

## July 2014 Bar Examination

### QUESTION 1

When her husband died, Mary Mullins inherited three very large tracts of farm land known as Black Acre, White Acre and Green Acre — all in her home state of Georgia. Following the probate of Mr. Mullins' estate, Mary formed a C corporation, known as Black Acre, Inc., and transferred all of her interest in Black Acre to that corporation. She transferred all of her interest in White Acre to White Acre, LLC, a newly formed Georgia limited liability company. In 2012, upon advice of her financial planners, Mary gifted 10% of her stock in Black Acre, Inc., to each of her four children, leaving her with the remaining 60%. She likewise gifted 17.5% of her units of ownership in White Acre, LLC, to each of her children, leaving her with a 30% interest. Having never formed a corporation or other legal entity for Green Acre, she simply transferred by a recorded deed of gift a 20% undivided interest in her Green Acre farm to each of the four children. She thereby became a tenant-in-common with them, having held on to the remaining 20% interest.

Mary served as President of the corporation and as sole manager of the LLC. Her four children and she were elected the directors of the corporation. Neither the LLC's Articles of Organization nor its Operating Agreement contains provisions regarding either the sale of real estate or the transfer of a deceased member's units of ownership. Georgia statutory law therefore governs these issues.

Mary died two months ago. Her Will has been probated in the Probate Court of Busbee County, Georgia. Pursuant to the terms of her Will, Mary's daughter Dora has been appointed Executor of the estate. At a meeting attended by all four children after their mother's death, Dora was elected President of the corporation and as Manager of the LLC. All four children were elected as the sole directors of the corporation.

Mary's Will grants to Dora, as Executor, the power to sell any assets of the estate, including stock, LLC units and real property. The Will makes no specific bequests but directs that the residue of Mary's estate be divided equally among her four children, all of whom have survived her. Among Mary's assets are her retained stock in Black Acre, Inc., her retained units of ownership in White Acre, LLC, and her undivided interest in Green Acre. Black Acre and White Acre represent substantially all of the assets of the corporation and the LLC, respectively. A local farmer has stepped forward to offer a very reasonable price to purchase all three farms.

Dora has come to you for legal advice. Two of her brothers and she wish to sell the three farms and distribute the cash proceeds equally among the four children. Her third brother, Bill, who has been farming all three tracts, does not want any of the property sold, wants the corporation and LLC dissolved, and is insisting that the estate's ownership share of the three farm tracts be distributed equally and in kind

to all four children as tenants-in-common. Bill says he will not vote his stock or his LLC units to sell any real property interests in Black Acre or White Acre, and he will not sign a deed transferring any of his or his mother's farm interests in Green Acre to anyone outside the family. Dora has not yet distributed any of her mother's estate assets to any of the four children. Please respond to the following questions from Dora:

**Questions:**

- 1. Can brother Bill force a liquidation of the corporation known as Black Acre, Inc.? Please explain your answer.**
  
- 2. (a) Who has the authority to contract to sell the farm known as Black Acre?**  
  
**(b) What steps would you propose be taken to consummate the sale of the farm known as Black Acre? What percentage of support would you advise Dora she is likely to receive from the Board of Directors and from the shareholders of the Corporation for this sale?**  
  
**(c) What would happen to the net proceeds from the sale of the farm known as Black Acre?**
  
- 3. (a) Who has the authority to sell the farm known as White Acre?**  
  
**(b) What steps would you advise be taken in order to sell the farm known as White Acre?**
  
- 4. (a) Who has the authority to sell the farm known as Green Acre?**  
  
**(b) What steps would you suggest be taken to sell the Estate's interest in the farm known as Green Acre to the proposed purchaser?**

## QUESTION 2

Barrington County is a small rural county in Southeast Georgia. It has an elected school board which has five members. In response to media coverage of "political correctness" in public schools, three members elected to the Barrington County School Board last November ran on a "return to traditional values" platform. Also, in recent years there has been an escalation of student disciplinary problems in Barrington County schools.

