rights to amend bylaws have been harmed directly with the corporation. Nothing in the fact pattern indicates that the investor is unsatisfied with the manner in which the corporation has been run by the directors; he merely wants to have his right to amend the bylaws enforced. Thus, the investor has a direct suit against the corporation, and does not have to make a demand on the board before bringing suit.

run.

MULTISTATE ESSAY EXAMINATION DIRECTIONS

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.

You may answer the questions in any order you wish. Do not answer more than one question in each answer booklet. If you make a mistake or wish to revise your answer, simply draw a line through the material you wish to delete.

If you are using a laptop computer to answer the questions, your jurisdiction will provide you with specific instructions.

Read each fact situation very carefully and do not assume facts that are not given in the question. Do not assume that each question covers only a single area of the law; some of the questions may cover more than one of the areas you are responsible for knowing.

Demonstrate your ability to reason and analyze. Each of your answers should show an understanding of the facts, a recognition of the issues included, a knowledge of the applicable principles of law, and the reasoning by which you arrive at your conclusions. The value of your answer depends not as much upon your conclusions as upon the presence and quality of the elements mentioned above.

Clarity and conciseness are important, but make your answer complete. Do not volunteer irrelevant or immaterial information.

Answer all questions according to generally accepted fundamental legal principles unless your testing jurisdiction has instructed you to answer according to local case or statutory law.

NOTE: Examinees testing in UBE jurisdictions must answer according to generally accepted fundamental legal principles rather than local case or statutory law.