

ACTEC[®]

Engagement Letters

A GUIDE FOR PRACTITIONERS

Second Edition 2007

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ENGAGEMENT LETTERS: A GUIDE FOR PRACTITIONERS

Second Edition 2007

For use with the *ACTEC Commentaries on the
Model Rules of Professional Conduct*, Fourth Edition 2006

*Developed by the
Professional Responsibility Committee of
The American College of Trust and Estate Counsel*

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INTRODUCTION

Purpose of the Engagement Letters and Checklists

In October 1993 the Board of Regents of The American College of Trust and Estate Counsel adopted the *ACTEC Commentaries on the Model Rules of Professional Conduct* (“*ACTEC Commentaries*”), to provide better guidance to estate planners regarding their professional responsibilities. The *ACTEC Commentaries* consists primarily of commentaries that discuss how the most relevant of the ABA’s Model Rules of Professional Conduct apply to trust and estate lawyers. The project was undertaken by ACTEC, in part, because of a concern that the ABA’s Model Rules of Professional Conduct and the Comments to them primarily reflected a perspective based on a litigation or adversarial model that provided insufficient guidance to estate planners regarding their ethical responsibilities.

The *ACTEC Commentaries* continues to be a work in progress—one that is periodically revised to reflect amendments to the Model Rules and the latest ethics cases and opinions. Accordingly, the *ACTEC Commentaries* was revised and updated in March 1995, March 1999, and again in March 2006. Among other things, the Fourth Edition of the *ACTEC Commentaries*, published in March 2006, addresses the important changes to the Model Rules made by the ABA in 2002 and 2003.

From the outset, the *Commentaries* have consistently emphasized that the Model Rules generally permit lawyers and their clients to define the scope and objectives of a legal engagement. Reflecting that emphasis, the *Commentaries* strongly encourage the use of engagement letters to establish the scope and objectives of an engagement, to describe the basis upon which fees will be determined, and to explain how conflicts of interest and issues of confidentiality will be handled. As stated in the ACTEC Commentary on MRPC 1.3, “The risk that a client will misunderstand the scope or duration of a representation can be substantially reduced or eliminated if the lawyer sends the client an engagement letter at the outset of the representation.”

Because of the critical importance of engagement letters, ACTEC—through the work of its Professional Responsibility Committee and with the financial support of the ACTEC Foundation—developed a series of forms of engagement letters, which were contained in *Engagement Letters: A Guide For Practitioners* (“*Engagement Letters*”), published in June 1999. The sample engagement letters that are included in that guide address the ethical issues that may arise as a trust and estate lawyer and a client collaborate in establishing the nature and scope of a representation. The First Edition of *Engagement Letters* also included checklists that could be use with, or independent of, the engagement letter forms. Trust and estate lawyers have responded favorably to *Engagement Letters*, which they have found to be a useful tool and reference work.

With the amendments to the Model Rules made by the ABA in 2002 and 2003 and the publication of the Fourth Edition of the *ACTEC Commentaries*, ACTEC is now publishing the Second Edition of *Engagement Letters*. The Second Edition builds on the initial edition by updating the forms and checklists to address the amended version of the Model Rules, to respond to other changes in the law, and to provide cross references to the latest edition of the *ACTEC Commentaries*. In addition, this Second Edition includes checklists and forms that address a variety of engagement scenarios that were not dealt with in the First Edition and by offer-

ing additional drafting options. The goal of these changes is to assist lawyers in providing ethical services to clients based on a family-oriented practice model, to demonstrate how trust and estate lawyers can use engagement letters to promote competent and ethical representation of their clients, to increase the utility and value of the engagement letters and checklists, and to provide an improved resource for the bench and bar and a better tool for law schools in teaching ethics.

Organization of the Engagement Letters

Following this introduction, there is a general checklist designed to aid the lawyer before preparing the engagement letter in any trust and estate representation. The general checklist includes cross references to the specific checklists and forms that follow.

Following the general checklist, there are eight chapters, each with a basic engagement letter form or specific language to be added to, or used in conjunction with, a basic engagement letter form addressing:

- Chapter 1: Representation of Spouses;
- Chapter 2: Representation of Multiple Generations of the Same Family;
- Chapter 3: Representation of Multiple Parties in a Business Context;
- Chapter 4: Estate Planning Lawyer Serving as a Fiduciary;
- Chapter 5: Representation of Executors and Trustees;
- Chapter 6: Fiduciary Litigation;
- Chapter 7: Dealing with the Potential for Diminished Capacity; and
- Chapter 8: Withdrawing from Representation.

Each chapter begins with an introduction and a cross reference to the *ACTEC Commentaries* applicable to the subject matter of that chapter. These are followed by a supplemental checklist designed to expand the utility of the general checklist with respect to the subject matter of that chapter. The engagement letter form or special language for addition to the engagement letter form then completes the chapter. Within many of the basic forms, there are sections setting forth optional provisions for that form.

Caveat: Limitations Regarding the Use of the Checklists and Forms

The *Engagement Letters* cannot and do not replace a lawyer's own independent judgment. In particular, the *Engagement Letters* are designed to address issues that would affect all lawyers in the United States but without reference to, or consideration of, the specific ethical rules and requirements of any particular jurisdiction. As a result, there may be state-specific rules that affect the use of a particular form and may require a deletion from, modification of, or addition to the basic form.

Moreover, no single form or checklist will cover all situations. Thus, lawyers and others using these materials should consider both the general checklist, the checklist for the basic form, the basic form, and the optional provisions in relationship to the specific services that the client has requested the lawyer to provide. When the client seeks an unusual service, the lawyer may find that the engagement letters and optional provisions do not address that unusual situation. Under such circumstances, the lawyer may need

to draft new or different provisions in the engagement letter in order to provide the requested service competently and ethically.

Finally, each form has an order for presenting issues to the client and a style in making that presentation. In general, the style is legalistic and thorough. In addition, the forms generally are based on an engagement letter from a law firm to a client, as opposed to one from an individual lawyer to a client, and they are also generally based on representing multiple clients. Accordingly, a lawyer using these forms and checklists should consider them a starting point that, based on the lawyer's independent judgment, should be modified as necessary to reflect the lawyer's style, practice, governing laws, and clientele.

User Comments

While the *Engagement Letters* reflect the thoughtful efforts of many Fellows in the College, and in particular the work of the members of the Professional Responsibility Committee, and while ACTEC has sought to make this tool as useful and thorough as possible, the *Engagement Letters*, as stated above, are a work in process. ACTEC would be pleased to receive from the lawyers and others using and studying these forms and checklists any comments regarding the *Engagement Letters*. These comments should be addressed to the Chair of the Professional Responsibility Committee using one of the following methods:

By letter to:
The American College of Trust and Estate Counsel
3415 South Sepulveda Boulevard, Suite 330
Los Angeles, California 90034
Attention: Chair of the Professional Responsibility Committee

By fax to:
(310) 572-7280
Attention: Chair of the Professional Responsibility Committee

By email to:
info@actec.org
Subject line: Attention: Chair of the Professional Responsibility Committee

Thank you in advance for your use of this guide and your contribution to its continuing development.

GENERAL CHECKLIST

1. ISSUES A LAWYER SHOULD CONSIDER BEFORE ACCEPTING THE REPRESENTATION
 - (a) Is there any previous or existing client or advisory relationship between/among the lawyer (or his or her firm) and any of the parties, their spouses, or families?
If so, does the lawyer have any conflict in representing any of the parties?
If the lawyer (or the lawyer's firm) has represented any of the parties, their spouses, or their families before, in what capacity (e.g., individually, as an officer or director of an organization, or as a fiduciary or beneficiary of an estate or trust)?
 - (b) How well does the lawyer know the parties?
 - (c) Are the parties U.S. citizens? Are the parties U.S. residents? What is the domicile of the parties? If any entity is involved, is the entity duly organized and in good standing in all appropriate jurisdictions? In which jurisdiction or jurisdictions will the entity be organized or authorized to do business?
 - (d) Do all parties appear to have adequate capacity to enter into the engagement?
 - (e) What common connections do the parties have with each other (e.g., spouses, parent and child, owners of a family-controlled entity, fiduciaries or beneficiaries of an estate or trust)?
 - (f) What other client, advisory, or referral relationships exist?
 - (g) Who are the other professionals involved (e.g., accountants, appraisers, brokers)?
 - (h) Are the expectations of the parties as to the outcome and timing of the lawyer's work reasonable and obtainable?
 - (i) What are the fee arrangements?
2. DEFINE THE SCOPE OF THE REPRESENTATION.
 - (a) Describe with appropriate specificity the objectives of the representation and the means by which those objectives are to be pursued.
 - (b) Describe the nature and consequences of any limitations on the scope of the representation, and obtain the clients' consent to such limitations.
 - (c) What do the parties expect the "style" of the representation to be (e.g., separate meetings with each party or combined meetings of all interested parties)? Do the parties intend to share spe-

cific materials relating to finances: documents, either existing or to be prepared? Do they intend that information will be transmitted in writing or orally? What about the sharing of disclosures to or from accountants, appraisers, insurance and investment advisors, or other professionals)?

- (d) Describe the extent to which the lawyer may elect or be required to share certain otherwise confidential information in order to comply with applicable standards of practice.
- (e) Describe with appropriate specificity the time frame within which the various phases of the engagement will be completed. Consider mentioning any foreseeable delays or periods during which the lawyer may not be available during the engagement; consider identifying the other attorneys, legal assistants, and support personnel in the lawyer's office who may or should be consulted in the event of the lawyer's absence or unavailability.
- (f) Because of the importance these issues have recently assumed in trust and estate matters, consideration should be given to including or excluding asset protection planning and the effect of the HIPAA regulations in the scope of the engagement.
- (g) Make it clear that absent an updated engagement letter, the lawyer will not be obligated to provide services beyond the scope of the engagement as described in the original letter.
- (h) Describe the extent to which the lawyer will rely upon information furnished by the parties and the extent, if any, to which the lawyer will attempt to verify this information. Describe the circumstances under which the lawyer may be required to verify some or all of the information furnished by the parties in order to comply with the applicable standards of practice (e.g., Circular 230). Describe the effect this investigation may have on the fee and any fee estimate.

3. IDENTIFY THE CLIENT OR CLIENTS.

(See the Supplemental Checklist for each practice scenario.)

4. EXPLAIN THE LAWYER'S DUTY TO AVOID CONFLICTS OF INTEREST AND HOW POTENTIAL OR ACTUAL CONFLICTS OF INTEREST WILL BE RESOLVED.

- (a) Describe the effect and consequences of any simultaneous representation of multiple clients, including the potential conflicts of interest that might arise, how any future conflicts of interest will be resolved, and the possibility of the subsequent withdrawal by the lawyer or a decision of any one or more of the individual clients to seek separate counsel.
- (b) If appropriate, describe the effect on the potential conflicts of interest resulting from any prior representation of one or more of the individual clients.
- (c) Obtain the consent of all clients to any simultaneous representation of multiple clients. Confirm in the engagement letter that the lawyer discussed the implications of joint represen-

tation, and secure the informed consent of all of the clients. Consider who can properly sign for any entity involved and who should perhaps sign, even though they may not have formal roles in the entity.

- (d) If appropriate, describe the possible conflicts of interest resulting from a prior or contemporaneous representation of a competitor of a client's business.
- (e) Consider requesting authorization by all of the clients to the disclosure to all the interested parties of the actions of any one of the clients constituting fraud, a violation of the governing documents of any entity involved, or in contravention of a mutual estate plan.
- (f) If appropriate, describe the possible conflict of interest if the lawyer is to receive an interest in any business as a part of the lawyer's fee.
- (g) Describe the adverse consequences that would result if it becomes necessary for the lawyer to withdraw from the joint representation, including the question as to whether any further representation by the lawyer of any one or more of the clients is appropriate or prohibited if the joint representation fails.
- (h) Identify which, if any, of the multiple clients the lawyer may or will continue to represent in the matter at hand or related matters if the joint representation fails for any reason [e.g., does the lawyer (or the lawyer's firm), on the basis of longstanding relationship with one of the clients, intend to represent that client in the future, even if the lawyer (or the firm) no longer represents another of the clients; or will the lawyer (and the firm) withdraw from representing any of the clients?].
- (i) Describe the possibility of a future prohibition on the lawyer's representation of any of the clients, depending upon the identity of the initial client.
- (j) Describe the opportunity of each of the parties to consult independent counsel before consenting to the joint representation.

5. EXPLAIN THE LAWYER'S DUTY OF CONFIDENTIALITY AND HOW CONFIDENTIAL INFORMATION WILL BE HANDLED.

- (a) Describe the lawyer's duty of confidentiality and how confidential information will be handled among the various individual clients and other constituents of any business entity involved, and obtain the clients' consent to the sharing of information in this manner.
- (b) Describe any implied authorization to disclose information to other professionals and consultants. Explain if separate interviews with multiple clients are to be held or not and that it is to be pursuant to client consent or instructions.

- (c) Describe the advantages and disadvantages of communication by e-mail, cell phone, fax, etc., and obtain the clients' consent to the use of these forms of communication and any limitations on their use.
 - (d) Describe the effect and consequences of any of the joint clients revoking the waiver of confidentiality and prohibiting any further sharing of confidential information.
 - (e) Describe the disadvantages resulting from the lawyer having to withdraw from the representation, or any client's decision to seek separate counsel, as a result of revocation by any of the individual clients of consent to the sharing of confidential information among all the clients.
 - (f) Describe how the diminished capacity or death of any individual client occurring after the representation is begun will affect the disclosure of confidential information.
 - (g) Point out that the duty of confidentiality and any waiver of the duty of confidentiality continue in effect, even after the engagement is terminated.
6. EXPLAIN THE FEE OR THE BASIS FOR THE DETERMINATION OF THE FEE AND THE BILLING ARRANGEMENTS [INCLUDING THE MATERIAL REQUIRED IN RULE 1.5 (b)].
- (a) If a contingent fee is involved, obtain the client's consent in writing.
 - (b) If appropriate, describe how the fee will be shared with other lawyers outside the firm.
 - (c) If appropriate, describe the consequences of the lawyer's fee being paid by someone other than the client and obtain the consent of the client to the arrangement; give assurances that the arrangement will not in any way diminish the lawyer's duty of loyalty to the client, including the sharing of confidential information or the exercise of independent professional judgment by the lawyer on behalf of the client.
 - (d) Describe factors that might cause the fee to be different from any estimate and how and when changes in standard billing rates may affect the fee.
 - (e) Describe the circumstances under which the lawyer may be required to independently verify some or all of the information furnished by the client in order to comply with the applicable standards of practice (e.g., Circular 230). Describe the effect this investigation may have on the fee and any fee estimate.
 - (f) Describe the lawyer's billing and collection policies.
 - (g) Verify the client's billing address and contact information.
 - (h) Describe who is liable for the lawyer's fees and expenses. If the representation involves multiple clients, describe the extent to which each client is or may be liable for the lawyer's fees and expenses and whether the liability of multiple clients is to be individual or joint and several.

- (i) Describe who will be responsible for the lawyer's fees and expenses if the representation is terminated for any reason before the engagement is completed.

7. TERMINATION OF THE REPRESENTATION

- (a) Describe the events, dates, or circumstances that will terminate the representation.
- (b) Describe the potentially adverse effects of any withdrawal from the representation by the lawyer. Describe the difference between mandatory and permissive withdrawal.
- (c) If the representation involves multiple clients, describe what information, if any, the lawyer will give to the clients if the lawyer is required to withdraw from the representation.
- (d) Describe what will happen when the lawyer withdraws and to whom the records will be sent.

8. BECAUSE OF THE IMPORTANCE THESE ISSUES HAVE ASSUMED IN A TRUST AND ESTATE PRACTICE, CONSIDERATION SHOULD BE GIVEN TO SPECIFICALLY INCLUDING A DISCUSSION OF THE LAWYER'S DOCUMENT OWNERSHIP, RETENTION, AND DESTRUCTION POLICIES.

9. DOCUMENT MULTIPLE REPRESENTATION.

- (a) Send out a proposed engagement letter to all of the prospective clients prior to a first meeting, or send out a letter to all of the clients after the first conference.
- (b) Review the engagement letter with the client at the first conference following a checklist or memorandum filled in during the first conference.
- (c) Identify all clients. See comment on Rule 1.7 as to who can sign for the entity (someone other than the represented principal). Consider including a representation by multiple clients that the interests being represented are not adversarial.
- (d) Require that all clients sign the engagement letter or memorandum or otherwise acknowledge the terms of any multiple representation.
- (e) Describe how the diminished capacity or death of any individual client occurring after the representation is begun will affect the representation; including, if appropriate, reference to, or summary of, the specific provisions of local law regarding the definition of diminished capacity, those persons who may be authorized to act on behalf of a client who has suffered diminished capacity, and the opportunity for the client to designate someone to act on his or her behalf in such an event.
- (f) Consider periodically reviewing with the client the engagement letter, to confirm the client's continuing assent to the terms of the representation during the term of the long-term representation.
- (g) Suggest that any potential client who is uncomfortable with any aspect of the arrangement consult another lawyer before signing.

CHAPTER 1. REPRESENTATION OF SPOUSES

Introduction

These forms illustrate issues that should be addressed in discussing potential problems regarding confidential information and conflicts of interest in connection with representing spouses in an estate planning context and present one way in which these potential problems may be resolved.

There are two forms of letter reflecting fundamentally different approaches to the representation. The first form suggests a joint arrangement in which the lawyer shares all information in his or her possession with both spouses, unless and until an event occurs that affects that representation; in which case, the form sets out options for dealing with that event and its effect on the representation. Practitioners and their clients usually choose this method of representation.

The second form contemplates concurrent separate representation, which is tantamount to separate and independent representation of each spouse. In this mode, each client instructs the lawyer to hold all information he or she receives from either spouse in confidence so that the situation approximates as closely as possible the situation if the spouses were represented by independent counsel. There is significant controversy as to whether this approach is viable in this context and others, although there are noted and respected practitioners who use it. In any event, it is recommended that, if this approach is attempted, the practitioner be aware of the potential pitfalls and proceed with caution.

References to the *ACTEC Commentaries* (Fourth Edition):

(Note that the page numbers shown below refer to the printed version of the *ACTEC Commentaries*.)

Terminology (re Informed Consent and Writing), p. 13
 General Principles (re Scope of Representation), p. 32
 Encouraging Communication; Discretion Regarding Content, p. 56
 Communications During Active Phase of Representation, pp. 56-57
 Termination of Representation, pp. 57-58
 Basis of Fees for Trusts and Estates Services, p. 63
 Joint and Separate Clients, pp. 75-76
 Joint Representation Presumed, pp. 75-76
 Multiple Separate Clients, p. 76
 Confidences Imparted by One Joint Client, pp. 76-77
 General Nonadversary Character of Estates and Trusts Practice; Representation of Multiple Clients, p. 91
 Disclosures to Multiple Clients, pp. 91-93
 Joint or Separate Representation, pp. 92-93
 Declining or Terminating Representation, pp. 140-143

Supplemental Checklist for Representation of Spouses

(Refer also to the General Checklist on pp. 4-8.)

1. ISSUES THE LAWYER SHOULD CONSIDER BEFORE ACCEPTING THE REPRESENTATION

- (a) Determine what duties, if any, the spouses owe to each other, and how these duties would affect the lawyer's representation and ability to carry out instructions such as those contained in existing pre- or post-marital agreements, contracts to make wills, and rights under pension plans.
- (b) Determine what duties, if any, either spouse owes to third parties regarding financial or property arrangements such as child support, parental support, obligations or rights to or from prior spouse and others by agreements, prior divorce decrees, or arising under compensation or retirement plans.
- (c) Determine what conflicts of interest exist, or may exist, between the two spouses and how they would affect the representation (e.g., knowledge the lawyer has that the plan of one spouse might defeat the plan or adversely affect the interests of the other; knowledge the lawyer has that possible future actions by one spouse might defeat the plan or adversely affect the interests of the other; or knowledge the lawyer has that a spouse's expectations or understanding of the facts relating to the other spouse or such spouse's intentions are not correct).

2. IDENTIFY THE CLIENT.

Is the client one of the spouses only, or are both spouses to be represented jointly or separately?

3. EXPLAIN HOW POTENTIAL OR ACTUAL CONFLICTS OF INTEREST WILL BE RESOLVED.

If a joint representation fails for any reason, the lawyer should address which, if either, of the clients the lawyer may continue to represent in the matter at hand or related matters. Does the lawyer (or the lawyer's firm) on the basis of longstanding relationship with one of the clients intend to represent that client in the future, even if the lawyer (and the firm) no longer represents the other spouse? Or will the lawyer (and the firm) withdraw from representing either of the spouses in the matter at hand or related matters?