Since the election, the new school board chairperson has proposed several multifaceted policies to address the "traditional values" agenda. The legality and constitutionality of some of the proposed policy changes have been the subject of concern by the Superintendent of Barrington County Schools. These proposed policy changes are as follows:

1. At the last board meeting, the Chair suggested that in order to set the proper tone for the "return to traditional values," each school board meeting begin with a nondenominational prayer. She said she recently spent a day at the Georgia House of Representatives and they began their session with a prayer offered by visiting clergy. She said, "If it is okay for them to do this, then it has to be okay for us to do it too."
2. Before the election, the Chair learned that a state law authorizing the reading of a state-composed nondenominational prayer at the beginning of each school day had recently been ruled unconstitutional. In response to that ruling, the Chair suggested that, at the first class of each day in all public schools of Barrington County, the teacher-in-charge of the room where each class is held announce that a period of silence, not to exceed two minutes in duration, be observed for meditation or voluntary prayer.
3. The third suggested policy change by the Chair is that each elementary school in Barrington County provide instruction in moral values in an effort to reverse the trend of disciplinary problems in all Barrington County schools. The instruction in moral values is to include, but is not limited to, the teachings of famous moral leaders Buddha, Confucius, Gandhi, Jesus, Nelson Mandela, Martin Luther King, Jr., Mohammed, and Moses.
4. In recent years, there has been some media attention in Barrington County regarding the previous school board's policy which prohibited the recognition of the December religious holidays in Barrington County schools. The fourth policy change suggested by the Chair is that teachers and administrators be allowed and encouraged to direct the placement of scenes or symbols in common areas of their schools in recognition of these December holidays, but said displays are to include

more than one religion, or one religion and at least one secular scene or symbol. Permissible scenes or symbols may include, but are not limited to, a menorah, or a Christmas image, such as a nativity scene (crèche), or Christmas tree.

**Question:**

**Assume you are the attorney for the Barrington County School Board and that the Barrington County School Superintendent requests your advice as to the legality and constitutionality of each of these four proposed policy changes and the likely outcome should the proposals be adopted and are later challenged in the courts. Please explain your answers.**

### QUESTION 3

Juliet and Romeo first met in 1985 during an extended trip to South America. Each was "recovering" from a hasty and ill-advised marriage in their early 20's that had ended for each in divorce. After six months of intermittent social contact during that year, they returned to Georgia in 1986 and rented a home together in Eastman, Georgia. Both are agricultural scientists, and both found work at a large pecan grower in Eastman. From 1986 through 1988 they both worked and jointly paid the expenses of their home from their separate earnings as deposited into their separate checking accounts. When Juliet became pregnant, she and Romeo discussed marriage, but took no action. The twins, Son and Daughter, were born on February 14, 1989.

In March 1989, Juliet and Romeo purchased a home in Dekalb County, Georgia, in their joint separate family names. A few weeks later, they joined the local Baptist Church and signed the joint pledge card as "Husband" and "Wife". In April 1989, Juliet took a job as a researcher with the Communicable Disease Center ("CDC") near the Emory Campus, and Romeo undertook the domestic duties of a stay-at-home father. As part of the CDC security clearance process, Juliet disclosed Romeo as her "husband" and Son and Daughter as her "children". Although Romeo and Juliet had previously filed separate Federal and Georgia personal income tax returns for 1986 through 1988, on April 15, 1990, they filed a joint Federal Form 1040 and joint Georgia Form 500 as husband and wife for tax year 1989, listing Son and Daughter as their dependents. Similar joint tax returns were filed each year thereafter. In 1989, Juliet and Romeo established a joint checking account as "Mr. and Mrs." using Romeo's family name as the family name on the account. All expenses of the home and family were paid thereafter from that account. Juliet deposited her paycheck into the joint account and Romeo deposited trust distributions made to him into the joint account. Romeo's bank deposits came from discretionary distributions made to him by the Corporate Trustee of the Romeo Irrevocable Trust ("Trust"). The Trust had been previously established by Romeo's father for "the support, maintenance, and education of" Romeo and his three adult siblings and their numerous children. In the Fall of 2007, Son and Daughter departed for the University.

During the Summer of 2008, Juliet became pregnant. Romeo suspected that he was not the father because he had previously undergone a vasectomy. After Romeo confronted Juliet, she confessed that she had had a sexual relationship with another man at work. Juliet and Romeo jointly attended marriage counseling. The parties reconciled their differences, and Juliet agreed to retire early and devote all of her considerable energies to the family. Thereafter, Youngest was born. Romeo signed her birth certificate as her father under the certification that ". . . the personal information provided on this certificate is correct to the best of my knowledge and belief." Youngest took Romeo's family name as her family name on her birth certificate.

Juliet came to see you yesterday to consult. Juliet accuses Romeo of adultery and that his adultery is the reason she has separated from him, having moved out of the family residence one week ago. Juliet acknowledges that unknown to Romeo she placed a passive video recording device in their Decatur home in 2013. One of these videos, as recorded on the Sunday night before she moved out of the home, preserves high definition video of Romeo engaged in sexual intercourse with Youngest's 25-year-old baby sitter ("Sitter"). Sitter had been hired to care for Youngest while Juliet and Romeo were out of town at separate locations visiting their respective extended families. Romeo returned early from his visit. According to Juliet, the video camera had been installed by her to monitor Youngest's baby sitters, especially when she was out of town and Youngest was left with an overnight baby sitter. The camera is remotely accessed through Juliet's hand-held device. She remotely accessed the camera early that Sunday evening. She saw what she saw and returned home Monday morning. She moved Youngest and some of their essentials to a local hotel. She called your office the next day for an appointment.

Juliet disclosed the video camera to Romeo for the first time in a telephone call to him the afternoon after she moved out. He demanded that she move back home with Youngest and destroy the video recording. He threatened that if she did not return with Youngest and destroy the recording, he would take the position that they were never married and that Juliet is a criminal and should be prosecuted for illegal surveillance of him. He told her that he could never be required to pay child support or alimony because he has not had any earned income since he left his job in Eastman in 1989.

Juliet digitally recorded her telephone conversation with Romeo. When he asked her if she were recording the call, she told him "no".

You have located the following:

**OCGA § 19-3-1.1:** No common-law marriage shall be entered into in this state on or after January 1, 1997. Otherwise valid common-law marriages entered into prior to January 1, 1997, shall not be affected by this Code section and shall continue to be recognized in this state.

**Questions:**

- 1. May Juliet or Romeo seek a divorce? Please explain your answer.**
- 2. May Juliet or Romeo seek and obtain alimony or equitable division of marital property? Please explain your answer.**

- 3. Are trust distributions to Romeo relevant to a determination of alimony or child support? Please explain your answer.**
  
- 4. What evidentiary use, if any, may be made by Juliet in the divorce action of the audio and video recordings? Please explain your answer.**

## QUESTION 4

Plaintiff Bill Jones was recently assigned by his company to make monthly exterminating visits to the residence of Defendant Arthur Smith. On his July visit to the Smith residence, his fourth monthly visit pursuant to a contract between Defendant Smith and Plaintiff Jones' employer, he was met at the front door by Defendant Smith and his pit bull named "Budro," who was barking, growling, snapping, and lunging at the door, as on Plaintiff's previous visits. As has become his custom, Plaintiff refused to enter the premises until Defendant had secured Budro in the gated pen in the backyard.

After Defendant put Budro in the pen and closed the latch on the gate, he secured it with a stick that he found on the ground nearby and returned to the house. Plaintiff treated the interior of the house, and then went out the back door to treat the exterior foundation of the house. As Plaintiff exited the back door, Budro began barking, snarling, snapping, and lunging at the fence and gate, just as he had at the front door. Angered by the dog, Plaintiff squirted him with bug spray as he walked by the pen. Now in a frenzy, Budro hit the fence and then the gate with even greater force, and broke the stick that Defendant used to secure the gate. This allowed the gate to open and Budro immediately chased down and attacked Plaintiff, causing severe biting and tearing injuries to his legs and arms before Defendant could intervene. Budro was pulled off of Plaintiff and returned to the pen, where the gate was secured by a padlock.

Afterwards, Defendant assured Plaintiff that, despite his aggressive behavior, Budro had never before bitten anyone. Plaintiff has no evidence to the contrary. Additionally, there was no leash law in effect in Defendant's city or county at the time of this incident.

Plaintiff comes to see you seeking representation in a suit for damages against Defendant for the injuries caused by Budro.

### Questions:

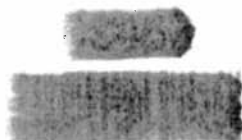
- 1. What are the various theories of liability, giving the elements of each, which might be asserted on Plaintiff's behalf in a Complaint for Damages regarding his personal injuries?**
- 2. What are the defenses that might be asserted in response to each such theory of liability?**
- 3. If you assume that a "leash law" was in effect at the time of Plaintiff's injuries, how would your analysis of each theory of liability in response to number (1) above be different, if it is different?**