- (a) Make it clear that the lawyer will be representing only one spouse or the other, or both of them, either jointly or separately.
- (b) Describe the possibility of a future prohibition on the lawyer's representation of either one of the spouses separately in the matter at hand or in related matters.
- (c) Describe the impact of gaining general knowledge regarding either spouse as opposed to knowledge of specific facts from prior representation, so as to avoid inadvertent disqualification.

Form of an Engagement Letter for the Representation of Both Spouses Jointly

[Date]

[Name(s) and Address(es)]

Subject: [Subject Matter of the Engagement]

Dear [Clients]:

You have asked me to [scope of representation]. I have agreed to do this work and will bill for it on the following basis: [DESCRIBE ARRANGEMENTS PERTAINING TO FEES, BILLING, ETC.]. If I am asked to perform tasks not described in this letter, an additional engagement letter may be required for that work.

It is common for a husband and wife to employ the same lawyer to assist them in planning their estates. You have taken this approach by asking me to represent both of you in your planning. It is important that you understand that, because I will be representing both of you, you are considered my client, collectively. Ethical considerations prohibit me from agreeing with either of you to withhold information from the other. Accordingly, in agreeing to this form of representation, each of you is authorizing me to disclose to the other any matters related to the representation that one of you might discuss with me or that I might acquire from any other source. In this representation, I will not give legal advice to either of you or make any changes in any of your estate planning documents without your mutual knowledge and consent. Of course, anything either of you discusses with me is privileged from disclosure to third parties, except (a) with your consent, (b) for communication with other advisors, or (c) as otherwise required or permitted by law or the rules governing professional conduct.

If a conflict of interest arises between you during the course of your planning or if the [number] of you have a difference of opinion concerning the proposed plan for disposition of your property or on any other subject, I can point out the pros and cons of your respective positions or differing opinions. However, ethical considerations prohibit me, as the lawyer for both of you, from advocating one of your positions over the other. Furthermore, I would not be able to advocate one of your positions versus the other if there is a dispute at any time as to your respective property rights or interests or as to other legal issues between you. If actual conflicts of interest do arise between you, of such a nature that in my judgment it is impossible for me to perform my ethical obligations to both of you, it would become necessary for me to cease acting as your joint attorney.

Once documentation is executed to put into place the planning that you have hired me to implement, my engagement will be concluded and our attorney-client relationship will terminate. If you need my services in the future, please feel free to contact me and renew our relationship. In the meantime, I will not take any further action with reference to your affairs unless and until I hear otherwise from you.

After considering the foregoing, if you consent to my representing both of you jointly, I request that you sign and return the enclosed copy of this letter. If you have any questions about anything discussed in this letter, please let me know. In addition, you should feel free to consult with another lawyer about the effect of signing this letter.

Sincerely,

[Lawyer]

CONSENT

Each of us has read the foregoing letter and understands its contents. We consent to having you represent both of us on the terms and conditions set forth. We each authorize you to disclose to the other and to our advisors any information regarding the representation that you receive from either of us or any other source.

Signed: _____, 20____

(Client 1)

Signed: _____, 20____

(Client 2)

Form of an Engagement Letter for the Representation of Both Spouses Concurrently but Separately

NOTE: Conflicts of interest and confidentiality are of paramount concern if a lawyer undertakes concurrent separate representation of spouses. Such representation should only be undertaken after careful consideration of all possible conflicts of interest and a determination that such representation is permissible in the lawyer's jurisdiction.

[Date]

[Name(s) and Address(es)]

Subject: [Subject Matter of the Engagement]

Dear [Clients]:

You have each asked me to [scope of representation]. I have agreed to do this work and will bill for it on the following basis: [DESCRIBE ARRANGEMENTS PERTAINING TO FEES, BILLING, ETC.]. If I am asked to perform tasks not described in this letter, an additional engagement letter may be required for that work.

It is common for a husband and wife to employ the same lawyer to assist them in planning their estates. You have taken this approach by asking me to represent both of you to [scope of representation]. However, each of you wants to maintain your right to confidentiality and the ability to meet separately with me. I have agreed to do this work on this basis and will bill for it on the following basis: [DESCRIBE ARRANGEMENTS PERTAINING TO FEES, BILLING, AND WHICH OF THE PARTIES, IF NOT BOTH, WILL BE RESPONSIBLE FOR PAYMENT.]. If I am asked to perform tasks not described in this letter, an additional engagement letter may be required.

I will represent each of you separately and will not discuss with either one of you what your spouse has disclosed to me. Each of you releases me from the obligation to reveal to you any information I may have received from the other that is material and adverse to your interest. Furthermore, I will not use any information I obtain from one of you in preparing the other's plan, even if the result is that the two plans are incompatible or one plan is detrimental to the interests of the other spouse. In short, the representation will be structured so that each of you will have the same relationship with me as if each of you had gone to a separate lawyer for assistance in your planning.

While I have agreed to undertake this representation on a separate and confidential basis, you should be aware that there might be disputes between you now or in the future as to your respective property rights and interests, or as to other issues that may arise between you. Should this occur, I would not be able to represent either of you in resolving any such dispute, and each of you would have to obtain your own representation.

After considering the foregoing, if each of you consents to my representation of each of you separately, I request that each of you sign and return the enclosed copy of this letter. If you have any questions about anything discussed in this letter, please let me know. In addition, you should feel free to consult with another lawyer about the effect of signing this letter.

Sincerely,

[Lawyer]

CONSENT

We have read the foregoing letter and understand its contents. We consent to having you represent each of us on the terms and conditions set forth.

Signed: _____, 20____
_____ (Client 1)

Signed: _____, 20____
_____ (Client 2)

CHAPTER 2. REPRESENTATION OF MULTIPLE GENERATIONS OF THE SAME FAMILY

Introduction

This form illustrates issues that should be addressed in discussing potential problems regarding confidential information and conflicts of interest in connection with representing multiple generations of the same family in an estate planning context, and presents one way in which these potential problems may be resolved.

The letter does not propose to deal with issues regarding the style of representation within any one family unit, such as whether the husband and wife of any one generation are to be represented, as between themselves, jointly or separately and concurrently. For example, it may be possible for the attorney to represent the husband and wife of each generation jointly as to each other but concurrently and separately as between the separate family units; or whether all of the assets of the parties are to be considered as a part of this engagement (for example, whether the disposition of the wife's property received from her former husband should be considered as a part of this engagement). It is suggested that those matters be dealt with in a separate letter to each separate family unit.

It is also important that the engagement letter define (and limit, as appropriate) the scope of the multiple representation engagement. For example, the lawyer might be representing members of the first generation jointly as to each other in connection with the disposition of the family business, but concurrently and separately as to each other in connection with other estate planning matters, such as the disposition of the wife's ancestral property to the children of her first marriage.

References to the *ACTEC Commentaries* (Fourth Edition):

(Note that the page numbers shown below refer to the printed version of the *ACTEC Commentaries*.)

General Principles (re Scope of Representation), p. 32
 Encouraging Communication; Discretion Regarding Content, p. 56
 Communications During Active Phase of Representation, pp. 56-57
 Termination of Representation, pp. 57-58
 Fee Paid by Person Other than Client, pp. 63, 69
 Joint and Separate Clients, pp. 75-76
 Joint Representation Presumed, pp. 75-76
 Multiple Separate Clients, p. 76
 Confidences Imparted by One Joint Client, pp. 76-77
 Separate Representation of Related Clients in Unrelated Matters, p. 77
 General Nonadversary Character of Estates and Trusts Practice; Representation of Multiple Clients, p. 91
 Disclosures to Multiple Clients, pp. 91-93
 Existing Client Asks Lawyer to Prepare Will or Trust for Another Person, p. 92

Joint or Separate Representation, pp. 92-93

Consider Possible Presence and Impact of Any Conflicts of Interest, pp. 92-93

Conflicts of Interest May Preclude Multiple Representation, p. 93

Declining or Terminating Representation, pp. 140-143

Supplemental Checklist for Representing Multiple Generations of the Same Family

(Refer also to the General Checklist on pp. 4-8.)

1. IDENTIFY THE CLIENT.

- (a) Are the clients first generation, husband and/or wife; second generation, husband and/or wife; both generations, all spouses or selected parties; or other?
- (b) In which of each party's capacity will the lawyer provide representation (e.g., individually, as a corporate officer or director, as a fiduciary, as general partner of the family partnership, etc.)? How many "hats" does each party wear, and in how many of those roles does the lawyer expect to represent each party?
- (c) What duties, if any, does each party owe to other family members, and how does that affect the lawyer's ability to represent each party and to carry out each party's instructions?

2. CONSIDER ANY CONFLICTS OF INTEREST.

What conflicts of interest exist or may exist among the multiple clients, and how do these conflicts affect the multiple representation? In answering this question, the following considerations may be helpful:

- (a) Are there any past, present, or likely future events that might indicate a conflict of interest between or among the parties (e.g., prior marriages, divorces, premarital agreements, property settlements, different domiciles, children from prior marriages, adoptions, children or other significant relationships outside of marriage, special needs of children or other family members, different plans for the distribution of the assets, different charitable motives, etc.)?
- (c) How do the parties want the lawyer to respond if the lawyer acquires knowledge that the plan of one client would adversely affect the interests of another client; knowledge that possible future actions by one client would adversely affect the interests of another client; or knowledge that one client's expectations or understanding of another client's intentions are not correct?

Form of an Engagement Letter for the Joint Representation of Multiple Generations of the Same Family

[Date]

[Name(s) and Address(es) of First Generation]

[Name(s) and Address(es) of Second Generation]

Subject: [Subject Matter of the Engagement]

Dear [First Generation] and [Second Generation]:

Thank you for your confidence in selecting our firm to perform legal services in connection with the [subject matter of the engagement].

Scope of the Engagement

We will provide legal services in connection with [specific description of the subject matter and scope of the engagement].

Identification of the Client

You have asked us to represent all of you jointly in connection with [subject matter of the engagement]. Before agreeing to this joint representation, it is important that all of you understand and agree to the terms and conditions of such representation.

Previous Representation

[OPTIONAL: *to be used when the law firm has previously represented the First Generation*]

As all of you know, our firm has previously represented and continues to represent [First Generation Husband and Wife] in connection with their estate planning and other matters. We have also represented [Family Business, Family Corporation, Family Limited Partnership, and/or Family Private Foundation]. We have not represented [Second Generation Husband and Wife] previously.

In our previous representation of [First Generation Husband and Wife], we were obligated not to disclose any details of their finances, estate plan, or estate planning documents to other members of the family. There is no reason why we cannot continue to represent [First Generation Husband and Wife] and represent [Second Generation, Husband and Wife] at the same time, as long as everyone is aware of the potential problems regarding the preservation or sharing of confidential information and the resolution of conflicts of interest that arise when our firm undertakes to represent more than one unit of the family.

Separate or Joint Representation – Confidential Information and Potential Conflicts of Interest

Lawyers may represent clients separately or jointly. There is a difference in the obligation of the attorney as follows:

A. Separate Representation

As attorneys for an individual client, we are required to preserve any confidential client information unless we are authorized by our client or by law to disclose such information to someone else. For example, in representing our client, we would ordinarily be prohibited from making known to anyone else any information known to us relating to our client, even if we think the information might be important to the other person.

When we represent an individual client separately, we advocate for our client's personal interests and give our client totally independent advice. We have a duty to act solely in the best interests of our client, without being influenced by the conflicting personal interests of any other clients or anyone else. Such separate representation ensures the preservation of our client's confidences and the elimination of any conflicts of interest between our client and any other person as related to our representation of our client.

B. Joint Representation

If we undertake to represent two or more clients jointly, we are obligated to disclose to each client any information that is relevant and material to the subject matter of the engagement. As long as the joint representation continues, no client can disclose any information to us and expect that such information be withheld from the other clients if such information is relevant and material to the subject matter of the engagement.

In a joint representation, we represent all of the clients collectively and simultaneously. We are not permitted to become an advocate for any client's personal interests but serve to assist the clients in developing a coordinated plan for the accomplishment of their common and mutual objectives. We also encourage the resolution of any individual differences in the best interests of the clients collectively. Relevant and material information shared with us by any client, although confidential to all third parties, will not be kept from any of you. However, we would generally not disclose information made known to us outside the joint meeting that we do not think is relevant and material to the subject matter of the engagement. Although joint representation is intended to accomplish the joint clients' common and mutual objectives, and in a cost-efficient manner, it also could result in the disclosure of information that one client might prefer be confidential. It might produce dissension if the clients cannot agree on a particular issue.

Again, it is important that you understand the differences in these forms of representation, as we will be representing all of you jointly.

If a conflict of interest arises among you during our representation or there is a difference of opinion, we can point out the pros and cons of your respective positions or differing opinions. However, in joint representation, we are prohibited from advocating one of your positions over the others. Similarly, we would not be able to advocate one of your positions versus the others if there is a dispute at any time as to your respective rights

or interests or as to other legal issues among you. If actual conflicts of interest arise of such a nature that in our judgment it is impossible for us to fulfill our ethical obligations to you, it would become necessary for us to cease acting as your joint attorneys.

In separate letters to [First Generation Husband and Wife] and [Second Generation Husband and Wife], we have addressed how each separate family unit chooses to be represented internally.

You may have differing and conflicting interests and objectives. Because each of your interests could potentially be affected by the interests of the others, it is necessary for each of you to consent to the form of our representation of you jointly.

Termination of the Engagement

[Prior representation of one of the family units. ALTERNATIVE 1: If previous clients revoke the waiver of confidentiality, lawyer will withdraw from representing any of the clients.]

As each of you is aware, our firm has previously represented [First Generation] personally and in matters related to their business interests. We have already advised [First Generation] that if we are engaged to represent all of you jointly in this matter, we may be required to disclose to [Second Generation] relevant and material information regarding [First Generation] that we otherwise would be prohibited from disclosing. [First Generation] has consented to such disclosure.

At any time, [First Generation] may invoke the duty of confidentiality so as to prevent us from disclosing to [Second Generation] any information received from [First Generation].

[OPTION 1: Lawyer will withdraw from representing any of the clients: “noisy withdrawal.”]

In such event, we would withdraw from representing any of you further in connection with this matter and would communicate to all of you the reason for our withdrawal.

[OPTION 2: Lawyer will withdraw from representing any of the clients: “silent withdrawal.”]

In such event, we would withdraw from representing any of you further in connection with this matter without communicating the reason for our withdrawal.

[Joint Representation and prior representation of one of the family units. ALTERNATIVE 2: If previous clients revoke the waiver of confidentiality, lawyer will continue to represent previous clients but will withdraw from representing the other clients.]

As each of you is aware, our firm has previously represented [First Generation] personally and in matters related to their business interests. We have already advised [First Generation] that if we are engaged to represent all of you jointly in this matter, we may be required to disclose to [Second Generation] relevant and material information regarding [First Generation] that we otherwise would be prohibited from disclosing. [First Generation] has consented to such disclosure.

At any time, [First Generation] may invoke a duty of confidentiality so as to prevent us from disclosing to [Second Generation] any information received from [First Generation]. In such event, we would continue to represent [First Generation] but would withdraw from representing [Second Generation] further in connection with this matter and would communicate to both of you the reason for such withdrawal.

[Joint Representation and no prior representation of either of the family units. ALTERNATIVE 1: Any client may revoke the waiver of confidentiality.]

If we begin with our firm representing all of you jointly, any one of you is free to engage separate counsel to represent you separately at any time. In addition, and whether or not you are represented by separate counsel, any one of you individually may invoke the duty of confidentiality as between you and others so as to prevent us from disclosing to the others any relevant and material information received from you that has not previously been disclosed to the other clients.

[OPTION 1: Lawyer will continue to represent remaining clients.]

In either event, you should understand that our representation of the remaining clients will continue unless terminated by them.

[OPTION 2: Lawyer will withdraw from representing all of the clients: “noisy withdrawal.”]

In either event, we would withdraw from representing all of you further in connection with this matter and would communicate to all of you the reason for our withdrawal.

[OPTION 3: Lawyer will withdraw from representing all of the clients: “silent withdrawal.”]

In either event, we would withdraw from representing all of you further in connection with this matter but without communicating to you the reason for our withdrawal.

[Joint Representation and no prior representation of either of the family units. ALTERNATIVE 2: No client may revoke the waiver of confidentiality.]

If we begin with our firm representing all of you jointly, none of you individually may invoke the duty of confidentiality as among you and the others so as to prevent us from disclosing to the others any relevant and material information received from you. However, any one of you is free to engage separate counsel to represent you separately at any time.

[OPTION 1: Lawyer will continue to represent the other clients.]

In such event, you should understand that our representation of the remaining clients will continue unless terminated by them.

[OPTION 2: Lawyer will withdraw from representing any of the clients: “noisy withdrawal.”]

In such event, we would withdraw from representing all of you further in connection with this matter and would communicate to all of you the reason for our withdrawal.

[OPTION 3: *Lawyer will withdraw from representing all of the clients: “silent withdrawal.”*]

In such event, we would withdraw from representing all of you further in connection with this matter, but without communicating to any of you the reason for our withdrawal.

After the [subject matter of the engagement] has been completed, our representation will be concluded, unless arrangements for a continuing representation are made. We will be happy to provide additional or continuing services, but unless such arrangements are made and agreed upon in writing, we will have no further responsibility to any of you in connection with any future or ongoing legal issues affecting the [subject matter of the engagement], including any duty to notify any of you of changes in the laws or the necessity to make any periodic or renewal filings or registrations.

Fees and Billing

[ALTERNATIVE 1: *Flat Fee*]

Our fee in connection with the [subject matter of the engagement] will be a flat fee of \$____. This fee includes the normal office and telephone conferences, research, analysis, and advice associated with the [subject matter of the engagement]. Significant changes in the scope of the services required or significant revisions to any documents that we have prepared will be charged separately, but any additional charges will be explained to you before any revisions are begun. One-half of this fee is payable once this engagement letter is signed and you authorize us to proceed and is not refundable, even if you later decide not to complete the [objective of the engagement]. The balance of the fee will be payable at the time when the [subject matter of the engagement] is complete.

[ALTERNATIVE 2: *Time-Based Billing*]

Our fee in connection with the [subject matter of the engagement] will be the product of the time spent by our lawyers and other professionals multiplied times their respective hourly rates. The time for which we are to be paid includes not only normal office conferences, research, analysis, and advice associated with the [subject matter of the engagement], but also the time involved in telephone calls, faxes, e-mail, and other forms of communication. We will bill you for our services on a monthly basis.

We adjust our hourly rates periodically. We consider the ability, experience, and reputation of our lawyers and paralegals when we set hourly rates. Changes are usually made each January 1, but sometimes they are made at other times. Any increase in rates will apply to all time beginning with the month when the rates are changed. Work done before that month will be billed at the hourly rate that was previously in effect. Different lawyers and paralegals in our firm may be involved in your work if that will result in lower fees, provide a specialized legal talent, or help us do your work more efficiently. We will try to assign lawyers and paralegals having the lowest hourly rates consistent with the skills, time demands, and other factors required for your work. We might not assign a lawyer or paralegal with the lowest hourly rate if, in our judgment, it may be in your best interests to assign a lawyer or paralegal with a higher hourly rate because of that lawyer's or paralegal's skill and experience or because of the time constraints of the work. We record and bill our time in one-tenth hour (six-minute) units. If a lawyer's or paralegal's total time on your work is less than three-tenths of an hour for the entire day, three-tenths of an hour will be billed for that day. If the lawyer's or paralegal's total time on your work is more than three-tenths of an hour for that day (whether done at one time or not), only the time actually spent will be billed.

In addition to our legal fees, as described above, we will be entitled to be reimbursed by you for out-of-pocket expenses that we pay on your behalf and for our internal costs. Out-of-pocket expenses include items such as filing fees charged by government agencies and travel expenses. Our internal costs include things like photocopying, long-distance telephone calls, fax transmissions, document scanning and electronic transmission, storage, and retrieval, courier services, computer research charges, and complex document production. Rather than tracking precise costs for every single internal charge (which would ultimately result in higher hourly rates for our clients), we charge fixed costs for these types of expenses. Our charges for these internal costs may exceed the actual direct costs that we pay to outsiders (such as the telephone company or photocopying contractors).

Sometimes it is necessary to hire other persons to provide services for you, such as accounting or appraisal firms. Their work may have more confidentiality if we (rather than you) request their services, and so we may hire them. However, you will be responsible for paying their fees and expenses, whether paid directly to them or to us in reimbursement.