Applicant Number

MPT-1

714



# THE MPT<sup>®</sup>

MULTISTATE PERFORMANCE TEST

## *In re Kay Struckman*

**Read the directions on the back cover.  
Do not break the seal until you are told to do so.**



NATIONAL CONFERENCE OF BAR EXAMINERS  
912 S. BEDFORD ST., MADISON, WI 53703  
608-280-8550

[WWW.NCBE.ORG](http://WWW.NCBE.ORG)

**In re Kay Struckman**

**FILE**

Memorandum from Steve Ramirez ..... 1

Letter from Kay Struckman..... 2

**LIBRARY**

Franklin Rule of Professional Conduct 1.8 ..... 5

Columbia State Bar Ethics Opinion 2011-91 ..... 6

**Lawrence v. Walker**, Franklin Court of Appeal (2006)..... 8

**Johnson v. LM Corporation**, Franklin Court of Appeal (2004)..... 11

**Sloane v. Davis**, Olympia Supreme Court (2009) ..... 14

**FILE**

**RAMIREZ & JAY LLP**

Attorneys at Law  
610 E. Broadway  
Windsor, Franklin 33073

**MEMORANDUM**

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

I have been retained by Kay Struckman, a local attorney. As you will see from her letter, Ms. Struckman wishes to modify her current retainer agreement to require arbitration of fee disputes. She wants to be sure that the modification of her retainer agreements with existing clients is ethical and that the arbitration provision would be legally enforceable.

I have attached some materials that bear on Ms. Struckman's question, including a judicial decision and a formal ethics opinion, both from outside of Franklin, that deal with similar issues. Franklin, Columbia, and Olympia have all adopted identical versions of Rule 1.8 of the Model Rules of Professional Conduct of the American Bar Association. There is no Franklin ethics opinion that has addressed the specific issues raised by Ms. Struckman, but there are two Franklin Court of Appeal cases that may be relevant.

I am scheduled to meet with Ms. Struckman this week to advise her on the goals set forth in her letter. To help me prepare for the meeting, please draft a memorandum to me responding to her request for advice as communicated in her letter. Your memorandum should include support for your conclusions with citation to legal authority, taking care to distinguish contrary authority, where appropriate.

I think it is possible—from both an ethics and a legal enforceability perspective—to modify her retainer agreements to require arbitration of fee disputes, but only if certain conditions are met. Be sure to set forth those conditions in your memorandum.

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

July 22, 2014

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

Re: Modification of Retainer Agreements

Dear Steve:

I am pleased that you found time to talk with me earlier today and even more pleased that you have agreed to advise me in this matter. I write to confirm the scope of advice I seek and confirm what I said during our meeting.

As I told you, the question on which I need legal advice is whether I may ethically modify retainer agreements with existing clients to include a provision requiring binding arbitration to resolve future fee disputes, and, if so, what is necessary to ensure that any resulting modification would be legally enforceable.

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

My current retainer agreement allows annual increases in my fees. I would like to modify my retainer agreements with existing clients to include a provision requiring binding arbitration of

future fee disputes in exchange for forgoing annual increases in my fees for two years. The provision I would like to include is as follows:

Any claim or controversy arising out of, or relating to, Lawyer's representation of Client shall be settled by arbitration, and binding judgment on the arbitration award may be entered by any court having jurisdiction thereof.

I request your advice on these particular issues:

First, would it be ethical for me to modify my retainer agreements with existing clients using the above language to cover future fee disputes? Is the language I've proposed above sufficient, and if not, why? What else do I need to add to make the provision comport with my ethical obligations to my clients? What process, if any, must I provide to my clients to modify their retainer agreements? In short, what steps do I need to take to ensure compliance with the Franklin Rules of Professional Conduct?

Second, assuming that it is ethical to modify my retainer agreements, would the language I propose to cover future fee disputes be legally enforceable? If not, what revisions to the language would I need to make? Is there anything else that I would need to do to ensure legal enforceability?

Although I want to do right by my clients, I do not want to impose undue burdens on myself. Fee disputes are not complicated. I would like to see fee disputes resolved quickly and with a minimum of costs to me—and to my clients.

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

Very truly yours,



---

Kay Struckman

# LIBRARY

**FRANKLIN RULE OF PROFESSIONAL CONDUCT 1.8**

**[Franklin Rule 1.8 is identical to Rule 1.8 of the ABA Model Rules of Professional Conduct; however, the Franklin Supreme Court has added its own comments.]**

**Rule 1.8 Conflict of Interest: Current Clients: Specific Rules**

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

...