Our bills are due when rendered. If a bill is not paid within 30 days after it is mailed to you, interest will accrue on the unpaid balance of that bill beginning on the thirty-first (31st) day and accruing thereafter at the rate of one percent (1%) per month. Interest charges will apply to specific monthly bills. Payments made on past-due accounts will be applied first to the oldest outstanding bill. If our bills are not paid reasonably soon after they are rendered, we reserve the right to stop work until your account is brought current and appropriate measures are taken to ensure prompt payment in the future. If we have to bring collection efforts for payment, you agree that you will pay the costs of collection procedures, including reasonable attorneys fees incurred by us (whether paid to our firm or another firm retained by us).

We may require a retainer or advance fee deposit for your work. Unless you and we agree otherwise, the retainer or advance fee deposit will be applied to our final statement, and any unused portion will be returned to you. We may also request an advance cost deposit (in addition to the retainer or advance fee deposit) when we expect that we will incur substantial costs on your behalf.

Each of you agrees that you will all be jointly and severally responsible for the payment of all amounts owed to us and that we can seek payment in full from any one of you at our election. Any agreement between any of you to limit your responsibility for payment of amounts owed to us will not be binding upon us unless we agree in writing to those limits. Your joint and several responsibility for the payment of our fees and expenses includes the situation in which our representation is terminated for any reason prior to the completion of the [subject matter of the engagement].

Effect of Disability

If any one of you becomes unable to make adequately-considered decisions regarding the [subject matter of the engagement] because of mental disability or other reasons, the ethics rules which govern the practice of law in this jurisdiction state that we may attempt to continue a normal attorney-client relationship with you as much as is possible. Those rules also authorize us to seek the appointment of a guardian or to take other actions to protect your interests if we consider that to be necessary. You should be aware that, by means of a

durable power of attorney, you can designate one or more other persons to make decisions for you about the [subject matter of the engagement] and to sign documents on your behalf. If you authorize someone to act for you, and if their authority is broad enough to allow them to instruct us with regard to your interest in the [subject matter of the engagement], we can continue to do work on your behalf by dealing with them, and we can rely on instructions from them. We can communicate with them and disclose information they need to make informed decisions on your behalf, including information that is protected by the attorney-client privilege or the attorney work-product privilege.

Retention, Delivery, Retrieval, and Destruction of the Files

You should understand that the file that will be created by our firm in connection with your estate planning will belong to all of you jointly. During the course of this engagement, each of you will be furnished copies of all documents and of all significant correspondence. When the [subject matter of the engagement] is completed, we will deliver the originals of all documents to you jointly. We will retain physical and/or electronic copies of all of the documents, all correspondence, and, to the extent we deem appropriate, all notes made in connection with this engagement in our file. All of you acting together may direct us to turn over our file to any one of you or to anyone else that all of you designate, at any time. In such case, we will retain in our possession all internal communications and notes prepared by our firm and, at your expense, make, retain, and store physical and/or electronic copies of all other matters in our file to be delivered to you or at your request.

It is the policy of our firm that client files that are no longer needed by our lawyers and other professionals on a recurring basis are closed and placed in storage in a location away from our offices. The off-site storage of closed files helps us to reduce our operating expenses, and consequently our fees. Because you will have been furnished with the originals and/or copies of all relevant materials contained in our files during the course of the active phase of our representation, in the event that we are asked by you to recover materials contained in a file that has been closed and placed in off-site storage, you agree that we shall be entitled to be paid by the requesting party a reasonable charge for the cost of the recovery of the file and the identification, reproduction, and delivery of the requested materials.

Unless our firm is engaged to provide on-going representation in connection with [subject matter of the engagement], it is our firm's policy to destroy all copies of correspondence, notes, and documents retained in our file created in connection with the representation ten (10) years after the completion of the engagement. Before destroying the file, we will attempt to contact you to make arrangements for delivery of any original documents and the other contents of the file to you. This letter will serve as notice to you that if we are unable to contact you at the most recent address contained in our file, we will destroy the file without further notice. It will be your responsibility to notify us of any change in your address or contact information, as the same may change from time to time.

Consent to the Terms of the Engagement

Before we begin, each of you must consider all of the factors discussed in this letter and consent to the form of the representation. After each of you has considered this decision carefully, we ask that each of you please

sign the statement that follows this letter to indicate your consent to the conditions of the representation. If, after considering this matter, any one of you prefers a different form of representation, please let us know.

Because any change in legal representation after we begin will result in an increase in the time and expense needed to complete your estate planning, for which each of you would be financially responsible, we urge each of you to give careful consideration to the structure of the representation before we begin.

We are enclosing an extra copy of this letter to be signed and returned to us consenting to the conditions of the representation as described in this letter. The return of a copy of this letter signed by each of you will serve as authorization for us to proceed with [subject matter of the engagement]. Also enclosed is a return-address envelope for your convenience in returning the signed copy of this letter.

If any one of you has any questions about anything discussed in this letter, please call us. Each of you should also feel free to contact an attorney in another firm to discuss the effect of agreeing to the terms of the joint representation as outlined in this letter.

We appreciate the opportunity to work with you in connection with your estate planning, and we look forward to hearing from you soon.

Sincerely,

[Lawyer]

Consent to the Representation and the Terms of the Engagement

We have each reviewed the foregoing letter concerning the various aspects of separate and joint representation, and we choose to have [Lawyer] represent all of us jointly in connection with [subject matter of the engagement] on the terms described above.

Signed: _____, 20____

(Husband, First Generation)

Signed: _____, 20____

(Wife, First Generation)

Signed: _____, 20____

(Husband, Second Generation)

Signed: _____, 20____

(Wife, Second Generation)

CHAPTER 3. REPRESENTATION OF MULTIPLE PARTIES IN A BUSINESS CONTEXT

Introduction

This form illustrates some of the issues to be addressed in the representation of business interests. The focus of the form is on the creation of the business entity. Here, the fact of creation of the entity itself, a new client, poses an immediate conflict of interest with the organizers as individuals.

Over time, there is likely to be an evolution in the representation of the entity and its owners, employees, officers, and other involved parties that may include spouses, other members of the same family, or others whose interests are related. For example, there may be a death or withdrawal of a significant owner, or there may be a change in control of the entity. The lawyer must be particularly alert to the impact of the new entity, the shifting interests within it and among the individuals involved, and the emerging potential for conflicts arising as a result of events that have not been identified in advance. It is important to require the client to keep the lawyer continuously advised as to the emergence of intra-organizational and inter-personal conflicts that, if not promptly resolved, may destroy the representation.

The form letters in this section contemplate the creation of a new entity as the reason for the engagement of counsel. If the entity has already been in existence, however, the lawyer may be retained for a specific purpose, e.g., to prepare appropriate buy/sell agreements, establish employee benefits, participate in designing compensation arrangements, or to establish rational succession planning. These forms may be tailored to meet those circumstances.

Whether or not there is an evolution in the representation, or the representation involves an existing business entity, it is important for the lawyer to constantly be aware of who is the client and, in this respect, to be careful to document the relationships as they may change from time to time.

In each situation, the engagement letter should define and limit the scope of the representation. As change occurs, amendments to the initial engagement letter may have to be delivered to all of the parties in interest and their consents to the continued representation obtained.

References to the *ACTEC Commentaries* (Fourth Edition):

(Note that the page numbers shown below refer to the printed version of the *ACTEC Commentaries*.)

General Principles (re Scope of Representation), p. 32
 Time Constraints Imposed by Client, p. 51
 Encouraging Communication; Discretion Regarding Content, p. 56
 Communications During Active Phase of Representation, pp. 56-57
 Termination of Representation, pp. 57-58
 Fee Paid by Person Other than Client, pp. 63, 69
 Joint and Separate Clients, pp. 75-76

Joint Representation Presumed, pp. 75-76

Multiple Separate Clients, p. 76

Confidences Imparted by One Joint Client, pp. 76-77

Separate Representation of Related Clients in Unrelated Matters, p. 77

Implied Authorization to Disclose, p. 78

Prospective Clients, pp. 75, 76, 91-92, 145-146

General Nonadversary Character of Estates and Trusts Practice; Representation of Multiple Clients, p. 91

Disclosures to Multiple Clients, pp. 91-93

Consider Possible Presence and Impact of Any Conflicts of Interest, pp. 92-93

Organization as Client, pp. 127-130

Declining or Terminating Representation, pp. 140-143

Supplemental Checklist for the Representation of Multiple Parties in a Business Context

(Refer also to the General Checklist on pp. 4-8.)

1. DEFINE THE SCOPE OF THE REPRESENTATION.

Describe with appropriate specificity the objectives of the representation and the means by which those objectives are to be pursued (e.g., advice and counsel regarding the choice of the business entity; the corporate and management structure of the business; the funding and financing of the business and its operations, and the federal and state income tax consequences of the organization; funding, operation, and sale or other disposition of the business; the preparation and filing of the organization documents; and the preparation and filing of documents to effect the initial funding and financing of the business, including telephone and office conferences and correspondence with the organizers and any accountants, lenders, brokers, and other related professionals).

2. IDENTIFY THE CLIENT.

Is the client the new entity, one or more of the organizers, or the entity and one or more of the organizers?

- (a) If appropriate, describe the possible conflict of interest if the lawyer is to receive an interest in the business as a part of the lawyer's fee.
- (b) Describe the adverse consequences of any necessity of the lawyer to withdraw from the joint representation, including the possible prohibition of any further representation by the lawyer of any of the joint individual clients if the joint representation fails.
- (c) Make it clear if the lawyer will be representing the business entity or the individual constituents of the business or both.
- (d) Describe the potential conflicts of interest resulting from the lawyer's representation of the entity or the lawyer's representation of the constituents individually.

- (e) Describe the possibility of a future prohibition on the lawyer's representation of either the entity or the constituents, depending upon the identity of the initial client.
- (f) Include a description of the effect on the conflict-of-interest rules, depending on the choice of entity and the lawyer's duty to the constituents or the entity under the entity or aggregation theory.
- (g) Describe the impact of gaining general knowledge of entity policies and practices vs. knowledge of specific facts from prior representation so as to avoid inadvertent disqualification.

3. POSSIBLE CLASSIFICATION OF THE ROLE OF THE LAWYER AS AN INTERMEDIARY IN THE REPRESENTATION UNDER RULE 2.2 (TO THE EXTENT THAT RULE 2.2 MAY BE AVAILABLE OR APPLICABLE IN THE SUBJECT JURISDICTION)

- (a) Describe the possibility of the lawyer serving as an intermediary rather than as an advocate and the resulting effect on the treatment of confidential information and potential conflicts of interest.
- (b) Describe the differences in the duties of the lawyer in serving as an intermediary as opposed to a normal role as advocate, including a greater burden on the individual clients for making decisions.
- (c) Describe the necessity and effect of any withdrawal of the lawyer if the intermediation fails.
- (d) Make it clear that the engagement either is or is not an intermediation.
- (e) If the lawyer is to serve as intermediary, have all the clients consent to the intermediation.

4. EXPLAIN THE FEE OR THE BASIS FOR THE DETERMINATION OF THE FEE AND THE BILLING ARRANGEMENTS [INCLUDING THE MATERIAL REQUIRED IN RULE 1.5 (b)].

- (a) If the firm is to receive any form of ownership in the entity as part of its fee, describe how the quantity and value of the ownership interest is to be determined and the ethical issues involved (Rule 1.5).
- (b) Describe who will be responsible for the fees and expenses if the new entity is never organized.

5. TERMINATION OF THE REPRESENTATION

Describe what will happen when the lawyer withdraws and to whom the records will be sent.

**Form of an Engagement Letter for Representation in Connection with the Organization
of a New Business Entity (Representing the Entity Only)**

[Date]

[Addressees]

Subject: Organization of [New Entity]

Dear [Client(s)]:

Thank you for your confidence in selecting our firm to perform legal services in connection with the organization of [New Entity].

Scope of the Engagement

We will provide legal services in connection with the formation of [New Entity] as a [corporation/partnership/limited liability company/ etc.] under the laws of the State of [State], including providing advice and counsel regarding the choice of the business entity; the ownership and management structure of the company; the funding and financing of the company and its operations; and, subject to applicable standards of tax practice, the federal and state income tax consequences of the organization, funding, operation, and sale or other disposition of the company or its property; the preparation and filing of the organization documents; and the preparation and filing of documents to effect the initial funding and financing of the company. These services will include telephone and office conferences and correspondence with the organizers of the company and any accountants, lenders, brokers, and other related professionals. If appropriate, and if requested, we will also provide advice and counsel and document preparation in connection with the acquisition or leasing of property by [New Entity], transfer restriction agreements and buy-sell agreements between [New Entity] and its (shareholders/partners/members, etc.), and employment agreements between [New Entity] and its key employees.

Identification of the Client

Our client will be [New Entity]. As described below, we will not undertake to represent any of you individually.

It is important that each of you understands that the interests of [New Entity] may not always be identical to the interests of the [number] of you as its organizers, owners, and managers and that the interests of any one of the [number] of you may not always be identical to the interests of the others. Therefore, each of you should be aware that in your individual capacity you should carefully consider retaining independent counsel to advise and represent you separately from [New Entity] and from the others.

Separate Representation – Confidential Information and Potential Conflicts of Interest

You have asked us to represent [New Entity] separately in connection with its organization. We are happy to do this; however, it is important that each one of you understands and consents to the considerations involved in such representation.

As attorneys for [New Entity], we are required to preserve any confidential information we become aware of concerning the company, unless we are authorized to disclose such information to someone else. We have a duty to act solely in the best interest of [New Entity], without being influenced by the conflicting personal interests of any of the [number] of you or of any other clients. For example, in representing [New Entity], we would ordinarily be prohibited from making known to any one or more of you individually any information known to us relating to [New Entity], even if we think the information might be important to you in making decisions affecting your interest in [New Entity]. This could include our knowledge of information affecting [New Entity] disclosed to us by one of the others of you. Nevertheless, because our client will be [New Entity] and you will be its initial governing constituents, even though we will not be representing any of you separately, we are obligated to disclose to each of you any information any of you discloses to us that is relevant and material to the organization of [New Entity] and none of you can disclose any information to us and require that such information be withheld from the others if such information is relevant and material to the organization of [New Entity].

Each of you may have differing and conflicting interests and objectives and your interests and objectives may be in conflict with the best interests of [New Entity]. For example, you may have different views on how the financial rights and governance rights of [New Entity] should be distributed among you. Some decisions regarding one or more of the legal or tax aspects of the structure and organization of [New Entity] may be favorable to one or more of you but unfavorable to others. These are just general examples. Your own situation and interests are unique. However, because our client is [New Entity] and not any of you individually, we could not advise you that a proposal suggested by one of you might be adverse to your own personal interests.

Because each of your interests could potentially be affected by the interests of [New Entity], it will be necessary for each of you to consent to the form of our representation of [New Entity].

Separate Representation

Unlike joint representation [or intermediation], as described above, if each of you were to retain a separate attorney, each of you would have an advocate for your personal interests and would receive totally independent advice. Each of you would meet separately with your attorney, and information given by you to your attorney would be confidential and could not be disclosed by the attorney to anyone else without your consent. Separate representation would ensure the preservation of each of your confidences and the elimination of any conflicts of interest between you and your attorney; however, separate representation might result in each of you taking positions on issues relating to the organization of [New Entity] that would be adverse to each other and would result in a duplication of expenses in having separate attorneys.

Termination of the Engagement

[ALTERNATIVE 1: *No prior representation of any of the organizers.*]

If we begin with our firm representing [New Entity] and not any of you individually, any one of you is completely free to engage separate counsel to represent you separately at any time. In that event, you should understand that our representation of [New Entity] will continue unless terminated by the appropriate action of its duly authorized constituents. In addition, and whether or not you are represented by separate counsel, none of you individually can invoke a duty of confidentiality as between you and the others so as to prevent us from disclosing to the others any information received from you that is relevant and material to the organization of [New Entity].

[ALTERNATIVE 2: *Prior representation of one of the organizers.*]

As each of you is aware, our firm has previously represented [Client-Organizer] personally and in matters related to [his/her] business interests. We have already advised [Client-Organizer] that if we are engaged to represent [New Entity] in connection with its organization, we may be required to disclose to [New Entity] and its constituents and to each of you information regarding [Client-Organizer] that we might otherwise be prohibited from disclosing; and [Client-Organizer] has consented to any such disclosure to the extent it is relevant and material to the organization of [New Entity].

If we begin with our firm representing [New Entity] and not any of you individually, any one of you is completely free to engage separate counsel to represent you separately at any time. In that event, you should understand that our representation of [New Entity] will continue unless terminated by the appropriate action of its duly authorized constituents or unless [Client-Organizer] chooses to engage separate counsel or requests that we terminate our representation of [New Entity]. In such case, we would withdraw from representing [New Entity] further in connection with its organization and would communicate to all of you the reason for our withdrawal. In addition, and whether or not you are represented by separate counsel, none of you individually, other than [Client-Organizer], can invoke a duty of confidentiality as between you and the others so as to prevent us from disclosing to the others any information received from you that is relevant and material to the organization of [New Entity]. If [Client-Organizer] invokes a duty of confidentiality with respect to [himself/herself] and our firm so as to prevent us from disclosing to the others of you any information received from [him/her] that is relevant and material to the organization of [New Entity], we would withdraw from representing [New Entity] further in connection with its organization and would communicate to all of you the reason for our withdrawal.

When the organization of [New Entity] has been completed, our representation of [New Entity] and all of you as organizers will be concluded, unless arrangements for a continuing representation are made. We will be happy to provide additional or continuing services, but unless such arrangements are made and agreed upon in writing, we will have no further responsibility to [New Entity] or to you in connection with any future or ongoing legal issues affecting [New Entity], including any duty to notify you of changes in the laws or the necessity to make any periodic or renewal filings or registrations.

Fees and Billing

[ALTERNATIVE 1: *Flat Fee*]

Our fee in connection with the organization of [New Entity] will be a flat fee of \$____. This fee includes the normal office and telephone conferences, research, analysis, and advice associated with the organization of [New Entity] and the preparation and filing of the appropriate documents to complete the organization. Significant changes in the scope of the services required or significant revisions to the organizational documents will be charged separately, but any additional charges will be explained to you before any revisions are begun. One-half of this fee is payable once this engagement letter is signed and you authorize us to proceed and is not refundable even if you later decide not to complete the organization. The balance of the fee will be payable at the time when the organization is complete.

[ALTERNATIVE 2: *Time-Based Billing*]

Our fee in connection with the organization of [New Entity] will be the product of the time spent by our lawyers and other professionals multiplied times their respective hourly rates. The time for which we are to be paid includes not only normal office conferences, research, analysis, and advice associated with the organization of [New Entity] and the preparation and filing of the appropriate documents to complete the organization, but also the time involved in telephone calls, faxes, e-mail, and other forms of communication. We will bill you for our services on a monthly basis.

We adjust our hourly rates periodically. We consider the ability, experience, and reputation of our lawyers and paralegals when we set hourly rates. Changes are usually made each January 1, but sometimes they are made at other times. Any increase in rates will apply to all time beginning with the month when the rates are changed. Work done before that month will be billed at the hourly rate that was previously in effect. Different lawyers and paralegals in our firm may be involved in your work if that will result in lower fees, provide a specialized legal talent, or help us do your work more efficiently. We will try to assign lawyers and paralegals having the lowest hourly rates consistent with the skills, time demands, and other factors required for your work. We might not assign a lawyer or paralegal with the lowest hourly rate if, in our judgment, it may be in your best interests to assign a lawyer or paralegal with a higher hourly rate because of that lawyer's or paralegal's skill and experience or because of the time constraints of the work. We record and bill our time in one-tenth hour (six-minute) units. If a lawyer's or paralegal's total time on your work is less than three-tenths of an hour for the entire day, three-tenths of an hour will be billed for that day. If the lawyer's or paralegal's total time on your work is more than three-tenths of an hour for that day (whether done at one time or not), only the time actually spent will be billed.

In addition to our legal fees, as described above, we will be entitled to be reimbursed by you for out-of-pocket expenses that we pay on your behalf and for our internal costs. Out-of-pocket expenses include items such as filing fees charged by government agencies and travel expenses. Our internal costs include things like photocopying, long-distance telephone calls, fax transmissions, document scanning and electronic transmission, storage, and retrieval, courier services, computer research charges, and complex document production. Rather than tracking precise costs for every single internal charge (which would ultimately result in higher hourly

rates for our clients), we charge fixed costs for these types of expenses. Our charges for these internal costs may exceed the actual direct costs that we pay to outsiders (such as the telephone company or photocopying contractors).

Sometimes it is necessary to hire other persons to provide services for you, such as accounting or appraisal firms. Their work may have more confidentiality if we (rather than you) request their services, and so we may hire them. However, you will be responsible for paying their fees and expenses, whether paid directly to them or to us in reimbursement.

Our bills are due when rendered. If a bill is not paid within 30 days after it is mailed to you, interest will accrue on the unpaid balance of that bill beginning on the thirty-first (31st) day and accruing thereafter at the rate of one percent (1%) per month. Interest charges will apply to specific monthly bills. Payments made on past-due accounts will be applied first to the oldest outstanding bill. If our bills are not paid reasonably soon after they are rendered, we reserve the right to stop work until your account is brought current and appropriate steps are taken to ensure prompt payment in the future. If we have to bring collection efforts for payment, you agree that you will pay the costs of collection procedures, including reasonable attorneys fees incurred by us (whether paid to our firm or another firm retained by us).

We may require a retainer or advance fee deposit for your work. Unless you and we agree otherwise, the retainer or advance fee deposit will be applied to our final statement, and any unused portion will be returned to you. We may also request an advance cost deposit (in addition to the advance fee deposit) when we expect that we will incur substantial costs on your behalf.

Each of you agrees that you will be jointly and severally responsible for the payment of all amounts owed to us and that we can seek payment in full from any one of you at our election. Any agreement between any of you to limit your responsibility for payment of amounts owed to us will not be binding upon us unless we also agree in writing to those limits. Your joint and several responsibility for the payment of our fees and expenses includes the situation in which our representation is terminated for any reason prior to the completion of the organization of [New Entity].

Effect of Death or Disability

If any one of you becomes unable to make adequately-considered decisions regarding the organization of [New Entity] because of mental disability or other reasons, the ethics rules that govern the practice of law in this jurisdiction state that we may attempt to continue a normal attorney-client relationship with you as much as is possible. Those rules also authorize us to seek the appointment of a guardian or to take other actions to protect your interests if we consider that to be necessary. You should be aware that, by means of a durable power of attorney, you can designate one or more other persons to make decisions for you about the organization of [New Entity] and to sign documents on your behalf. If you authorize someone to act for you, and if their authority is broad enough to allow them to instruct us with regard to your interest in [New Entity] and its organization, we can continue to do work on your behalf by dealing with them, and we can rely on instructions from them. We can communicate with them and disclose information they need to make informed decisions on your behalf, including information that is protected by the attorney-client privilege.

If you die during the course of this engagement, the personal representatives of your estate generally succeed to all of your rights with respect to this engagement and are entitled to act on your behalf. Thereafter, we could continue to do work on your behalf by dealing with your personal representatives, and we can rely on instructions from them. We can communicate with them and disclose information they need to make informed decisions on your behalf, including information that is protected by the attorney-client privilege or the attorney work-product privilege.

Retention, Delivery, Retrieval, and Destruction of the Files

Each of you should understand that the file that will be created by our firm in connection with the organization of [New Entity] will belong to our client, as identified in this letter. During the course of this engagement, each of you will be furnished copies of all of the organizational documents and of all significant correspondence. When the organization of [New Entity] is completed, we will deliver the originals of all of the organization documents to the Secretary of [New Entity]. We will retain physical and/or electronic copies of all of the organizational documents, all correspondence, and, to the extent we deem appropriate, all notes made in connection with this engagement in our file. The client may direct us to turn over our file to [New Entity], to any one of you, or to anyone else that the client designates, at any time. In such case, we will retain in our possession all internal communications and notes prepared by our firm and, at the expense of [New Entity], make, retain, and store physical and/or electronic copies of all other matters in our file to be delivered to [New Entity] or at its request.

It is the policy of our firm that client files that are no longer needed by our lawyers and other professionals on a recurring basis are closed and placed in storage in a location away from our offices. The off-site storage of closed files helps us to reduce our operating expenses, and consequently our fees. Because you and [New Entity] will have been furnished with the originals and/or copies of all relevant materials contained in our files during the course of the active phase of our representation, in the event that we are asked by you or [New Entity] to recover materials contained in a file that has been closed and placed in off-site storage, we shall be entitled to be paid by the requesting party a reasonable charge for the cost of the recovery of the file and the identification, reproduction, and delivery of the requested materials.

Unless our firm is engaged to provide on-going representation of [New Entity], it is our firm's policy to destroy all copies of correspondence, notes, and documents retained in our file created in connection with the organization of a new entity ten (10) years after the completion of the organization. Before destroying the file, we will attempt to contact our client, as identified in this letter, to make arrangements for delivery of any original documents and the other contents of the file to the client. This letter will serve as notice to you that if we are unable to contact our client at the most recent address contained in our file, we will destroy the file without further notice. It will be your responsibility to notify us of any change in your address or any change in the address or contact information for [New Entity], as appropriate, as the same may change from time to time.

Conflicts with Other Clients

Sometimes our lawyers are asked to represent a client who has interests that are adverse to another client whom we represent in other matters. The ethics rules that govern the practice of law in this jurisdiction per-

mit us to accept multiple representations if certain requirements are met. While we represent you and/or [New Entity], we will not represent another client in matters that are directly adverse to your interests or the interests of [New Entity] unless and until we have made full disclosure to you and to [New Entity] of all relevant facts, circumstances, and implications. You agree that we can represent those other clients whose interests are adverse to yours or to the interests of [New Entity] if we confirm to you in good faith that the following conditions are met: (1) there is no substantial relationship between the other client's matter and our work for you or for [New Entity]; (2) our representation of the other client will not involve or disclose any confidential information we have received from you or [New Entity] (with the use of any ethically-approved screening measures, if appropriate); and (3) the other client also consents to our continuing representation of you and/or [New Entity]. If you make a good-faith objection to our statement, we will have the burden of proving that these conditions have been met.

Consent to the Terms of the Engagement

Before we begin, each of you must consider all of the factors discussed in this letter and consent to the form of the representation. After you have considered this decision carefully, we ask that you please sign the statement that follows this letter to indicate your consent to the conditions of the representation. If, after considering this matter, you prefer a different form of representation, please let us know.

Because any change in legal representation after we begin will result in an increase in the time and expense needed to complete the organization of [New Entity], for which each of you would be financially responsible, we urge you to give careful consideration to the structure of the representation before we begin.

We are enclosing an extra copy of this letter to be signed and returned to us consenting to the conditions of the representation as described in this letter. The return of a copy of this letter signed by each of you will serve as authorization for us to proceed with the organization of [New Entity]. Also enclosed is a return-address envelope for your convenience in returning the signed copy of this letter.

If you have any questions about anything discussed in this letter, please call us. You should also feel free to contact an attorney in another firm to discuss the effect of agreeing to the terms of the representation as outlined in this letter.

We appreciate the opportunity to work with you on the organization of [New Entity], and we look forward to hearing from you soon.

Sincerely,

[Lawyer]

Consent to the Representation and the Terms of the Engagement

We have each reviewed the foregoing letter concerning the various aspects of joint and separate representation, and we choose to have [Firm] represent [New Entity] separately in connection with its organization on the terms described above.

Signed: _____, 20__ _____
(Organizer 1)

Signed: _____, 20__ _____
(Organizer 2)

Signed: _____, 20__ _____
(Organizer 3)

**Form of an Engagement Letter for Representation in Connection with the Organization
of a New Business Entity (Representing the Organizers Jointly and Not the Entity)**

[Date]

[Addressees]

Subject: Organization of [New Entity]

Dear [Client(s)]:

Thank you for your confidence in selecting our firm to represent the [number] of you collectively in connection with the organization of [New Entity].

Scope of the Engagement

We will provide legal services in connection with the formation of [New Entity] as a [corporation/partnership/limited liability company, etc.] under the laws of the State of [State], including providing advice and counsel regarding the choice of the business entity; the ownership and management structure of the company; the funding and financing of the company and its operations; and, subject to applicable standards of tax practice, the federal and state income tax consequences of the organization, funding, operation, and sale or other disposition of the company or its property; the preparation and filing of the organization documents; and the preparation and filing of documents to effect the initial funding and financing of the company. These services will include telephone and office conferences and correspondence with the organizers of the company and any accountants, lenders, brokers, and other related professionals. If appropriate, and if requested, we will also provide advice and counsel and document preparation in connection with the acquisition or leasing of property by [New Entity], transfer restriction agreements and buy-sell agreements between [New Entity] and its [shareholders/partners/members, etc.], and employment agreements between [New Entity] and its key employees.

Identification of the Client

Our client will be the [number] of you collectively in your capacity as the organizers and initial owners and managers of [New Entity]. As described below, we will be representing the [number] of you jointly, and we will not undertake to represent [New Entity] or any of you separately.

It is important that each of you understands that the interests of [New Entity] may not always be identical to the interests of the [number] of you as its organizers, owners, and managers and that the interests of any one of the [number] of you may not always be identical to the interests of the others. Therefore, each of you should be aware that in your individual capacity you should carefully consider retaining independent counsel to advise and represent you separately from [New Entity] and from the others.

Joint Representation – Confidential Information and Potential Conflicts of Interest

You have asked us to represent all of you collectively in connection with the organization of [New Entity]. We are happy to do this; however, it is important that each one of you understands and consents to the considerations involved in such a joint representation.

As your attorneys, we would normally owe each one of you a duty to preserve any confidential information you share with us, unless you authorize us to disclose such information to someone else. We would also owe you a duty to act solely in your best interest, without being influenced by the conflicting interests of other clients. If we represent two or more clients simultaneously in the same matter, we have a potential conflict of interest resulting from our conflicting duties to each of the separate clients. For example, in advising you regarding the organization of [New Entity], we would ordinarily be obliged to make known to you any information that we believe might be important to you in making decisions affecting your interest in [New Entity]. This could include our knowledge of information affecting [New Entity] disclosed to us by one of the others of you; however, because we are under a duty to preserve the confidential information made known to us by each of you, we cannot disclose this information to you unless the other person consents. Also, we could not advise you that a proposal suggested by one of you might be adverse to your own personal interests.

Each of you may have differing and conflicting interests and objectives. You may have different views on how the financial rights and governance rights of [New Entity] should be distributed among you. Some decisions regarding one or more of the legal or tax aspects of the structure and organization of [New Entity] may be favorable to one or more of you but unfavorable to others. These are just general examples. Your own situation and interests are unique.

Because each of your interests could potentially be affected by the interests of the others, it will be necessary for each of you to consent to the form of our representation of all of you.

In a joint representation, we represent all of you collectively and simultaneously, almost as if all of you were a single client. We will not be an advocate for any one of you personally, but will serve only to assist all of you in developing a coordinated plan for the structure and organization of [New Entity] and will encourage the resolution of your individual differences in an equitable manner and in the best interests of your on-going relationship as the owners and managers of [New Entity]. We will normally meet with all of you at the same time, and relevant and material information shared with us by any one of you, although confidential as to all others, cannot and will not be kept from any of you; however, we will generally not disclose to the others information any one of you makes known to us outside a joint meeting that we do not think is relevant and material to the organization of [New Entity]. Although the product of the joint representation is intended to be the organization of [New Entity] on terms agreeable to all of you, and in a cost-efficient manner, it could also result in the disclosure of information that one of you might prefer to remain confidential, and it could produce dissension if all of you cannot agree on a particular issue relating to the structure and organization of [New Entity].

Separate Representation

Unlike joint representation [or intermediation], as described above, if each of you were to retain a separate attorney, each of you would have an advocate for your personal interests and would receive totally independent advice. Each of you would meet separately with your attorney, and information given by you to your attorney would be confidential and could not be disclosed by the attorney to anyone else without your consent. Separate representation would ensure the preservation of each of your confidences and the elimination of any conflicts of interest between you and your attorney; however, separate representation might result in each of you taking positions on issues relating to the organization of [New Entity] that would be adverse to each other and would result in a duplication of expenses in having separate attorneys.

Termination of the Engagement

[ALTERNATIVE 1: *No prior representation of any of the organizers*]

If we begin with our firm representing all of you jointly, any one of you is completely free to change your mind and engage separate counsel at any time. In addition, any one of you can revoke your waiver of our duty of confidentiality as between you and the others and re-invoke the duty so as to prevent us from disclosing any confidential information received from you that we have not previously disclosed to the others. In either case, we would withdraw from representing any of you further in connection with the organization of [New Entity] unless all of you consent to our continued representation of one or more of you, and we would communicate to all of you the reason for our withdrawal.

[ALTERNATIVE 2: *Prior representation of one of the organizers*]

As each of you is aware, our firm has previously represented [Client-Organizer] personally and in matters related to [his/her] business interests. We have already advised [Client-Organizer] that if we are engaged to represent all [number] of you collectively in connection with the organization of [New Entity], we may be required to disclose to each of you information regarding [Client-Organizer] that we might otherwise be prohibited from disclosing; and [Client-Organizer] has consented to any such disclosure to the extent it is relevant and material to the organization of [New Entity].

If we begin with our firm representing all of you jointly, any one of you is completely free to change your mind and engage separate counsel at any time. In addition, any one of you can revoke your waiver of our duty of confidentiality as between you and the others and re-invoke the duty so as to prevent us from disclosing any confidential information received from you that we have not previously disclosed to the others. In either case, we would withdraw from representing any of you further in connection with the organization of [New Entity], unless all of you consent to our continued representation of one or more of you, and we would communicate to all of you the reason for our withdrawal. Notwithstanding this, if we are requested by [Client-Organizer] to continue to represent [him/her] in connection with the organization of [New Entity], we would do so and, by agreeing to our representation of the [number] of you collectively as described in this letter, each of you consents to our continuing representation of [Client-Organizer] in that event.

When the organization of [New Entity] has been completed, our representation of [New Entity] and all of you as organizers will be concluded, unless arrangements for a continuing representation are made. We will be happy to provide additional or continuing services, but unless such arrangements are made and agreed upon in writing, we will have no further responsibility to [New Entity] or to you in connection with any future or ongoing legal issues affecting [New Entity], including any duty to notify you of changes in the laws or the necessity to make any periodic or renewal filings or registrations.

Fees and Billing

[ALTERNATIVE 1: *Flat Fee*]

Our fee in connection with the organization of [New Entity] will be a flat fee of \$____. This fee includes the normal office and telephone conferences, research, analysis, and advice associated with the organization of [New Entity] and the preparation and filing of the appropriate documents to complete the organization. Significant changes in the scope of the services required or significant revisions to the organizational documents will be charged separately, but any additional charges will be explained to you before any revisions are begun. One-half of this fee is payable once this engagement letter is signed and you authorize us to proceed and is not refundable even if you later decide not to complete the organization. The balance of the fee will be payable at the time when the organization is complete.

[ALTERNATIVE 2: *Time-Based Billing*]

Our fee in connection with the organization of [New Entity] will be the product of the time spent by our lawyers and other professionals multiplied times their respective hourly rates. The time for which we are to be paid includes not only normal office conferences, research, analysis, and advice associated with the organization of [New Entity] and the preparation and filing of the appropriate documents to complete the organization, but also the time involved in telephone calls, faxes, e-mail, and other forms of communication. We will bill you for our services on a monthly basis.

We adjust our hourly rates periodically. We consider the ability, experience, and reputation of our lawyers and paralegals when we set hourly rates. Changes are usually made each January 1, but sometimes they are made at other times. Any increase in rates will apply to all time beginning with the month when the rates are changed. Work done before that month will be billed at the hourly rate that was previously in effect. Different lawyers and paralegals in our firm may be involved in your work if that will result in lower fees, provide a specialized legal talent, or help us do your work more efficiently. We will try to assign lawyers and paralegals having the lowest hourly rates consistent with the skills, time demands, and other factors required for your work. We might not assign a lawyer or paralegal with the lowest hourly rate if, in our judgment, it may be in your best interests to assign a lawyer or paralegal with a higher hourly rate because of that lawyer's or paralegal's skill and experience or because of the time constraints of the work. We record and bill our time in one-tenth hour (six-minute) units. If a lawyer's or paralegal's total time on your work is less than three-tenths of an hour for the entire day, three-tenths of an hour will be billed for that day. If the lawyer's or paralegal's total time on your work is more than three-tenths of an hour for that day (whether done at one time or not), only the time actually spent will be billed.

In addition to our legal fees, as described above, we will be entitled to be reimbursed by you for out-of-pocket expenses that we pay on your behalf and for our internal costs. Out-of-pocket expenses include items such as filing fees charged by government agencies and travel expenses. Our internal costs include things like photocopying, long-distance telephone calls, fax transmissions, document scanning and electronic transmission, storage, and retrieval, courier services, computer research charges, and complex document production. Rather than tracking precise costs for every single internal charge (which would ultimately result in higher hourly rates for our clients), we charge fixed costs for these types of expenses. Our charges for these internal costs may exceed the actual direct costs that we pay to outsiders (such as the telephone company or photocopying contractors).

Sometimes it is necessary to hire other persons to provide services for you, such as accounting or appraisal firms. Their work may have more confidentiality if we (rather than you) request their services, and so we may hire them. However, you will be responsible for paying their fees and expenses, whether paid directly to them or to us in reimbursement.

Our bills are due when rendered. If a bill is not paid within 30 days after it is mailed to you, interest will accrue on the unpaid balance of that bill beginning on the thirty-first (31st) day and accruing thereafter at the rate of one percent (1%) per month. Interest charges will apply to specific monthly bills. Payments made on past-due accounts will be applied first to the oldest outstanding bill. If our bills are not paid reasonably soon after they are rendered, we reserve the right to stop work until your account is brought current and appropriate steps are taken to ensure prompt payment in the future. If we have to bring collection efforts for payment, you agree that you will pay the costs of collection procedures, including reasonable attorneys fees incurred by us (whether paid to our firm or another firm retained by us).

We may require a retainer or advance fee deposit for your work. Unless you and we agree otherwise, the retainer or advance fee deposit will be applied to our final statement, and any unused portion will be returned to you. We may also request an advance cost deposit (in addition to the advance fee deposit) when we expect that we will incur substantial costs on your behalf.

Each of you agrees that you will be jointly and severally responsible for the payment of all amounts owed to us and that we can seek payment in full from any one of you at our election. Any agreement between any of you to limit your responsibility for payment of amounts owed to us will not be binding upon us unless we also agree in writing to those limits. Your joint and several responsibility for the payment of our fees and expenses includes the situation in which our representation is terminated for any reason prior to the completion of the organization of [New Entity].

Effect of Death or Disability

If any one of you becomes unable to make adequately-considered decisions regarding the organization of [New Entity] because of mental disability or other reasons, the ethics rules that govern the practice of law in this jurisdiction state that we may attempt to continue a normal attorney-client relationship with you as much as is possible. Those rules also authorize us to seek the appointment of a guardian or to take other actions to protect your interests if we consider that to be necessary. You should be aware that, by means of a durable

power of attorney, you can designate one or more other persons to make decisions for you about the organization of [New Entity] and to sign documents on your behalf. If you authorize someone to act for you, and if their authority is broad enough to allow them to instruct us with regard to your interest in [New Entity] and its organization, we can continue to do work on your behalf by dealing with them, and we can rely on instructions from them. We can communicate with them and disclose information they need to make informed decisions on your behalf, including information that is protected by the attorney-client privilege.

If you die during the course of this engagement, the personal representatives of your estate generally succeed to all of your rights with respect to this engagement and are entitled to act on your behalf. Thereafter, we could continue to do work on your behalf by dealing with your personal representatives, and we can rely on instructions from them. We can communicate with them and disclose information they need to make informed decisions on your behalf, including information that is protected by the attorney-client privilege or the attorney work-product privilege.

Retention, Delivery, Retrieval, and Destruction of the Files

Each of you should understand that the file that will be created by our firm in connection with the organization of [New Entity] will belong to our client, as identified in this letter. During the course of this engagement, each of you will be furnished copies of all of the organizational documents and of all significant correspondence. When the organization of [New Entity] is completed, we will deliver the originals of all of the organization documents to the Secretary of [New Entity]. We will retain physical and/or electronic copies of all of the organizational documents, all correspondence, and, to the extent we deem appropriate, all notes made in connection with this engagement in our file. The client may direct us to turn over our file to [New Entity], to any one of you, or to anyone else that the client designates, at any time. In such case, we will retain in our possession all internal communications and notes prepared by our firm and, at the expense of [New Entity], make, retain, and store physical and/or electronic copies of all other matters in our file to be delivered to [New Entity] or at its request.

It is the policy of our firm that client files that are no longer needed by our lawyers and other professionals on a recurring basis are closed and placed in storage in a location away from our offices. The off-site storage of closed files helps us to reduce our operating expenses, and consequently our fees. Because you and [New Entity] will have been furnished with the originals and/or copies of all relevant materials contained in our files during the course of the active phase of our representation, in the event that we are asked by you or [New Entity] to recover materials contained in a file that has been closed and placed in off-site storage, we shall be entitled to be paid by the requesting party a reasonable charge for the cost of the recovery of the file and the identification, reproduction, and delivery of the requested materials.