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement . . . .

\* \* \*

**Comments**

(i) The Franklin Supreme Court has ruled that although modifying a retainer agreement with an existing client amounts to a business transaction within the meaning of Rule 1.8, entering into a retainer agreement with a new client does not. *Rice v. Gravier Co.* (Fr. Sup. Ct. 1992).

\* \* \*



**COLUMBIA STATE BAR ETHICS COMMITTEE**  
**ETHICS OPINION 2011-91**

**Question Presented and Brief Answer**

May a lawyer modify a retainer agreement with an existing client to include a provision requiring binding arbitration of any future malpractice claim?

No. We do not believe that the lawyer can meet the requirements of Rule 1.8 of the Columbia Rules of Professional Conduct in making such a modification.

**Discussion**

Nothing in the Columbia Rules of Professional Conduct prohibits agreements requiring binding arbitration of existing malpractice claims. An agreement to modify a retainer agreement is governed by Rule 1.8 as well as by other principles discussed herein. We have a number of concerns.

First, Rule 1.8 requires that the lawyer inform the client in writing of the essential terms of the agreement. We assume that lawyers will make a sincere effort to explain the arbitration process, but we question whether the client will understand the advantages and disadvantages of arbitration as well as the tactical considerations of arbitration versus litigation. We are most concerned about those small business and individual clients who lack the benefit of in-house counsel or other resources to advise them about arbitration. It is not enough to explain that arbitration differs from litigation. Clients must be told the major implications of arbitration, such as lack of formal discovery and lack of a jury or judge trial. Because the proposed agreement covers *future* malpractice claims, the client is asked to enter into the agreement without consideration of the particular facts and circumstances of a dispute that might arise at some later time.

Second, lawyers are in a fiduciary relationship with their clients. Lawyers bear the burden of demonstrating the reasonableness and good faith of the agreements they enter into with their clients. Should a client challenge the agreement requiring binding arbitration of future malpractice claims, the court will be called upon to scrutinize the agreement carefully. The

standard of good faith and reasonableness implies a heightened obligation of lawyers to be fair and frank in specifying the terms of the attorney-client relationship. Most clients will be less sophisticated than lawyers in understanding how arbitration differs from litigation. It will be very difficult for lawyers to meet their obligations as fiduciaries under these circumstances.

Third, we are concerned that a few lawyers might use mandatory binding arbitration of future malpractice claims to avoid investigations into misconduct. By doing so, a lawyer would in effect deprive the Columbia Supreme Court, and its Disciplinary Commission, of its jurisdiction to investigate and discipline lawyers who engage in misconduct. We cannot condone a tactic that undermines the authority of the Supreme Court to oversee the conduct of lawyers.

Although some courts have approved agreements requiring binding arbitration of future fee disputes, they have imposed certain conditions. A common condition is that the lawyer must urge the client to seek the advice of independent legal counsel concerning the agreement. Such a condition is consistent with our Rule 1.8(a), which requires that the lawyer advise the client to seek the advice of independent legal counsel and give the client a reasonable opportunity to do so. We are not convinced that lawyers can meet this condition with respect to an agreement requiring binding arbitration of future *malpractice* claims. It is unrealistic to expect a client to seek and pay for independent counsel in the midst of the lawyer's representation. Moreover, the client is being told not to trust the client's own lawyer.

Another common condition is that the lawyer must advise the client that certain legal rights, including the right to trial, may be affected. The lawyer must also explain the implications of that forfeiture of the right to a jury trial.

An agreement requiring binding arbitration of malpractice claims may be appropriate once the claim has arisen and the client is represented by new counsel who can adequately inform and advise the client about arbitration. However, we conclude that a lawyer may not modify a retainer agreement with an existing client to require binding arbitration of future malpractice claims.

## Lawrence v. Walker

Franklin Court of Appeal (2006)

Gina Lawrence filed a claim for malpractice against Robert Walker, whom she had retained as her attorney in a divorce matter. Walker responded that the retainer agreement signed by Lawrence at the inception of the representation requires binding arbitration of malpractice claims. The district court denied Walker's motion to compel arbitration, and this interlocutory appeal followed.

Because arbitration is a matter of contract, the threshold issue here is whether attorney and client agreed to mandatory binding arbitration of the malpractice claim. But because clients as a class are particularly dependent on, and vulnerable to, their attorneys and therefore deserve safeguards to protect their interests, an agreement requiring binding arbitration must have been entered into openly and fairly to be legally enforceable. *Cf. Johnson v. LM Corp.* (Fr. Ct. App. 2004) (so holding as to employees vis-à-vis employers).