Unless our firm is engaged to provide on-going representation of [New Entity], it is our firm's policy to destroy all copies of correspondence, notes, and documents retained in our file created in connection with the organization of a new entity ten (10) years after the completion of the organization. Before destroying the file, we will attempt to contact our client, as identified in this letter, to make arrangements for delivery of any original documents and the other contents of the file to the client. This letter will serve as notice to you that if we are unable to contact our client at the most recent address contained in our file, we will destroy the file without

further notice. It will be your responsibility to notify us of any change in your address or any change in the address or contact information for [New Entity], as appropriate, as the same may change from time to time.

Conflicts with Other Clients

Sometimes our lawyers are asked to represent a client who has interests that are adverse to another client whom we represent in other matters. The ethics rules that govern the practice of law in this jurisdiction permit us to accept multiple representations if certain requirements are met. While we represent you and/or [New Entity], we will not represent another client in matters that are directly adverse to your interests or the interests of [New Entity] unless and until we have made full disclosure to you and to [New Entity] of all relevant facts, circumstances, and implications. You agree that we can represent those other clients whose interests are adverse to yours or to the interests of [New Entity] if we confirm to you in good faith that the following conditions are met: (1) there is no substantial relationship between the other client's matter and our work for you or for [New Entity]; (2) our representation of the other client will not involve or disclose any confidential information we have received from you or [New Entity] (with the use of any ethically-approved screening measures, if appropriate); and (3) the other client also consents to our continuing representation of you and/or [New Entity]. If you make a good-faith objection to our statement, we will have the burden of proving that these conditions have been met.

Consent to the Terms of the Engagement

Before we begin, each of you must consider all of the factors discussed in this letter and consent to the form of the representation. After you have considered this decision carefully, we ask that you please sign the statement that follows this letter to indicate your consent to the conditions of the representation. If, after considering this matter, you prefer a different form of representation, please let us know.

Because any change in legal representation after we begin will result in an increase in the time and expense needed to complete the organization of [New Entity], for which each of you would be financially responsible, we urge you to give careful consideration to the structure of the representation before we begin.

We are enclosing an extra copy of this letter to be signed and returned to us consenting to the conditions of the representation as described in this letter. The return of a copy of this letter signed by each of you will serve as authorization for us to proceed with the organization of [New Entity]. Also enclosed is a return-address envelope for your convenience in returning the signed copy of this letter.

If you have any questions about anything discussed in this letter, please call us. You should also feel free to contact an attorney in another firm to discuss the effect of agreeing to the terms of the representation as outlined in this letter.

We appreciate the opportunity to work with you on the organization of [New Entity], and we look forward to hearing from you soon.

Sincerely,

[Lawyer]

Consent to the Representation and the Terms of the Engagement

We have each reviewed the foregoing letter concerning the various aspects of joint and separate representation, and we choose to have [Firm] represent all of us collectively and jointly in connection with the organization of [New Entity] on the terms described above.

Signed: _____, 20__ _____
(Organizer 1)

Signed: _____, 20__ _____
(Organizer 2)

Signed: _____, 20__ _____
(Organizer 3)

Engagement Letter for Representation in Connection with the Organization of a New Business Entity (Representing Both the Entity and the Organizers Jointly)

[Date]

[Addressees]

Subject: Organization of [New Entity]

Dear [Client(s)]:

Thank you for your confidence in selecting our firm to represent the [number] of you collectively in connection with the organization of [New Entity], and to represent [New Entity].

Scope of the Engagement

We will provide legal services in connection with the formation of [New Entity] as a (corporation/partnership/limited liability company/ etc.) under the laws of the State of [State], including providing advice and counsel regarding the choice of the business entity; the ownership and management structure of the company; the funding and financing of the company and its operations; and, subject to applicable standards of tax practice, the federal and state income tax consequences of the organization, funding, operation, and sale or other disposition of the company or its property; the preparation and filing of the organization documents; and the preparation and filing of documents to effect the initial funding and financing of the company. These services will include telephone and office conferences and correspondence with the organizers of the company and any accountants, lenders, brokers, and other related professionals. If appropriate, and if requested, we will also provide advice and counsel and document preparation in connection with the acquisition or leasing of property by [New Entity], transfer restriction agreements and buy-sell agreements between [New Entity] and its [shareholders/partners/members, etc.], and employment agreements between [New Entity] and its key employees.

Identification of the Client

Our client will be [New Entity] and the [number] of you collectively in your capacity as the organizers and initial owners and managers of [New Entity]. As described below, we will not undertake to represent any of you separately.

It is important that each of you understands that the interests of [New Entity] may not always be identical to the interests of the [number] of you as its organizers, owners, and managers and that the interests of any one of the [number] of you may not always be identical to the interests of the others. Therefore, each of you should be aware that in your individual capacity you should carefully consider retaining independent counsel to advise and represent you separately from [New Entity] and from the others.

Joint Representation – Confidential Information and Potential Conflicts of Interest

You have asked us to represent all of you collectively in connection with the organization of [New Entity] and to also represent [New Entity]. We are happy to do this; however, it is important that each one of you understands and consents to the considerations involved in such a joint representation.

As your attorneys, we would normally owe each one of you a duty to preserve any confidential information you share with us, unless you authorize us to disclose such information to someone else. We would also owe you a duty to act solely in your best interest, without being influenced by the conflicting interests of other clients. If we represent two or more clients simultaneously in the same matter, we have a potential conflict of interest resulting from our conflicting duties to each of the separate clients. For example, in advising you regarding the organization of [New Entity], we would ordinarily be obliged to make known to you any information that we believe might be important to you in making decisions affecting your interest in [New Entity]. This could include our knowledge of information affecting [New Entity] disclosed to us by one of the others of you; however, because we are under a duty to preserve the confidential information made known to us by each of you, we cannot disclose this information to you unless the other person consents. Also, we could not advise you that a proposal suggested by one of you might be adverse to your own personal interests.

It is also important that you understand that, in connection our representation of [New Entity], we are obliged to maintain the confidentiality of any information relating to [New Entity] that may be disclosed to us by other constituents (i.e., shareholders, partners, members, directors, governors, and officers) of [New Entity]. Because we are under a duty to preserve the confidential information made known to us by other constituents of [New Entity], we cannot disclose this information to you unless [New Entity], acting through its duly-authorized governing body, consents. Without that consent, we could not make known to you any information that we believe might be important to you in making decisions affecting your interest in [New Entity], nor could we advise you that a proposal suggested by one of the other constituents of [New Entity] might be adverse to your own personal interests.

Each of you may have differing and conflicting interests and objectives, and your interests and objectives may be in conflict with the best interests of [New Entity]. You may have different views on how the financial rights and governance rights of [New Entity] should be distributed among you. Some decisions regarding one or more of the legal or tax aspects of the structure and organization of [New Entity] may be favorable to one or more of you but unfavorable to others. These are just general examples. Your own situation and interests are unique.

Because each of your interests could potentially be affected by the interests of the others and of the interests of [New Entity], it will be necessary for each of you to consent to the form of our representation of all of you and of [New Entity].

In joint representation of [New Entity] and the [number] of you collectively, we will represent all of you and [New Entity] collectively and simultaneously, almost as if all of you were a single client. We will not be an advocate for any one of you personally, but will serve only to assist all of you in developing a coordinated plan for the structure and organization of [New Entity] and will encourage the resolution of your individual differences in an equitable manner and in the best interests of your on-going relationship as the owners and

managers of [New Entity]. We will normally meet with all of you and any other constituents of [New Entity] at the same time, and relevant and material information shared with us by any one of you and by any other constituents of [New Entity], although confidential as to all others, cannot and will not be kept from any of you or any other constituents of [New Entity]; however, we will generally not disclose to any of the others information any one of you or any other constituents makes known to us outside a joint meeting that we do not think is relevant and material to the organization of [New Entity]. Although the product of the joint representation is intended to be the organization of [New Entity] on terms agreeable to all of you, and in a cost-efficient manner, it could also result in the disclosure of information that one of you might prefer to remain confidential, and it could produce dissension if all of you cannot agree on a particular issue relating to the structure and organization of [New Entity].

Separate Representation

Unlike joint representation [or intermediation], as described above, if each of you were to retain a separate attorney, each of you would have an advocate for your personal interests and would receive totally independent advice. Each of you would meet separately with your attorney, and information given by you to your attorney would be confidential and could not be disclosed by the attorney to anyone else without your consent. Separate representation would ensure the preservation of each of your confidences and the elimination of any conflicts of interest between you and your attorney; however, separate representation might result in each of you taking positions on issues relating to the organization of [New Entity] that would be adverse to each other and would result in a duplication of expenses in having separate attorneys.

Termination of the Engagement

[ALTERNATIVE 1: No prior representation of any of the organizers]

If we begin with our firm representing all of you and [New Entity] jointly, any one of you is completely free to change your mind and engage separate counsel at any time. In addition, any one of you can revoke your waiver of our duty of confidentiality as between you and the others and re-invoke the duty so as to prevent us from disclosing any confidential information received from you which we have not previously disclosed to the others. In either case, we would withdraw from representing [New Entity] and any of you further in connection with the organization of [New Entity] unless all of you consent to our continued representation of [New Entity] or one or more of you, and we would communicate to all of you the reason for our withdrawal.

[ALTERNATIVE 2: Prior representation of one of the organizers]

As each of you is aware, our firm has previously represented [Client-Organizer] personally and in matters related to [his/her] business interests. We have already advised [Client-Organizer] that if we are engaged to represent [New Entity] and the [number] of you collectively in connection with the organization of [New Entity], we may be required to disclose to [New Entity] and its constituents and to each of you information regarding [Client-Organizer] that we might otherwise be prohibited from disclosing; and [Client-Organizer] has consented to any such disclosure to the extent it is relevant and material to the organization of [New Entity].

If we begin with our firm representing [New Entity] and all of you jointly, any one of you is completely free to change your mind and engage separate counsel at any time. In addition, any one of you can revoke your waiver of our duty of confidentiality as between you and the others and re-invoke the duty so as to prevent us from disclosing any confidential information received from you that we have not previously disclosed to the others. In either case, we would withdraw from representing any of you further in connection with the organization of [New Entity], unless all of you consent to our continued representation of one or more of you, and we would communicate to all of you the reason for our withdrawal. Notwithstanding this, if we are requested by [Client-Organizer] to continue to represent [him/her] in connection with the organization of [New Entity], we would do so and, by agreeing to our representation of [New Entity] and the [number] of you collectively as described in this letter, each of you consents to our continuing representation of [Client-Organizer] in that event.

When the organization of [New Entity] has been completed, our representation of [New Entity] and all of you as organizers will be concluded, unless arrangements for a continuing representation are made. We will be happy to provide additional or continuing services, but unless such arrangements are made and agreed upon in writing, we will have no further responsibility to [New Entity] or to you in connection with any future or ongoing legal issues affecting [New Entity], including any duty to notify you of changes in the laws or the necessity to make any periodic or renewal filings or registrations.

Fees and Billing

[ALTERNATIVE 1: *Flat Fee*]

Our fee in connection with the organization of [New Entity] will be a flat fee of \$____. This fee includes the normal office and telephone conferences, research, analysis, and advice associated with the organization of [New Entity] and the preparation and filing of the appropriate documents to complete the organization. Significant changes in the scope of the services required or significant revisions to the organizational documents will be charged separately, but any additional charges will be explained to you before any revisions are begun. One-half of this fee is payable once this engagement letter is signed and you authorize us to proceed and is not refundable even if you later decide not to complete the organization. The balance of the fee will be payable at the time when the organization is complete.

[ALTERNATIVE 2: *Time-Based Billing*]

Our fee in connection with the organization of [New Entity] will be the product of the time spent by our lawyers and other professionals multiplied times their respective hourly rates. The time for which we are to be paid includes not only normal office conferences, research, analysis, and advice associated with the organization of [New Entity] and the preparation and filing of the appropriate documents to complete the organization, but also the time involved in telephone calls, faxes, e-mail, and other forms of communication. We will bill you for our services on a monthly basis.

We adjust our hourly rates periodically. We consider the ability, experience, and reputation of our lawyers and paralegals when we set hourly rates. Changes are usually made each January 1, but sometimes they

are made at other times. Any increase in rates will apply to all time beginning with the month when the rates are changed. Work done before that month will be billed at the hourly rate that was previously in effect. Different lawyers and paralegals in our firm may be involved in your work if that will result in lower fees, provide a specialized legal talent, or help us do your work more efficiently. We will try to assign lawyers and paralegals having the lowest hourly rates consistent with the skills, time demands, and other factors required for your work. We might not assign a lawyer or paralegal with the lowest hourly rate if, in our judgment, it may be in your best interests to assign a lawyer or paralegal with a higher hourly rate because of that lawyer's or paralegal's skill and experience or because of the time constraints of the work. We record and bill our time in one-tenth hour (six-minute) units. If a lawyer's or paralegal's total time on your work is less than three-tenths of an hour for the entire day, three-tenths of an hour will be billed for that day. If the lawyer's or paralegal's total time on your work is more than three-tenths of an hour for that day (whether done at one time or not), only the time actually spent will be billed.

In addition to our legal fees, as described above, we will be entitled to be reimbursed by you for out-of-pocket expenses that we pay on your behalf and for our internal costs. Out-of-pocket expenses include items such as filing fees charged by government agencies and travel expenses. Our internal costs include things like photocopying, long-distance telephone calls, fax transmissions, document scanning and electronic transmission, storage, and retrieval, courier services, computer research charges, and complex document production. Rather than tracking precise costs for every single internal charge (which would ultimately result in higher hourly rates for our clients), we charge fixed costs for these types of expenses. Our charges for these internal costs may exceed the actual direct costs that we pay to outsiders (such as the telephone company or photocopying contractors).

Sometimes it is necessary to hire other persons to provide services for you, such as accounting or appraisal firms. Their work may have more confidentiality if we (rather than you) request their services, and so we may hire them. However, you will be responsible for paying their fees and expenses, whether paid directly to them or to us in reimbursement.

Our bills are due when rendered. If a bill is not paid within 30 days after it is mailed to you, interest will accrue on the unpaid balance of that bill beginning on the thirty-first (31st) day and accruing thereafter at the rate of one percent (1%) per month. Interest charges will apply to specific monthly bills. Payments made on past-due accounts will be applied first to the oldest outstanding bill. If our bills are not paid reasonably soon after they are rendered, we reserve the right to stop work until your account is brought current and appropriate steps are taken to ensure prompt payment in the future. If we have to bring collection efforts for payment, you agree that you will pay the costs of collection procedures, including reasonable attorneys fees incurred by us (whether paid to our firm or another firm retained by us).

We may require a retainer or advance fee deposit for your work. Unless you and we agree otherwise, the retainer or advance fee deposit will be applied to our final statement, and any unused portion will be returned to you. We may also request an advance cost deposit (in addition to the advance fee deposit) when we expect that we will incur substantial costs on your behalf.

Each of you agrees that you will be jointly and severally responsible for the payment of all amounts owed to us and that we can seek payment in full from any one of you at our election. Any agreement between any of you to limit your responsibility for payment of amounts owed to us will not be binding upon us unless we also agree in writing to those limits. Your joint and several responsibility for the payment of our fees and expenses includes the situation in which our representation is terminated for any reason prior to the completion of the organization of [New Entity].

Effect of Death or Disability

If any one of you becomes unable to make adequately-considered decisions regarding the organization of [New Entity] because of mental disability or other reasons, the ethics rules that govern the practice of law in this jurisdiction state that we may attempt to continue a normal attorney-client relationship with you as much as is possible. Those rules also authorize us to seek the appointment of a guardian or to take other actions to protect your interests if we consider that to be necessary. You should be aware that, by means of a durable power of attorney, you can designate one or more other persons to make decisions for you about the organization of [New Entity] and to sign documents on your behalf. If you authorize someone to act for you, and if their authority is broad enough to allow them to instruct us with regard to your interest in [New Entity] and its organization, we can continue to do work on your behalf by dealing with them, and we can rely on instructions from them. We can communicate with them and disclose information they need to make informed decisions on your behalf, including information that is protected by the attorney-client privilege.

If you die during the course of this engagement, the personal representatives of your estate generally succeed to all of your rights with respect to this engagement and are entitled to act on your behalf. Thereafter, we could continue to do work on your behalf by dealing with your personal representatives, and we can rely on instructions from them. We can communicate with them and disclose information they need to make informed decisions on your behalf, including information that is protected by the attorney-client privilege or the attorney work-product privilege.

Retention, Delivery, Retrieval, and Destruction of the Files

Each of you should understand that the file that will be created by our firm in connection with the organization of [New Entity] will belong to our client, as identified in this letter. During the course of this engagement, each of you will be furnished copies of all of the organizational documents and of all significant correspondence. When the organization of [New Entity] is completed, we will deliver the originals of all of the organization documents to the Secretary of [New Entity]. We will retain physical and/or electronic copies of all of the organizational documents, all correspondence, and, to the extent we deem appropriate, all notes made in connection with this engagement in our file. The client may direct us to turn over our file to [New Entity], to any one of you, or to anyone else that the client designates, at any time. In such case, we will retain in our possession all internal communications and notes prepared by our firm and, at the expense of [New Entity], make, retain, and store physical and/or electronic copies of all other matters in our file to be delivered to [New Entity] or at its request.

It is the policy of our firm that client files that are no longer needed by our lawyers and other professionals on a recurring basis are closed and placed in storage in a location away from our offices. The off-site storage of closed files helps us to reduce our operating expenses, and consequently our fees. Because you and [New Entity] will have been furnished with the originals and/or copies of all relevant materials contained in our files during the course of the active phase of our representation, in the event that we are asked by you or [New Entity] to recover materials contained in a file that has been closed and placed in off-site storage, we shall be entitled to be paid by the requesting party a reasonable charge for the cost of the recovery of the file and the identification, reproduction, and delivery of the requested materials.

Unless our firm is engaged to provide on-going representation of [New Entity], it is our firm's policy to destroy all copies of correspondence, notes, and documents retained in our file created in connection with the organization of a new entity ten (10) years after the completion of the organization. Before destroying the file, we will attempt to contact our client, as identified in this letter, to make arrangements for delivery of any original documents and the other contents of the file to the client. This letter will serve as notice to you that if we are unable to contact our client at the most recent address contained in our file, we will destroy the file without further notice. It will be your responsibility to notify us of any change in your address or any change in the address or contact information for [New Entity], as appropriate, as the same may change from time to time.

Conflicts with Other Clients

Sometimes our lawyers are asked to represent a client who has interests that are adverse to another client whom we represent in other matters. The ethics rules that govern the practice of law in this jurisdiction permit us to accept multiple representations if certain requirements are met. While we represent you and/or [New Entity], we will not represent another client in matters that are directly adverse to your interests or the interests of [New Entity] unless and until we have made full disclosure to you and to [New Entity] of all relevant facts, circumstances, and implications. You agree that we can represent those other clients whose interests are adverse to yours or to the interests of [New Entity] if we confirm to you in good faith that the following conditions are met: (1) there is no substantial relationship between the other client's matter and our work for you or for [New Entity]; (2) our representation of the other client will not involve or disclose any confidential information we have received from you or [New Entity] (with the use of any ethically-approved screening measures, if appropriate); and (3) the other client also consents to our continuing representation of you and/or [New Entity]. If you make a good-faith objection to our statement, we will have the burden of proving that these conditions have been met.

Consent to the Terms of the Engagement

Before we begin, each of you must consider all of the factors discussed in this letter and consent to the form of the representation. After you have considered this decision carefully, we ask that you please sign the statement that follows this letter to indicate your consent to the conditions of the representation. If, after considering this matter, you prefer a different form of representation, please let us know.

Because any change in legal representation after we begin will result in an increase in the time and expense needed to complete the organization of [New Entity], for which each of you would be financially responsible, we urge you to give careful consideration to the structure of the representation before we begin.

We are enclosing an extra copy of this letter to be signed and returned to us consenting to the conditions of the representation as described in this letter. The return of a copy of this letter signed by each of you will serve as authorization for us to proceed with the organization of [New Entity]. Also enclosed is a return-address envelope for your convenience in returning the signed copy of this letter.

If you have any questions about anything discussed in this letter, please call us. You should also feel free to contact an attorney in another firm to discuss the effect of agreeing to the terms of the representation as outlined in this letter.

We appreciate the opportunity to work with you on the organization of [New Entity], and we look forward to hearing from you soon.

Sincerely,

[Lawyer]

Consent to the Representation and the Terms of the Engagement

We have each reviewed the foregoing letter concerning the various aspects of joint and separate representation, and we choose to have [Firm] represent all of us collectively and [New Entity] jointly in connection with the organization of [New Entity] on the terms described above.