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

fees and any other aspect of our attorney-client relationship." The agreement does not specify that malpractice claims are one of the matters to be arbitrated.

An agreement requiring binding arbitration effects a waiver of several rights. In rendering an award, arbitrators, unlike judges, are not required to follow the law. Awards based on an erroneous interpretation of the law or evidence cannot be overturned by the courts except in very limited instances. Because of limited judicial review, the choice of arbitrator is critical.

Further, parties may or may not have certain procedural rights in arbitration, such as the right to subpoena witnesses, to cross-examine them, or even to participate in an in-person hearing. Arbitration proceedings are often confidential. There is no reporting system that provides convenient public access to these proceedings. Therefore, it is unlikely that a client could know what to expect from an arbitration.

Because of the implications of an agreement to arbitration, courts enforce an agreement

requiring binding arbitration only where the client has been explicitly made aware of the existence of the arbitration provision and its implications. Absent notification and at least some explanation, the client cannot be said to have exercised a “real choice” in entering into the agreement.

The arbitration provision in the present case was part of a retainer agreement drafted by the attorney and presented to the client for her signature. It was not the product of negotiation.

It is undisputed that the term “malpractice” does not appear in the retainer agreement. The critical sentence reads “disputes regarding legal fees and any other aspect of our attorney-client relationship.” It is more likely that Lawrence, the client, understood only that she was agreeing to mandatory binding arbitration of future fee disputes, not that her agreement also affected malpractice claims.

The language of an agreement should be interpreted most strongly against the party who created the uncertainty. This ambiguity in the language might alone be reason to conclude that Lawrence did not voluntarily agree to arbitrate malpractice claims.

Moreover, where a fiduciary duty exists, as here between an attorney and a client, the attorney bears the burden of proving the good faith of any agreement the attorney enters into with the client. In such a case, the attorney is well advised to draft the agreement clearly.

We do not mean to express an opinion against arbitration of disputes between lawyers and clients. Where parties enter into an agreement openly and with complete information, arbitration represents an appropriate and even desirable approach to resolving such disputes. Arbitration affords both parties a speedier and often less costly method to reach a resolution of a dispute. It employs more flexible rules of evidence and procedure.

Having said this, we repeat that agreements requiring binding arbitration involve a waiver of significant rights, and should be entered into only after full disclosure of their consequences. Moreover, the court must carefully scrutinize agreements between clients and attorneys to determine that their terms are fair and reasonable. In *Johnson v. LM Corp.*, we examined the terms of an arbitration program for employees. We articulated the minimum requirements for

the enforceability of an agreement requiring binding arbitration in a context involving employers and employees and the latter's statutory rights. We believe that the context here, involving attorneys and clients and the former's fiduciary duties, is analogous.

In this case, the attorney has failed in his burden to show that the client knowingly entered into the agreement requiring binding arbitration of malpractice claims. Therefore, we need not consider the protections we discussed in *Johnson*.

Accordingly, we conclude that the client did not enter into an agreement requiring binding arbitration of malpractice claims that was legally enforceable. In light of that holding, we need not address the question of whether the agreement was ethically compliant.

Affirmed.

## Johnson v. LM Corporation

Franklin Court of Appeal (2004)

Claire Johnson and other employees brought an action seeking a declaration that the LM Mandatory Employee Arbitration Program is contrary to public policy and therefore unlawful. The LM program requires company employees to submit employment disputes to binding arbitration, including those claims based on statutes such as the Equal Pay Act and the Human Rights Act. The district court declared the program lawful, and the employees appealed.

By agreeing to mandatory binding arbitration of a statutory claim, the parties do not forgo the substantive rights afforded by the statute. Rather, the parties submit the dispute to an arbitral, rather than a judicial, forum. The employees argue, however, that the arbitration process contains a number of shortcomings that prevent the vindication of their statutory rights.

Our Supreme Court has held that employees as a class are particularly dependent on, and vulnerable to, their employers and therefore deserve safeguards to protect their interests. *Lafayette v. Armstrong* (Fr. Sup. Ct. 1999). On the basis of that holding, the Court

formulated five minimum requirements for a legally enforceable employment agreement requiring binding arbitration of statutory claims. Such an arbitration agreement must (1) provide for a neutral arbitrator, (2) provide for more than minimal discovery, (3) require a written, reasoned decision, (4) provide for all of the types of relief that would otherwise be available in court, and (5) not require employees to pay unreasonable fees or costs as a condition of access to the arbitration forum. *Id.*

Because of the limited review of arbitration decisions, the choice of arbitrator may be crucial. There is variety in how arbitrators are selected and variety in the number of arbitrators used in an arbitration. Regardless of the choices available, what is critical is that every arbitrator be neutral. To ensure neutrality, an arbitrator must disclose any grounds that might exist for a conflict between the arbitrator's interests and parties' interests. According to the LM program, the arbitrators are to be selected from the Franklin Arbitration Association (FAA), a long-standing and well-respected private nonprofit provider of arbitrators. To

maintain its reputation, the FAA requires its arbitrators to disclose any conflicts of interest that could compromise their neutrality. Assuming that the program in place requires that the arbitrators provide information about potential conflicts of interest so that the parties have the information necessary to determine whether to challenge any arbitrator assigned, the LM program passes muster as providing for neutral arbitrators.

The employees claim that the limit on the number of depositions permitted in the LM program, namely three depositions by each party, frustrates their ability to conduct discovery and thus fails to meet *Lafayette's* second requirement that there be more than minimal discovery. While due process may not require the same degree of discovery that our courts permit, due process does require that there be a fair opportunity to be heard. Arguably, some discovery may be necessary if parties are to have a fair hearing. However, in this case, the employees' argument has no merit. Even our state rules of civil procedure limit the number of depositions that may be taken without a showing that additional discovery is needed. Depositions are not the only means of discovery useful to the parties in

preparing for hearings. Often, a simple exchange of documents will assist the parties in trial preparation. We presume, because there is no evidence to the contrary, that an arbitrator would permit additional discovery if a proper showing were made.

The employees argue that the LM program provides no assurance that arbitrators will issue a written decision stating the reasons for their decisions, and no assurance that arbitrators will be aware that they may award all the relief available under the statute. The employees further argue that because review is limited, they will have no means of determining whether the arbitrators followed the law unless they issue written decisions giving reasons for the decision. Our Supreme Court has already ruled on the necessity of a written decision giving reasons for the decision in arbitration proceedings. *Lake v. Whiteside* (Fr. Sup. Ct. 1994). While the procedures in the case at bar do not require a written, reasoned decision, this court must assume that the arbitrators will follow the law and produce such a decision. By reviewing the reasons given for the arbitrators' written decisions, the employees will be able to determine whether the arbitrators considered all the remedies available.

Finally, the employees argue that the LM program violates the requirement that the parties not be required to pay unreasonable fees or costs as a condition of accessing the arbitral forum. They point to provisions in the LM program that each party to the arbitration shall pay a pro rata share of the fees of the arbitrators, together with other costs of the arbitration incurred or approved by the arbitrators.

Unfortunately, in this case, the record is unclear as to what the fees and costs are. The parties are in dispute as to how the arbitration expenses will be divided between the employees and the employer. It is possible that exorbitant fees and costs will frustrate the employees' ability to pursue their statutory claims. If so, the program may be unlawful. Because the record here is unclear, we vacate the judgment of the district court and remand for further proceedings.

Vacated and remanded.



## Sloane v. Davis

Olympia Supreme Court (2009)

Attorney Margit Davis and her client, Liam Sloane, entered into a retainer agreement that provided that the parties would use binding arbitration to resolve any disputes concerning Davis's representation. Sloane later sued Davis for negligence in representing him in a business matter. Davis moved to compel arbitration, which the trial court granted. The court of appeals affirmed.

Sloane concedes that he voluntarily agreed to the arbitration clause in the retainer agreement, concedes that the arbitration process was generally fair, and concedes that if this agreement applied to any issue other than attorney malpractice, it would be legally enforceable. He simply argues that, as a matter of public policy, attorneys should not be permitted to use arbitration to avoid litigation of an attorney malpractice matter.

This court has previously found that attorneys must adhere to certain standards when entering into business transactions with their clients. These standards include ensuring that the terms of the transaction are fair and are fully disclosed in writing and in a manner reasonably understandable to the

client. The attorney must also advise the client in writing of the desirability of seeking independent legal advice about the transaction. The client must then give informed consent in writing. *Olympia Rule of Professional Conduct 1.8*.