Signed: _____, 20__ _____
(Organizer 1)

Signed: _____, 20__ _____
(Organizer 2)

Signed: _____, 20__ _____
(Organizer 3)

**Form of an Engagement Letter for Representation in Connection with the Organization
of a New Business Entity (Representing the Organizers as an Intermediary)**

[Date]

[Addressees]

Subject: Organization of [New Entity]

Dear [Clients]:

Thank you for your confidence in selecting our firm to represent you, acting as an Intermediary as described below, in connection with the organization of [New Entity].

Scope of the Engagement

We will provide legal services in connection with the formation of [New Entity] as a [corporation/partnership/limited liability company, etc.] under the laws of the State of [State], including providing advice and counsel regarding the choice of the business entity; the ownership and management structure of the company; the funding and financing of the company and its operations; and, subject to applicable standards of tax practice, the federal and state income tax consequences of the organization, funding, operation, and sale or other disposition of the company or its property; the preparation and filing of the organization documents; and the preparation and filing of documents to effect the initial funding and financing of the company. These services will include telephone and office conferences and correspondence with the organizers of the company and any accountants, lenders, brokers, and other related professionals. If appropriate, and if requested, we will also provide advice and counsel and document preparation in connection with the acquisition or leasing of property by [New Entity], transfer restriction agreements and buy-sell agreements between [New Entity] and its [shareholders/partners/members, etc.], and employment agreements between [New Entity] and its key employees.

Identification of the Client

Our client will be the [number] of you collectively in your capacity as the organizers and initial owners and managers of [New Entity], and in connection with this representation, we will be acting as an Intermediary as described below. We will not undertake to represent [New Entity] or any of you separately.

It is important that each of you understands that the interests of [New Entity] may not always be identical to the interests of the [number] of you as its organizers, owners, and managers and that the interests of any one of the [number] of you may not always be identical to the interests of the others. Therefore, each of you should be aware that in your individual capacity you should carefully consider retaining independent counsel to advise and represent you separately from [New Entity] and from the others.

Intermediation

You have asked us to represent all of you collectively in connection with the organization of [New Entity] and to do so in the capacity as an Intermediary. We are happy to do this; however, it is important that each one of you understand and consent to the considerations involved in such a representation.

As your attorneys, we would normally owe each one of you a duty to preserve any confidential information you share with us, unless you authorize us to disclose such information to someone else. We would also owe you a duty to act solely in your best interest, without being influenced by the conflicting interests of other clients. If we represent two or more clients simultaneously in the same matter, we have a potential conflict of interest resulting from our conflicting duties to each of the separate clients. For example, in advising you regarding the organization of [New Entity], we would ordinarily be obliged to make known to you any information that we think might be important to you in making decisions affecting your interest in [New Entity]. This could include our knowledge of information affecting [New Entity] disclosed to us by one of the others of you; however, because we are under a duty to preserve the confidential information made known to us by each of you, we cannot disclose this information to you unless the other person consents. Also, we could not advise you that a proposal suggested by one of you might be adverse to your own personal interests.

Each of you may have differing and conflicting interests and objectives. You may have different views on how the financial rights and governance rights of [New Entity] should be distributed among you. Some decisions regarding one or more of the legal or tax aspects of the structure and organization of [New Entity] may be favorable to one or more of you but unfavorable to others. These are just general examples. Your own situation and interests are unique.

Because each of your interests could potentially be affected by the interests of the others, it will be necessary for each of you to consent to the form of our representation of all of you.

We may represent all of you collectively, acting as an Intermediary in connection with the organization of [New Entity]. The hallmarks of an intermediation include our impartiality while serving as an intermediary and the necessity of an open, candid, and non-adversarial pursuit of the common objectives by each of you. Intermediation differs significantly from the partisan role normally played by lawyers because it requires that we be impartial as [between/among] the [number] of you, rather than serving as an advocate on behalf of any one of you. When we serve as an intermediary, each of you must assume greater responsibility for your own decisions than if each of you were independently represented. As an intermediary, we will seek to achieve your common objectives and to resolve potentially conflicting interests by developing your mutual interests. While we will maintain confidentiality as against outsiders, we will not keep information provided to us by any one of you confidential from the other [number]. We will withdraw from the representation, and from representing any one of you further in connection with the organization of [New Entity], if any of you requests or if one or more of you revokes our authority to disclose information to the others. Although the product of an intermediation is intended to be the structure and organization of [New Entity] on terms agreeable to all of you, and in a cost-efficient manner, it could also result in the disclosure of information that one of you might prefer to remain confidential, and it could produce dissension if all of you could not agree on a particular issue relating to the structure and organization of [New Entity].

Separate Representation

Unlike joint representation [or intermediation], as described above, if each of you were to retain a separate attorney, each of you would have an advocate for your personal interests and would receive totally independent advice. Each of you would meet separately with your attorney, and information given by you to your attorney would be confidential and could not be disclosed by the attorney to anyone else without your consent. Separate representation would ensure the preservation of each of your confidences and the elimination of any conflicts of interest between you and your attorney; however, separate representation might result in each of you taking positions on issues relating to the organization of [New Entity] that would be adverse to each other and would result in a duplication of expenses in having separate attorneys.

Termination of the Engagement

[ALTERNATIVE 1: *No prior representation of any of the organizers*]

If we begin with our firm representing all of you acting as an intermediary, any one of you is completely free to change your mind and terminate the intermediation at any time. In addition, any one of you can revoke your waiver of our duty of confidentiality as between you and the others and re-invoke the duty so as to prevent us from disclosing any confidential information received from you that we have not previously disclosed to the others. In either case, we would withdraw from representing any of you further in connection with the organization of [New Entity] and would communicate to all of you the reason for our withdrawal.

[ALTERNATIVE 2: *Prior representation of one of the organizers*]

As each of you is aware, our firm has previously represented [Client-Organizer] personally and in matters related to [his/her] business interests. We have already advised [Client-Organizer] that if we are engaged to represent the [number] of you collectively, acting as an intermediary, in connection with the organization of [New Entity], we may be required to disclose to each of you information regarding [Client-Organizer] that we might otherwise be prohibited from disclosing; and [Client-Organizer] has consented to any such disclosure to the extent it is relevant and material to the organization of [New Entity].

If we begin with our firm representing all of you acting as an intermediary, any one of you is completely free to change your mind and terminate the intermediation at any time. In addition, any one of you can revoke your waiver of our duty of confidentiality as between you and the others and re-invoke the duty so as to prevent us from disclosing any confidential information received from you that we have not previously disclosed to the others. In either case, we would withdraw from representing any of you further in connection with the organization of [New Entity], and we would communicate to all of you the reason for our withdrawal.

When the organization of [New Entity] has been completed, our representation of [New Entity] and all of you as organizers will be concluded, unless arrangements for a continuing representation are made. We will be happy to provide additional or continuing services but unless such arrangements are made and agreed upon in writing, we will have no further responsibility to [New Entity] or to you in connection with any future or ongoing legal issues affecting [New Entity], including any duty to notify you of changes in the laws or the necessity to make any periodic or renewal filings or registrations.

Fees and Billing

[ALTERNATIVE 1: *Flat Fee*]

Our fee in connection with the organization of [New Entity] will be a flat fee of \$____. This fee includes the normal office and telephone conferences, research, analysis, and advice associated with the organization of [New Entity] and the preparation and filing of the appropriate documents to complete the organization. Significant changes in the scope of the services required or significant revisions to the organizational documents will be charged separately, but any additional charges will be explained to you before any revisions are begun. One-half of this fee is payable once this engagement letter is signed and you authorize us to proceed and is not refundable even if you later decide not to complete the organization. The balance of the fee will be payable at the time when the organization is complete.

[ALTERNATIVE 2: *Time-Based Billing*]

Our fee in connection with the organization of [New Entity] will be the product of the time spent by our lawyers and other professionals multiplied times their respective hourly rates. The time for which we are to be paid includes not only normal office conferences, research, analysis, and advice associated with the organization of [New Entity] and the preparation and filing of the appropriate documents to complete the organization, but also the time involved in telephone calls, faxes, e-mail, and other forms of communication. We will bill you for our services on a monthly basis.

We adjust our hourly rates periodically. We consider the ability, experience, and reputation of our lawyers and paralegals when we set hourly rates. Changes are usually made each January 1, but sometimes they are made at other times. Any increase in rates will apply to all time beginning with the month when the rates are changed. Work done before that month will be billed at the hourly rate that was previously in effect. Different lawyers and paralegals in our firm may be involved in your work if that will result in lower fees, provide a specialized legal talent, or help us do your work more efficiently. We will try to assign lawyers and paralegals having the lowest hourly rates consistent with the skills, time demands, and other factors required for your work. We might not assign a lawyer or paralegal with the lowest hourly rate if, in our judgment, it may be in your best interests to assign a lawyer or paralegal with a higher hourly rate because of that lawyer's or paralegal's skill and experience or because of the time constraints of the work. We record and bill our time in one-tenth hour (six-minute) units. If a lawyer's or paralegal's total time on your work is less than three-tenths of an hour for the entire day, three-tenths of an hour will be billed for that day. If the lawyer's or paralegal's total time on your work is more than three-tenths of an hour for that day (whether done at one time or not), only the time actually spent will be billed.

In addition to our legal fees, as described above, we will be entitled to be reimbursed by you for out-of-pocket expenses that we pay on your behalf and for our internal costs. Out-of-pocket expenses include items such as filing fees charged by government agencies and travel expenses. Our internal costs include things like photocopying, long-distance telephone calls, fax transmissions, document scanning and electronic transmission, storage, and retrieval, courier services, computer research charges, and complex document production. Rather than tracking precise costs for every single internal charge (which would ultimately result in higher hourly

rates for our clients), we charge fixed costs for these types of expenses. Our charges for these internal costs may exceed the actual direct costs that we pay to outsiders (such as the telephone company or photocopying contractors).

Sometimes it is necessary to hire other persons to provide services for you, such as accounting or appraisal firms. Their work may have more confidentiality if we (rather than you) request their services, and so we may hire them. However, you will be responsible for paying their fees and expenses, whether paid directly to them or to us in reimbursement.

Our bills are due when rendered. If a bill is not paid within 30 days after it is mailed to you, interest will accrue on the unpaid balance of that bill beginning on the thirty-first (31st) day and accruing thereafter at the rate of one percent (1%) per month. Interest charges will apply to specific monthly bills. Payments made on past-due accounts will be applied first to the oldest outstanding bill. If our bills are not paid reasonably soon after they are rendered, we reserve the right to stop work until your account is brought current and appropriate steps are taken to ensure prompt payment in the future. If we have to bring collection efforts for payment, you agree that you will pay the costs of collection procedures, including reasonable attorneys fees incurred by us (whether paid to our firm or another firm retained by us).

We may require a retainer or advance fee deposit for your work. Unless you and we agree otherwise, the retainer or advance fee deposit will be applied to our final statement, and any unused portion will be returned to you. We may also request an advance cost deposit (in addition to the advance fee deposit) when we expect that we will incur substantial costs on your behalf.

Each of you agrees that you will be jointly and severally responsible for the payment of all amounts owed to us and that we can seek payment in full from any one of you at our election. Any agreement between any of you to limit your responsibility for payment of amounts owed to us will not be binding upon us unless we also agree in writing to those limits. Your joint and several responsibility for the payment of our fees and expenses includes the situation in which our representation is terminated for any reason prior to the completion of the organization of [New Entity].

Effect of Death or Disability

If any one of you becomes unable to make adequately-considered decisions regarding the organization of [New Entity] because of mental disability or other reasons, the ethics rules that govern the practice of law in this jurisdiction state that we may attempt to continue a normal attorney-client relationship with you as much as is possible. Those rules also authorize us to seek the appointment of a guardian or to take other actions to protect your interests if we consider that to be necessary. You should be aware that, by means of a durable power of attorney, you can designate one or more other persons to make decisions for you about the organization of [New Entity] and to sign documents on your behalf. If you authorize someone to act for you, and if their authority is broad enough to allow them to instruct us with regard to your interest in [New Entity] and its organization, we can continue to do work on your behalf by dealing with them, and we can rely on instructions from them. We can communicate with them and disclose information they need to make informed decisions on your behalf, including information that is protected by the attorney-client privilege.

If you die during the course of this engagement, the personal representatives of your estate generally succeed to all of your rights with respect to this engagement and are entitled to act on your behalf. Thereafter, we could continue to do work on your behalf by dealing with your personal representatives, and we can rely on instructions from them. We can communicate with them and disclose information they need to make informed decisions on your behalf, including information that is protected by the attorney-client privilege or the attorney work-product privilege.

Retention, Delivery, Retrieval, and Destruction of the Files

Each of you should understand that the file that will be created by our firm in connection with the organization of [New Entity] will belong to our client, as identified in this letter. During the course of this engagement, each of you will be furnished copies of all of the organizational documents and of all significant correspondence. When the organization of [New Entity] is completed, we will deliver the originals of all of the organization documents to the Secretary of [New Entity]. We will retain physical and/or electronic copies of all of the organizational documents, all correspondence, and, to the extent we deem appropriate, all notes made in connection with this engagement in our file. The client may direct us to turn over our file to [New Entity], to any one of you, or to anyone else that the client designates, at any time. In such case, we will retain in our possession all internal communications and notes prepared by our firm and, at the expense of [New Entity], make, retain, and store physical and/or electronic copies of all other matters in our file to be delivered to [New Entity] or at its request.

It is the policy of our firm that client files that are no longer needed by our lawyers and other professionals on a recurring basis are closed and placed in storage in a location away from our offices. The off-site storage of closed files helps us to reduce our operating expenses, and consequently our fees. Because you and [New Entity] will have been furnished with the originals and/or copies of all relevant materials contained in our files during the course of the active phase of our representation, in the event that we are asked by you or [New Entity] to recover materials contained in a file that has been closed and placed in off-site storage, we shall be entitled to be paid by the requesting party a reasonable charge for the cost of the recovery of the file and the identification, reproduction, and delivery of the requested materials.

Unless our firm is engaged to provide on-going representation of [New Entity], it is our firm's policy to destroy all copies of correspondence, notes, and documents retained in our file created in connection with the organization of a new entity ten (10) years after the completion of the organization. Before destroying the file, we will attempt to contact our client, as identified in this letter, to make arrangements for delivery of any original documents and the other contents of the file to the client. This letter will serve as notice to you that if we are unable to contact our client at the most recent address contained in our file, we will destroy the file without further notice. It will be your responsibility to notify us of any change in your address or any change in the address or contact information for [New Entity], as appropriate, as the same may change from time to time.

Conflicts with Other Clients

Sometimes our lawyers are asked to represent a client who has interests that are adverse to another client whom we represent in other matters. The ethics rules that govern the practice of law in this jurisdiction per-

mit us to accept multiple representations if certain requirements are met. While we represent you and/or [New Entity], we will not represent another client in matters that are directly adverse to your interests or the interests of [New Entity] unless and until we have made full disclosure to you and to [New Entity] of all relevant facts, circumstances, and implications. You agree that we can represent those other clients whose interests are adverse to yours or to the interests of [New Entity] if we confirm to you in good faith that the following conditions are met: (1) there is no substantial relationship between the other client's matter and our work for you or for [New Entity]; (2) our representation of the other client will not involve or disclose any confidential information we have received from you or [New Entity] (with the use of any ethically-approved screening measures, if appropriate); and (3) the other client also consents to our continuing representation of you and/or [New Entity]. If you make a good-faith objection to our statement, we will have the burden of proving that these conditions have been met.

Consent to the Terms of the Engagement

Before we begin, each of you must consider all of the factors discussed in this letter and consent to the form of the representation. After you have considered this decision carefully, we ask that you please sign the statement that follows this letter to indicate your consent to the conditions of the representation. If, after considering this matter, you prefer a different form of representation, please let us know.

Because any change in legal representation after we begin will result in an increase in the time and expense needed to complete the organization of [New Entity], for which each of you would be financially responsible, we urge you to give careful consideration to the structure of the representation before we begin.

We are enclosing an extra copy of this letter to be signed and returned to us consenting to the conditions of the representation as described in this letter. The return of a copy of this letter signed by each of you will serve as authorization for us to proceed with the organization of [New Entity]. Also enclosed is a return-address envelope for your convenience in returning the signed copy of this letter.

If you have any questions about anything discussed in this letter, please call us. You should also feel free to contact an attorney in another firm to discuss the effect of agreeing to the terms of the representation as outlined in this letter.

We appreciate the opportunity to work with you on the organization of [New Entity], and we look forward to hearing from you soon.

Sincerely,

[Lawyer]

Consent to the Representation and the Terms of the Engagement

We have each reviewed the foregoing letter concerning the various aspects of the representation, and we choose to have [Firm] serve as an Intermediary in representing all of us collectively in connection with the organization of [New Entity] on the terms described above.

Signed: _____, 20__ _____
(Organizer 1)

Signed: _____, 20__ _____
(Organizer 2)

Signed: _____, 20__ _____
(Organizer 3)

CHAPTER 4. ESTATE PLANNING LAWYER SERVING AS A FIDUCIARY

Introduction

This form addresses ethical issues that arise when a client asks the estate planning lawyer to serve as a fiduciary. These ethical issues should be disclosed and discussed with the client. This form should be adapted to fit each specific factual situation and applicable state law.

There are a number of specific ethical issues in this setting, including full disclosure to and discussion with the client of the alternative possibilities for fiduciary appointment, relative cost effectiveness of each of the alternatives, possible elimination of normal bonding requirements, and possible inclusion of exculpatory language in the dispositive document, which will have an effect on the standard of care to which the fiduciary will be held for liability purposes. Care must be taken with these subjects since the fiduciary will have been the scrivener.

References to the *ACTEC Commentaries* (Fourth Edition):

(Note that the page numbers shown below refer to the printed version of the *ACTEC Commentaries*.)

Lawyer Serving as Fiduciary and Counsel to Fiduciary, pp. 36-37

Basis of Fees for Trusts and Estates Services, p. 63

Selection of Fiduciaries, p. 95

Appointment of Scrivener as Fiduciary, pp. 95-96

Exculpatory Clauses, pp. 108, 112-113

Prohibited Transactions, p. 112

Supplemental Checklist for the Estate Planning Lawyer Serving as a Fiduciary

(Refer also to the General Checklist on pp. 4-8.)

1. ISSUES A LAWYER SHOULD CONSIDER BEFORE ACCEPTING THE REPRESENTATION
 - (a) Does the lawyer or his or her law firm have a policy regarding lawyers serving as fiduciary? If so, what is the policy (encourage, discourage, prohibit)?
 - (b) Does the lawyer have adequate support staff to permit the lawyer to perform fiduciary services efficiently and cost effectively?
 - (c) Does the lawyer's professional liability policy include or exclude lawyers serving as personal representative? trustee? guardian or conservator? attorney-in-fact?

2. DEFINE THE CONTENTS OF THE LETTER.

What should the engagement letter include when the client requests the estate planning lawyer serve as fiduciary?

- (a) Fact that client independently selected lawyer as fiduciary
- (b) Disclosure of potential conflicts of interest
- (c) Advantages and disadvantages of lawyer serving as fiduciary
- (d) Compensation to be paid lawyer as fiduciary and lawyer's law firm for legal services
- (e) Explanation of exculpatory language and available options with respect to its use
- (f) Explanation of bonding requirements, including cost of bond, customary practice, and relationship to professional liability insurance

3. CONSIDER THE ADVANTAGES AND DISADVANTAGES OF CO-FIDUCIARIES.

- (a) Two heads better than one
- (b) Costs
- (c) Checks and balances

Form of a Letter Regarding the Appointment of the Lawyer as a Fiduciary

[Date]

[Name(s) and Address(es)]

Subject: Serving as Your [Executor/Trustee]

Dear [Client(s)]:

At our recent estate planning conference, you requested that I serve as the [executor/trustee under your will/trustee of your trust (Fully Identify Trust)]. I am willing to undertake this responsibility. However, in accepting this responsibility, I want to explain certain ethical considerations to you and obtain your acknowledgment that conflicts of interest could develop in connection with my service as your [executor/trustee].

ALTERNATIVE 1: *Responsibilities of Executor*

The executor of your will is charged with the responsibility to collect, manage, and protect your assets; to pay your just debts and funeral expenses; to prepare and file required tax returns; to pay the taxes required to be paid by your estate; to pay the expenses of the administration of your estate; and to distribute your estate in the manner directed by your will.

ALTERNATIVE 2: *Responsibilities of Trustee*

The trustee of your trust is charged with the responsibility to manage, invest, reinvest, and protect the assets of the trust; to prepare and file required tax returns for the trust; to pay taxes required to be paid by your trust and the expenses of the administration of your trust; and to distribute the trust income and assets in the manner directed by your trust agreement.