Davis more than met her obligations under Rule 1.8. First, the terms of the business transaction, here the arbitration process, were fair. Since Sloane concedes that the arbitration process Davis uses is fair, we need not further consider that issue.

Second, Davis made a full disclosure in writing in a manner that was easily understandable to the client. When Davis met with Sloane, she orally explained the retainer agreement, including the arbitration clause. Davis then mailed a copy of the retainer agreement to Sloane along with a brochure explaining arbitration. The brochure explained that by agreeing to arbitrate, Sloane would waive his right to a jury trial. The brochure explained the types of matters that might be arbitrated, including malpractice claims, and also provided examples of arbitration procedures that

might be different from those Sloane would experience in litigation. It also explained that the arbitrators would be required to disclose any conflicts of interest, follow the law, award appropriate remedies available under the law, and issue a written decision explaining the basis for the decision.

Further, the brochure sent to Sloane explained that Sloane could and should seek the advice of another attorney before signing the retainer agreement. The accompanying letter asked Sloane to sign and return the retainer agreement within one week, if Sloane agreed to it. In fact, Sloane did not seek independent legal advice but signed the retainer agreement and returned it to Davis on the same day he received it.

Sloane's argument that Davis failed to meet her obligations under Rule 1.8 is without merit. Likewise, Sloane's argument that he was unaware of the ramifications of the arbitration process is without merit.

Sloane also argues that, as a matter of public policy, even if the requirements of Rule 1.8 were met and even if the agreement to arbitrate was legally enforceable, attorneys should not be permitted to use arbitration to avoid litigation of a dispute with a client. We disagree.

By agreeing to use arbitration rather than litigation to resolve an attorney malpractice claim, the client does not give up the right to sue. The client simply shifts determination of the dispute from the courtroom to an arbitral forum. In doing so, the client and the attorney often benefit from a process that can be speedier and more cost-effective than litigation. The arbitration process can offer a more informal means of resolution and provides a private forum, often more attractive to client and attorney alike.

Sloane is correct that the attorney cannot prospectively limit liability to the client. But this retainer agreement contains no limit on liability. Rather, where the arbitrator is bound to follow the law and to award remedies, if any, consistent with the law, there does not appear to be any limit.

Sloane also argues that the attorney cannot limit the ability of the Olympia Supreme Court to discipline attorneys who violate the norms of practice. But nothing in this retainer agreement prevents Sloane or anyone from filing a charge with the Board of Attorney Discipline.

Affirmed.

## 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 answering this performance test, you should concentrate on the materials in the File and Library. 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.

Applicant Number



MPT-2

714



# *In re Linda Duram*

**Read the directions on the back cover.  
Do not break the seal until you are told to do so.**



NATIONAL CONFERENCE OF BAR EXAMINERS  
302 S. BEDFORD ST., MADISON, WI 53703  
608-280-8550  
WWW.NCBEX.ORG

© 2014 by the National Conference of Bar Examiners.  
All rights reserved.

**In re Linda Duram**

**FILE**

Memorandum from Henry Fines .....1  
Guide for drafting demand letters .....2  
Email correspondence .....3  
Affidavit of Linda Duram .....5  
Letter from Maria Oliver, M.D. ....7

**LIBRARY**

Excerpts from the Family and Medical Leave Act, 29 U.S.C. § 2601 *et seq.* .....9  
Excerpts from Code of Federal Regulations, Title 29, Labor .....10  
**Shaw v. BG Enterprises**, U.S. Court of Appeals (15th Cir. 2011) .....12  
**Carson v. Houser Manufacturing, Inc.**, U.S. Court of Appeals (15th Cir. 2013) .....15

**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.

### **Affidavit of Linda Duram**

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

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 22<sup>nd</sup> day of July, 2014.

Linda Duram

Linda Duram

Signed before me this 22<sup>nd</sup> 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.

# LIBRARY

**The Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 *et seq.***

**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.).

\* \* \*

**§ 825.302 Employee notice requirements for foreseeable 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 . . . .

**§ 825.303 Employee notice requirements for unforeseeable 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; . . . .

## Shaw v. BG Enterprises

United States Court of Appeals (15th Cir. 2011)

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

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

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.

**Carson v. Houser Manufacturing, Inc.**

United States Court of Appeals (15th Cir. 2013)

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

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.

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

insufficient to meet the standard of one who is *in loco parentis*.

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 answering this performance test, you should concentrate on the materials in the File and Library. 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.