Your [executor/trustee] should exercise good judgment, prudence, common sense, diligence, fairness, honesty, and have reasonable skill and experience in the management of the types of assets that comprise your [estate/trust], or obtain assistance in connection with the management of those assets.

Others Who Could Be Nominated as [Executor/Trustee]

Others who might serve as your [executor/trustee] include your spouse, one or more of your children, a bank or trust company, an investment advisor, your accountant, a relative, a personal friend, or a business associate.

Potential Conflicts of Interest

I can serve as your [executor/trustee] if that is your desire. However, several potential conflicts of interest may arise from my service as your [executor/trustee]. One of these conflicts of interest relates to the probability that my law firm will serve as legal counsel for me as [executor/trustee].

A lawyer's independence may be compromised when he or she acts as both [executor/trustee] and lawyer for the [executor/trustee]. The normal checks and balances that exist when two unrelated parties serve separately as [executor/trustee] and lawyer for the [executor/trustee] are absent. Unless [the Probate Court/a court] is asked to intervene, there may not be an independent, impartial review to determine if the [executor/trustee] is exercising an appropriate level of care, skill, diligence, and prudence in the administration of your [estate/trust], and there may not be an independent, impartial evaluation as to whether or not the fees and expenses charged by the [executor/trustee] and the fees and expenses charged by the law firm are reasonable. There may be other potential conflicts that may arise that might not be anticipated at this time.

Compensation to the Lawyer Nominated as [Executor/Trustee]; Retention of Law Firm

Both the [executor/trustee] and the lawyer for the [executor/trustee] are entitled to compensation for services performed on behalf of the [estate/trust]. When a lawyer has been nominated as [executor/trustee], he or she can receive compensation for performing services as [executor/trustee] and as the lawyer for the [executor/trustee], as long as he or she charges only once for services rendered and as long as the total compensation for serving as both [executor/trustee] and lawyer for the [executor/trustee] is reasonable.

When I am requested by a client to serve as [executor/trustee], it is my practice to charge [DESCRIBE BASIS FOR FEE OR COMMISSION AS (EXECUTOR/TRUSTEE)]. In addition to [an executor's/a trustee's] fee or commission, I would also be entitled to reimbursement for out-of-pocket expenses, including court costs and fidelity bond premiums. In serving as [executor/trustee], I will likely obtain professional investment advice, and that cost will be charged to your [estate/trust].

When I am requested by a client to serve as [executor/trustee], it is my practice to engage my law firm to represent me in my capacity as [executor/trustee]. It is our firm's practice to charge [describe basis for fees as lawyer]. In addition to these fees, our firm would also be entitled to reimbursement for all out-of-pocket expenses. I would be entitled to receive my distributive share of the law firm's compensation.

[OPTIONAL ADDITIONAL PARAGRAPH REGARDING COMPENSATION]

It has been my experience that where I have been requested to serve as [executor/trustee], the combination of my [executor's/trustee's] fees and the legal fee charged by my law firm are less than the combination of [an executor's/a trustee's] fee charged by a bank or trust company and the legal fee charged by our law firm.

[OPTIONAL ADDITIONAL PARAGRAPHS]

Waiver of Bond; Use of Exculpatory Language

A [will/trust] may include language relieving the [executor/trustee] from the normal obligation to post [an executor's/a trustee's] bond with the court for the faithful performance of his or her obligations as well as language absolving the [executor/trustee] nominated in the will from liability for actions not involving negligence, fraud, or bad faith. For example, a [will/trust] may provide that the [executor/trustee] is not to be charged with losses resulting from the action or inaction of the [executor/trustee] in the exercise of reasonable care, diligence, and prudence.

[CHOOSE ONE OF THE FOLLOWING]

[ALTERNATIVE 1:]

Where the [will/trust] nominates the lawyer who prepared the [will/trust] as [executor/trustee], there is a potential conflict of interest for the lawyer incorporating into the [will/trust] language that relieves the lawyer from the obligation to post bond or which absolves the lawyer from liability for his or her own actions. I normally include language that relieves the [executor/trustee] from the obligation to post bond. I normally include language that exonerates the [executor/trustee] from liability for decisions made in the exercise of reasonable care, diligence, and prudence.

[ALTERNATIVE 2:]

In [wills/trusts] where I am nominated to serve as [an executor/a trustee], I normally do not include any language that relieves the [executor/trustee] of the obligation to post bond or that exonerates the [executor/trustee] from liability for decisions made as [executor/trustee]. Absent such language, under the laws of this state, I [may/would] be obliged to post a bond for the faithful performance of my duties as [executor/trustee] and I am obliged to exercise the degree of care, skill, prudence, and diligence that a prudent person would use in the management of his or her own affairs. [NOTE: The “prudent person rule” differs from state-to-state. Be sure the rule is correctly stated for the jurisdiction in which the document is being drafted.] I estimate the annual faithful performance bond premium will cost approximately \$_____ annually and is payable out of the assets of the [estate/trust].

It is your choice whether or not to waive the requirements of [an executor’s/a trustee’s] bond and whether to include or exclude language exonerating me from liability as your [executor/trustee]. Please advise me of your decision.

ALTERNATIVE: Change of [Executor/Trustee]

It is quite common for a [will/trust] to grant to one or more individuals the right to remove a trustee with or without cause and to appoint a successor. [You have instructed me [not] to include such a provision in your [will/trust].]

Consulting Independent Counsel

Because of the potential for a conflict of interest in my advising you with regard to these matters [and the inclusion or exclusion of language relieving me of any potential liability], you may want to consider discussing these matters with another lawyer. [NOTE: Counsel should consider the implications of *Fred Hutchinson Cancer Research Center v. Holman*, 732 P.2d 974 (Wash. 1987), where the court held that an exoneration clause did not protect the scrivener fiduciary against liability: “as the attorney engaged to write the decedent’s will, [defendant] is precluded from reliance on the clause to limit his own liability when the testator did not receive independent advice as to its meaning and effect.” 732 P.2d at 980.]

Nominating the Lawyer as [Executor/Trustee]

If, after consideration of these issues, you want to nominate me as your [executor/trustee], I would like you to acknowledge and waive the potential conflicts of interest I have explained to you. Please review the statement of nomination below. After you have considered this decision carefully, I ask that you sign the consent that follows this letter to indicate your request that I serve as your [executor/trustee]. Please return a signed copy of the consent to me. If you have any questions about anything discussed in this letter, please let me know.

Sincerely,

[Lawyer]

Confirmation of Appointment

We have voluntarily nominated [Lawyer] as [executor/trustee] in our [wills/trusts]. [He/she] is also the lawyer who prepared these instruments for us. [He/she] did not promote [himself/herself] or consciously influence us in the decision to appoint [him/her] as [executor/trustee]. In addition, [he/she] has disclosed to us the potential conflicts of interest that might arise as a result of [his/her] serving as [executor/trustee], as described above, including an explanation of the responsibilities of the [executor/trustee], a list of others who might be nominated as [executor/trustee], the fees and expenses to be paid to the [executor/trustee], the likelihood that [his/her] law firm will also serve as attorney for the [executor/trustee], an explanation of the risks and disadvantages of such dual service, and an explanation of the decision regarding the inclusion or exclusion of exculpatory language in our wills.

We direct that our [wills/trusts] [____ include ____ not include] language relieving our lawyer from the obligation to post a bond for the faithful performance of [his/her] duties as [executor/trustee] and [____ include ____ not include] language absolving the lawyer as [executor/trustee] from liability for losses resulting from decisions made in the exercise of reasonable care, diligence, and prudence.

Signed: _____, 20__ _____
(Husband)

Signed: _____, 20__ _____
(Wife)

CHAPTER 5. REPRESENTATION OF EXECUTORS AND TRUSTEES

Introduction

These forms illustrate specific issues that should be addressed when the lawyer is about to undertake general representation of an executor, administrator, or trustee.

Representation of guardians and conservators is beyond the scope of this material, as state laws typically set forth detailed requirements for representation of this class of fiduciaries.

This section comprises two checklists and specific language for two corresponding engagement letters. The first set pertains to representation of an estate's executor or administrator, and the second set pertains to the representation of a trustee.

These letters are not designed to describe every situation in which lawyers represent fiduciaries and should be modified as appropriate for applicable state laws, rules of practice, and particular circumstances.

References to the *ACTEC Commentaries* (Fourth Edition):

(Note that the page numbers shown below refer to the printed version of the *ACTEC Commentaries*.)

General Principles (re Scope of Representation), p. 32
 Multiple Fiduciaries, p. 33
 Communication with Beneficiaries of Fiduciary Estate, p. 33
 Representation of Fiduciary in Representative and Individual Capacities, p. 33
 Lawyer May Not Make False or Misleading Statements, p. 35
 Disclosure of Acts or Omissions by Fiduciary Client, p. 35
 Representation of Fiduciary in Representative, Not Individual, Capacity, p. 35
 General and Individual Representation Distinguished, p. 35
 Lawyer Should Not Attempt to Diminish Duties of Lawyer to Beneficiaries Without Notice to Them, p. 36
 Duties to Beneficiaries, p. 36
 Planning the Administration of a Fiduciary Estate, pp. 51-52
 Advising Fiduciary Regarding Administration, p. 57
 Termination of Representation, pp. 57-58
 Basis of Fees for Trusts and Estates Services, p. 63
 Implied Authorization to Disclose, p. 78
 Disclosures by Lawyer for Fiduciary, pp. 73-74, 85
 Designation of Scrivener as Attorney for Fiduciary, pp. 95-96
 Prohibited Transactions, p. 112
 Organization as Client, pp. 127-130
 Truthfulness in Statements to Others, pp. 150, 151, 156
 Dealing with Unrepresented Person, pp. 157-158

**Supplemental Checklist for the Representation of an Executor
in Connection with the Administration of an Estate**

(Refer also to the General Checklist on pp. 4-8.)

1. IDENTIFY THE CLIENT.
 - (a) Under the majority view, the named executor or administrator (referred to for convenience as “the executor”) hires the lawyer and becomes the client.
 - (b) Most courts hold that the executor is the lawyer’s client. A few courts and commentators suggest that “the estate” is the client, or primary client, of the lawyer. However, typically the discussion or analysis that follows such an assertion speaks in terms of duties owed to the beneficiaries and even to any creditors. The practitioner should exercise special care to identify the client and anticipate and deal with potential or actual conflicts of interest. The forms that follow do not attempt to deal with conflicts of interest but do identify the client and identify those who are not clients, in accordance with the suggestions set forth in the *ACTEC Commentaries*.
2. CONSIDER THRESHOLD ISSUES.
 - (a) Does the lawyer have an impermissible conflict of interest, such as a client relationship with a party who is expected to have a claim against the estate?
 - (b) If the lawyer has, or has had, a client relationship with a beneficiary, heir, or creditor of the estate that the lawyer believes will not adversely affect the proffered representation, the lawyer must make disclosure and seek the informed consent of the former, present, and proposed clients in accordance with ethical rules.
 - (c) If the lawyer has a claim against the estate for prior services, is it appropriate for the lawyer to make disclosure to, and request consent from, the executor?
 - (d) If there are two or more executors, is there anything to indicate that the interests are otherwise than mutual, or are there reasons to consult with the executors and obtain their consents to multiple representation?
3. DEFINE THE CONTENTS OF THE ENGAGEMENT LETTER.
 - (a) Include a statement as to the proposed client relationship, e.g., the representation is of the executor in a fiduciary capacity and not representation of the beneficiaries.
 - (b) In connection with the explanation of the lawyer-client communications privilege and potential conflicts of interest, consider requesting that the executor agree to waive future conflicts (e.g., allowing the lawyer to continue to represent one or more co-executors if a split develops and a co-executor engages separate counsel and/or allowing the lawyer to disclose information to the court or the beneficiaries.)

- (c) Include a suggestion that the executor should feel free to consult other counsel before agreeing to the terms of engagement.
 - (d) Explain how custody of the intangible assets of the estate will be handled, e.g., who has custody of the estate checkbook.
 - (e) Discuss how non-probate assets will be handled, including what responsibility the executor has or may have with respect to those assets and the rights of the estate to require contribution by the recipients of those assets for an appropriate share of taxes and administration expenses.
 - (f) Explain who will be responsible for the preparation of the estate and inheritance tax returns and the fiduciary income tax returns for the estate.
4. CONSIDER WHETHER A COPY OF THE ENGAGEMENT LETTER SHOULD BE GIVEN TO THE BENEFICIARIES. (THIS STEP IS REQUIRED IN SOME JURISDICTIONS.)
 5. CONSIDER PROVIDING THE TRUSTEE WITH A COPY OF OR A REFERENCE TO “WHAT IT MEANS TO BE A TRUSTEE—A GUIDE FOR CLIENTS,” PREPARED BY THE ACTEC PRACTICE COMMITTEE AND AVAILABLE ON THE ACTEC WEB SITE.
 6. IN STATES THAT HAVE A STATUTORY LIST OF THE RESPONSIBILITIES OF AN EXECUTOR OR TRUSTEE, PROVIDE A COPY OF THE STATUTE. CONSIDER HAVING THE EXECUTOR OR TRUSTEE SIGN AN ACKNOWLEDGMENT THAT THE STATUTE HAS BEEN READ AND UNDERSTOOD (REQUIRED IN CALIFORNIA).

**Form of an Engagement Letter for the Representation of an Executor
in Connection with the Administration of an Estate**

[Date]

[Name(s) and Address(es)]

Subject: [Subject Matter of the Engagement]

Dear [Client(s)]:

Thank you for your confidence in selecting our firm to perform legal services in connection with the [subject matter of the engagement].

Scope of the Engagement

We will provide those services that are necessary and appropriate to administer the estate under the law of [State], commencing with the petition to probate the will and have you qualified as executor. The normal services that will then be involved are the following: [OPTIONAL LANGUAGE: The following list includes the types of services that may be provided]

- (a) Prepare and complete all notices of appointment of you as executor and other notices with respect to creditors as are required by the laws of the State of [State] and rules of court having jurisdiction of the estate.
- (b) Assist you in preparing a complete inventory of all assets of any kind or nature that are subject to probate, and any non-probate assets such as life insurance, retirement benefits, and other assets.
- (c) Help you make a thorough search for all debts, obligations, and contingent liabilities of the estate in order to determine the financial condition of the estate and advise you regarding other action that must be taken by you to secure, reinvest, or protect the assets and provide for the discharge of liabilities, including death taxes of the estate.
- (d) Prepare and complete all interim reports to the Probate Court and the beneficiaries as required during the course of administration of the estate.
- (e) Prepare all tax returns for the estate, including federal estate tax and generation-skipping tax returns, state inheritance tax, or any local or state property tax returns, as well as federal and state fiduciary income tax returns.
- (f) Review and consider with you any post-death planning, such as alternative asset valuation options, use of disclaimers, funding of trusts as provided for in the estate plan, timing the dis-

tribution of assets that are beneficial to the estate and any beneficiaries, and election of income tax benefits to the estate and beneficiaries.

- (g) Plan for the payment of all death taxes and the source of funds to be used in payment of any tax obligations, along with any elections for installment payment of taxes, if available.
- (h) Prepare a plan of distribution of assets held in the estate, either outright or to separate continuing trusts, for the beneficiaries.
- (i) Prepare all reports, notices, consents, receipts, and accountings for closing the estate and your discharge as executor.
- (j) Counsel and advise on any related questions or matters arising out of the administration of the estate.

If there are other legal services that you wish us to perform for you as executor, we should first consult together and supplement this letter agreement before commencing those tasks.

Identification of the Client

You should understand that we represent you as executor. We do not represent the beneficiaries of the estate, even though we will, from time to time, provide them with information about the administration of the estate. In appropriate circumstances, we may advise beneficiaries to obtain independent counsel, as we do not represent them.

Apart from any applicable legal requirement to notify the beneficiaries that the will has been probated and the estate administration commenced, we consider it good practice to do so and to provide each beneficiary with a copy of the will. In doing so, we will make it clear that you, alone, are our client. Furthermore, we usually keep the beneficiaries advised as the administration of the estate progresses; for example, by furnishing copies of the formal inventory of estate assets as soon as that has been formalized.

[SPECIAL LANGUAGE IF THERE ARE MULTIPLE EXECUTORS:]

While there is nothing at this point to suggest that any differences of opinion will develop between you during the course of administration of the estate, it is possible that issues may arise on which the [number] of you do not agree. Ordinarily, under such circumstances, a law firm could not represent all of the co-executors without being involved in a serious conflict-of-interest problem.

Conflicts of interest may arise in a number of different contexts, including whether and to what extent discretionary distributions should be made from the estate, the investment policy to be followed by the co-executors, and the payment of compensation to the co-executors. In the event that the co-executors should reach different conclusions concerning the management and administration of the estate, it might be best for each of you to have the benefit of independent counsel to avoid the possibility that our advice to one

of you would be influenced in any way by our representation of one of the other co-executors. For now, we will represent all of you in the administration of the estate, with the understanding that each of you retains the right to obtain independent legal counsel at any time that it appears to you to be advantageous.

Although we do not anticipate that it will be necessary, if a conflict does arise [between/among] the co-executors, and it is impossible in our judgment to perform our obligations to each of you in accordance with the standards that we would maintain in representing any individual client, we will withdraw from all further representation of the co-executors and advise one or all of you to obtain independent counsel. In such event, we would submit a statement for legal services rendered up to the date of such withdrawal. [NOTE: In some states, this will not be appropriate, and application would have to be made to the probate court for an award of a portion of the single statutory attorney's fee that will be awarded for ordinary legal services to the estate.]

As a part of my representation, there will be complete and free disclosure to each of you of all information concerning the estate that I may receive from [either/any] of you in your capacity as co-executor. Such information will not be confidential between you, collectively, and us as your lawyers, irrespective of whether the information is obtained in conferences at which all of you are present, or private conferences with one of you, including conferences that may have taken place before the date of this letter.

[SPECIAL LANGUAGE IF THE EXECUTOR IS ALSO A BENEFICIARY:]

Because you are a beneficiary of the estate, I must advise you that I only represent you in your capacity as executor, and can only represent you as a beneficiary if there is no conflict of interest by reason of such relationship. For example, a conflict could arise in distribution of assets to you if one of the other beneficiaries should object to your individual ownership of partial interest in an estate asset; or by reason of the amount of compensation that you may claim. In the event of such a conflict, consideration may have to be given by you to the employment of independent counsel to represent your personal interests.

Termination of the Engagement

When the [subject matter of the engagement] has been completed, our representation will be concluded unless arrangements for a continuing representation are made. We will be happy to provide additional or continuing services, but unless such arrangements are made and agreed upon in writing, we will have no further responsibility to [you/any of you] in connection with any future or ongoing legal issues affecting the [subject matter of the engagement], including any duty to notify [you/any of you] of changes in the laws or the necessity to make any periodic or renewal filings or registrations.

You may terminate this engagement at any time by notice in writing to us. Upon receipt of such notice, subject to such court approval as may be necessary in the context of the situation, we will promptly cease providing any service to you. You will be responsible for paying for our services rendered up to the time we receive such notice and for such reasonable services that we provide thereafter in connection with the transfer of responsibility for the matters we are handling at that time to your new counsel.

[SEE NOTES ABOVE ABOUT APPLICABILITY OF THIS TYPE OF ARRANGEMENT IN STATUTORY FEE STATES.]

We may terminate this engagement by giving you written notice. Upon termination of our representation, you will be responsible for paying for our services rendered up to the time we terminate our engagement and for such reasonable services that we provide thereafter in connection with the transfer of responsibility for the matters we are handling at that time to your new counsel. [SEE NOTES ABOVE ABOUT APPLICABILITY OF THIS TYPE OF ARRANGEMENT IN STATUTORY FEE STATES.]

Fees and Billing

[ALTERNATIVE 1: *Flat Fee*]

Our fee in connection with the [subject matter of the engagement] will be a flat fee of \$____. This fee includes the normal office and telephone conferences, research, analysis, and advice associated with the [subject matter of the engagement]. Significant changes in the scope of the services required or significant revisions to any documents that we have prepared will be charged separately, but any additional charges will be explained to you before any revisions are begun. One-half of this fee is payable once this engagement letter is signed and you authorize us to proceed and is not refundable even if you later decide not to complete the [objective of the engagement]. The balance of the fee will be payable at the time when the [subject matter of the engagement] is complete.

[ALTERNATIVE 2: *Time-Based Billing*]

Our fee in connection with the [subject matter of the engagement] will be the product of the time spent by our lawyers and other professionals multiplied times their respective hourly rates. The time for which we are to be paid includes not only normal office conferences, research, analysis, and advice associated with the [subject matter of the engagement], but also the time involved in telephone calls, faxes, e-mail, and other forms of communication. We will bill you for our services on a monthly basis.

We adjust our hourly rates periodically. We consider the ability, experience, and reputation of our lawyers and paralegals when we set hourly rates. Changes are usually made each January 1, but sometimes they are made at other times. Any increase in rates will apply to all time beginning with the month when the rates are changed. Work done before that month will be billed at the hourly rate that was previously in effect. Different lawyers and paralegals in our firm may be involved in your work if that will result in lower fees, provide a specialized legal talent, or help us do your work more efficiently. We will try to assign lawyers and paralegals having the lowest hourly rates consistent with the skills, time demands, and other factors required for your work. We might not assign a lawyer or paralegal with the lowest hourly rate if, in our judgment, it may be in your best interests to assign a lawyer or paralegal with a higher hourly rate because of that lawyer's or paralegal's skill and experience or because of the time constraints of the work. We record and bill our time in one-tenth hour (six-minute) units. If a lawyer's or paralegal's total time on your work is less than three-tenths of an hour for the entire day, three-tenths of an hour will be billed for that day. If the lawyer's or paralegal's total time on your work is more than three-tenths of an hour for that day (whether done at one time or not), only the time actually spent will be billed.

In addition to our legal fees, as described above, we will be entitled to be reimbursed by you for out-of-pocket expenses that we pay on your behalf and for our internal costs. Out-of-pocket expenses include items such as filing fees charged by government agencies and travel expenses. Our internal costs include things like photocopying, long-distance telephone calls, fax transmissions, document scanning and electronic transmission, storage, and retrieval, courier services, computer research charges, and complex document production. Rather than tracking precise costs for every single internal charge (which would ultimately result in higher hourly rates for our clients), we charge fixed costs for these types of expenses. Our charges for these internal costs may exceed the actual direct costs that we pay to outsiders (such as the telephone company or photocopying contractors).

Sometimes it is necessary to hire other persons to provide services for you, such as accounting or appraisal firms. Their work may have more confidentiality if we (rather than you) request their services, and so we may hire them. However, you will be responsible for paying their fees and expenses, whether paid directly to them or to us in reimbursement.

Our bills are due when rendered. If a bill is not paid within 30 days after it is mailed to you, interest will accrue on the unpaid balance of that bill beginning on the thirty-first (31st) day and accruing thereafter at the rate of one percent (1%) per month. Interest charges will apply to specific monthly bills. Payments made on past-due accounts will be applied first to the oldest outstanding bill. If our bills are not paid reasonably soon after they are rendered, we reserve the right to stop work until your account is brought current and appropriate measures are taken to ensure prompt payment in the future. If we have to bring collection efforts for payment, you agree that you will pay the costs of collection procedures, including reasonable attorneys fees incurred by us (whether paid to our firm or another firm retained by us).

We may require a retainer or advance fee deposit for your work. Unless you and we agree otherwise, the retainer or advance fee deposit will be applied to our final statement, and any unused portion will be returned to you. We may also request an advance cost deposit (in addition to the retainer or advance fee deposit) when we expect that we will incur substantial costs on your behalf.

You should understand that our fees will be payable whether or not approved by the inheritance and estate tax authorities or by the Probate Court. Although it is usual and customary to look to estate assets as the source of funds with which to pay our charges, the responsibility for payment ultimately is yours [NOTE: This arrangement would be prohibited in certain states that have statutory fee legislation].

Retention, Delivery, Retrieval, and Destruction of the Files

You should understand that the file that will be created by our firm in connection with the [subject matter of the engagement] will belong to our client, as identified in this letter. During the course of this engagement, you will be furnished copies of all documents and of all significant correspondence. When the [subject matter of the engagement] is completed, we will deliver the originals of all documents to our client. We will retain physical and/or electronic copies of all of the documents, all correspondence, and, to the extent we deem appropriate, all notes made in connection with this engagement in our file. Our client may direct us to turn over our file to you or to anyone else that the client designates, at any time. In such case, we will retain in our

possession all internal communications and notes prepared by our firm and, at the expense of our client, make, retain, and store physical and/or electronic copies of all other matters in our file to be delivered to our client or at its request.

It is the policy of our firm that client files that are no longer needed by our lawyers and other professionals on a recurring basis are closed and placed in storage in a location away from our offices. The off-site storage of closed files helps us to reduce our operating expenses, and consequently our fees. Because you will have been furnished with the originals and/or copies of all relevant materials contained in our files during the course of the active phase of our representation, in the event that we are asked by you to recover materials contained in a file that has been closed and placed in off-site storage, you agree that we shall be entitled to be paid by the requesting party a reasonable charge for the cost of the recovery of the file and the identification, reproduction, and delivery of the requested materials.

Unless our firm is engaged to provide on-going representation in connection with the [subject matter of the engagement], it is our firm's policy to destroy all copies of correspondence, notes, and documents retained in our file created in connection with the representation ten (10) years after the completion of the engagement. Before destroying the file, we will attempt to contact our client, as identified in this letter, to make arrangements for delivery of any original documents and the other contents of the file to our client. This letter will serve as notice to you that if we are unable to contact our client at the most recent address contained in our file, we will destroy the file without further notice. It will be your responsibility to notify us of any change in your address or contact information as the same may change from time to time.

Consent to the Terms of the Engagement

Before we begin, you must consider all of the factors discussed in this letter and consent to the form of the representation. After you have considered this decision carefully, we ask that you please sign the statement that follows this letter to indicate your consent to the conditions of the representation. If, after considering this matter, you prefer a different form of representation, please let us know.

Because any change in legal representation after we begin will result in an increase in the time and expense needed to complete the administration of the estate, for which you would be financially responsible, we urge you to give careful consideration to the structure of the representation before we begin.

[OPTIONAL PROVISION:]

As a condition of this representation, we require that, notwithstanding normal rules of confidentiality, you authorize us to notify the probate court and creditors and beneficiaries of the estate, as the case may be, of any actions or omissions on your part that have a material effect on their interests in the estate, including acts or omissions that may constitute negligence, bad faith, or breach of your fiduciary duties. [NOTE: In many jurisdictions the attorney-client communications privilege might preclude this type of disclosure without the personal representative's informed waiver. Reference should be made to the law of the jurisdiction in which the estate proceeding is pending.]

We are enclosing an extra copy of this letter to be signed and returned to us consenting to the conditions of the representation as described in this letter. The return of a copy of this letter signed by you will serve as authorization for us to proceed with the administration of the estate. Also enclosed is a return-address envelope for your convenience in returning the signed copy of this letter.

If you have any questions about anything discussed in this letter, please call us. You should also feel free to contact an attorney in another firm to discuss the effect of agreeing to the terms of the representation as outlined in this letter.

We appreciate the opportunity to work with you on the administration of the estate, and we look forward to hearing from you soon.

Sincerely,

[Lawyer]

Consent to the Representation and the Terms of the Engagement

I have reviewed the foregoing letter concerning the various aspects of the representation, and I choose to have [Lawyer] represent me in connection with the administration of the estate of [Decedent] on the terms described above. [OPTIONAL PROVISION: I expressly waive the attorney-client privilege, my attorneys' duty to protect and preserve my confidences and secrets, and any other rule that may exist with respect to confidential information or secrets relating to my actions and activities as executor of the estate; and authorize and direct my attorneys to notify the probate court and the creditors and beneficiaries of the estate of all actions by me as executor of the estate that have any material effect on their interests in the estate, including actions that may constitute negligence, bad faith, or a breach of my fiduciary duties.]

Signed: _____, 20____

(Executor)

**Supplemental Checklist for the Representation of a Trustee
in Connection with the Administration of a Trust**

(Refer also to the General Checklist on pp. 4-8.)

1. IDENTIFY THE CLIENT.

- (a) Under the majority view, the trustee should be and usually is the lawyer's client. However, a few courts and practitioners favor an entity approach. See Comments at 1.(b) of Estate Administration Representation Checklist on page 68.
- (b) Inter vivos trusts:
 - 1. Typically, as part of an estate planning engagement, the lawyer serves as scrivener and then advises and assists both the settlor and trustee with respect to funding and otherwise setting up the trust; all parties likely proceed on the assumption, or with the tacit understanding, that the trustee will look to that attorney for ongoing advice.
 - 2. In the case of the typical irrevocable trust, the settlor retains no ongoing legal or equitable interest, making it unlikely that any conflicts will arise that would preclude the lawyer's continued representation of the settlor for other purposes or matters while also representing the trustee.
 - 3. A revocable trust is usually for the settlor's own benefit and remains fully subject to the settlor's control as long as the settlor remains competent to amend or revoke; however, if differences arise [between/among] the parties, the lawyer may have no alternative but to advise the trustee to obtain separate counsel, at least for the purpose of resolving the differences. When the settlor dies and the trust becomes irrevocable, the lawyer should confirm or formalize the representation of the trustee.
- (c) Testamentary trusts: Typically, the lawyer who has represented the executor will, more or less as a matter of course, come to represent the trustee as well. The transition from estate to trust will be "seamless" in many cases, especially if the same person serves in both fiduciary capacities. Nevertheless, an engagement letter is advisable to cover the points outlined below.
- (d) Co-trustees: Especially if unanimous action is required to bind the trust, the lawyer should be able to represent the co-trustees jointly, absent indications that differences exist between or among the co-trustees.

2. DEFINE THE CONTENTS OF THE ENGAGEMENT LETTER.

- (a) Include a statement as to the client relationship, i.e., the representation is of the trustee in a fiduciary capacity and no one else.

- (b) Give a specific description of the services to be rendered and, if appropriate, services not to be included. If there is a corporate or other professional fiduciary, the lawyer may simply indicate availability to perform those services the trustee may require from time to time.
- (c) Explain how fees will be determined and billed, together with an explanation of how costs will be accounted for; how to deal with principal vs. income issues. Further, will it be prudent for the trustee to pay fees on an interim basis, without court approval?
- (d) Describe lawyer-client communications privilege and potential conflicts of interest. Consider requesting that the trustee agree to waive future conflicts (e.g., allowing the lawyer to continue to represent one or more co-trustees if split develops and a co-trustee engages separate counsel, and allowing the lawyer to disclose information to the court or the beneficiaries).
- (e) Explain how the lawyer/client relationship may be terminated.
- (f) Consider suggesting that the trustee should feel free to consult other counsel before agreeing to the terms of engagement.

**Form of an Engagement Letter for the Representation of a Trustee
in Connection with the Administration of a Trust**

[Date]

[Name(s) and Address(es)]

Subject: [Subject Matter of the Engagement]

Dear [Client]:

Thank you for your confidence in selecting our firm to perform legal services in connection with the [subject matter of the engagement].

[OPTIONAL PROVISION FOR AN IRREVOCABLE INTER VIVOS TRUST:]

As you know, I represented [Settlor] in connection with establishing this trust, which is irrevocable and in which [he/she] has retained no interest. Although I anticipate continuing to represent [him/her] for other purposes, I am able to represent you as trustee of the trust upon the terms set forth in this letter.

Scope of the Engagement

We will provide such advice and assistance in connection with the administration of the trust as may be appropriate and agreed to from time to time. In that connection, we would be pleased to discuss with you your duties and responsibilities as trustee and your obligation to the beneficiaries of the trust including any special circumstances with respect to beneficiaries that you should be aware of as trustee.

[OPTIONAL:]

We can provide, through a special custody account arrangement we have with [XYZ Trust Company], full administrative services, including record keeping, bill paying, handling periodic or special distributions, and daily sweeping of principal and income cash into selected short-term investment funds. We will provide full particulars if this custody arrangement is of interest to you.

[OPTIONAL:]

We are also prepared to advise you on tax questions that may arise in the administration of the trust and to handle federal and state fiduciary income tax preparation and to deal with any property taxes that may be applicable.

[OPTIONAL:]

We will advise you of your powers and responsibilities with respect to trust investments, but cannot provide investment advice as such.

If there are other legal services that you wish us to perform for you as trustee, we should first consult together and supplement this letter agreement before commencing those tasks.

Identification of the Client

You should understand that we represent you as trustee. We do not represent the beneficiaries of the trust, even though we will, from time to time, provide them with information about the administration of the trust. In appropriate circumstances, we may advise beneficiaries to obtain independent counsel as we do not represent them.

Apart from any applicable legal requirement to notify the beneficiaries of the terms of the trust, we consider it good practice to do so and to provide each beneficiary with a copy of the trust agreement. In doing so, we will make it clear that you, alone, are our client. Furthermore, we usually keep the beneficiaries advised regarding the administration of the trust; for example, by furnishing copies of the income tax returns or other accounting reports of the trust each year.

[SPECIAL LANGUAGE IF THERE ARE MULTIPLE TRUSTEES:]

While there is nothing at this point to suggest that any differences of opinion will develop between you, during the course of administration of the trust, it is possible that issues may arise on which the [number] of you do not agree. Ordinarily, under such circumstances, a law firm could not represent all of the co-trustees without being involved in a serious conflict-of-interest problem.

Conflicts of interest may arise in a number of different contexts, including whether, and to what extent, discretionary distributions should be made from the trust, the investment policy to be followed by the co-trustees, and the payment of compensation to the co-trustees. In the event that the co-trustees should reach different conclusions concerning the management and administration of the trust, it might be best for each of you to have the benefit of independent counsel to avoid the possibility that our advice to one of you would be influenced in any way by our representation of one of the other co-trustees. For now, we will represent all of you in the administration of the trust, with the understanding that each of you retains the right to obtain independent legal counsel at any time that it appears to you to be advantageous.

Although we do not anticipate that it will be necessary, if a conflict does arise [between/among] the co-trustees, and it is impossible in our judgment to perform our obligations to each of you in accordance with the standards that we would maintain in representing any individual client, we will withdraw from all further representation of the co-trustees and advise one or all of you to obtain independent counsel. In such event, we would submit a statement for legal services rendered up to the date of such withdrawal. [NOTE: In some states, this will not be appropriate, and application would have to be made to the court for an award of a portion of the single statutory attorney's fee that will be awarded for ordinary legal services to the trust.]

As a part of our representation, there will be complete and free disclosure to each of you of all information concerning the trust that we may receive from either of you in your capacity as co-trustee. Such information will not be confidential between you, collectively, and us as your lawyers, irrespective of whether the information is obtained in conferences at which all of you are present, or private conferences with one of you, including conferences that may have taken place before the date of this letter.

[SPECIAL LANGUAGE IF THE TRUSTEE IS ALSO A BENEFICIARY:]

Because you are a beneficiary of the trust, we must advise you that we only represent you in your capacity as trustee and can only represent you as a beneficiary if there is no conflict of interest by reason of such relationship. For example, a conflict could arise in distribution of assets to you if one of the other beneficiaries should object to your individual ownership of partial interest in a trust asset; or by reason of the amount of compensation that you may claim. In the event of such a conflict, consideration may have to be given by you to the employment of independent counsel to represent your personal interests.

Termination of the Engagement

When the [subject matter of the engagement] has been completed, our representation will be concluded unless arrangements for a continuing representation are made. We will be happy to provide additional or continuing services but unless such arrangements are made and agreed upon in writing, we will have no further responsibility to [you/any of you] in connection with any future or ongoing legal issues affecting the [subject matter of the engagement], including any duty to notify [you/any of you] of changes in the laws or the necessity to make any periodic or renewal filings or registrations.

You may terminate this engagement at any time by notice in writing to us. Upon receipt of such notice, subject to such court approval as may be necessary in the context of the situation, we will promptly cease providing any service to you. You will be responsible for paying for our services rendered up to the time we receive such notice and for such reasonable services that we provide thereafter in connection with the transfer of responsibility for the matters we are handling at that time to your new counsel. [SEE PREVIOUS NOTE ABOUT APPLICABILITY OF THIS TYPE OF ARRANGEMENT IN STATUTORY FEE STATES.]

We may terminate this engagement by giving you written notice. Upon termination of our representation, you will be responsible for paying for our services rendered up to the time we terminate our engagement and for such reasonable services that we provide thereafter in connection with the transfer of responsibility for the matters we are handling at that time to your new counsel. [SEE PREVIOUS NOTE ABOUT APPLICABILITY OF THIS TYPE OF ARRANGEMENT IN STATUTORY FEE STATES.]

Fees and Billing

Our fee in connection with the [subject matter of the engagement] will be the product of the time spent by our lawyers and other professionals multiplied times their respective hourly rates. The time for which we are to be paid includes not only normal office conferences, research, analysis, and advice associated with the [subject matter of the engagement], but also the time involved in telephone calls, faxes, e-mail, and other forms of communication. We will bill you for our services on a monthly basis

We adjust our hourly rates periodically. We consider the ability, experience, and reputation of our lawyers and paralegals when we set hourly rates. Changes are usually made each January 1, but sometimes they are made at other times. Any increase in rates will apply to all time beginning with the month when the rates are changed. Work done before that month will be billed at the hourly rate that was previously in effect.

Different lawyers and paralegals in our firm may be involved in your work if that will result in lower fees, provide a specialized legal talent, or help us do your work more efficiently. We will try to assign lawyers and paralegals having the lowest hourly rates consistent with the skills, time demands, and other factors required for your work. We might not assign a lawyer or paralegal with the lowest hourly rate if, in our judgment, it may be in your best interests to assign a lawyer or paralegal with a higher hourly rate because of that lawyer's or paralegal's skill and experience or because of the time constraints of the work. We record and bill our time in one-tenth hour (six-minute) units. If a lawyer's or paralegal's total time on your work is less than three-tenths of an hour for the entire day, three-tenths of an hour will be billed for that day. If the lawyer's or paralegal's total time on your work is more than three-tenths of an hour for that day (whether done at one time or not), only the time actually spent will be billed.

In addition to our legal fees, as described above, we will be entitled to be reimbursed by you for out-of-pocket expenses that we pay on your behalf and for our internal costs. Out-of-pocket expenses include items such as filing fees charged by government agencies and travel expenses. Our internal costs include things like photocopying, long-distance telephone calls, fax transmissions, document scanning and electronic transmission, storage, and retrieval, courier services, computer research charges, and complex document production. Rather than tracking precise costs for every single internal charge (which would ultimately result in higher hourly rates for our clients), we charge fixed costs for these types of expenses. Our charges for these internal costs may exceed the actual direct costs that we pay to outsiders (such as the telephone company or photocopying contractors).

Sometimes it is necessary to hire other persons to provide services for you, such as accounting or appraisal firms. Their work may have more confidentiality if we (rather than you) request their services, and so we may hire them. However, you will be responsible for paying their fees and expenses, whether paid directly to them or to us in reimbursement.

Our bills are due when rendered. If a bill is not paid within 30 days after it is mailed to you, interest will accrue on the unpaid balance of that bill beginning on the thirty-first (31st) day and accruing thereafter at the rate of one percent (1%) per month. Interest charges will apply to specific monthly bills. Payments made on past-due accounts will be applied first to the oldest outstanding bill. If our bills are not paid reasonably soon after they are rendered, we reserve the right to stop work until your account is brought current and appropriate measures are taken to ensure prompt payment in the future. If we have to bring collection efforts for payment, you agree that you will pay the costs of collection procedures, including reasonable attorneys fees incurred by us (whether paid to our firm or another firm retained by us).

We may require a retainer or advance fee deposit for your work. Unless you and we agree otherwise, the retainer or advance fee deposit will be applied to our final statement, and any unused portion will be returned to you. We may also request an advance cost deposit (in addition to the retainer or advance fee deposit) when we expect that we will incur substantial costs on your behalf.

You should understand that, although it is usual and customary to look to trust assets as the source of funds with which to pay our charges, the responsibility for payment ultimately is yours. [NOTE: This arrangement would be prohibited in certain states that have statutory fee legislation.]

Retention, Delivery, Retrieval, and Destruction of the Files

You should understand that the file that will be created by our firm in connection with the [subject matter of the engagement] will belong to our client, as identified in this letter. During the course of this engagement, you will be furnished copies of all documents and of all significant correspondence. When the [subject matter of the engagement] is completed, we will deliver the originals of all documents to our client. We will retain physical and/or electronic copies of all of the documents, all correspondence, and, to the extent we deem appropriate, all notes made in connection with this engagement in our file. Our client may direct us to turn over our file to you or to anyone else that the client designates, at any time. In such case, we will retain in our possession all internal communications and notes prepared by our firm and, at the expense of our client, make, retain, and store physical and/or electronic copies of all other matters in our file to be delivered to our client or at its request.

It is the policy of our firm that client files that are no longer needed by our lawyers and other professionals on a recurring basis are closed and placed in storage in a location away from our offices. The off-site storage of closed files helps us to reduce our operating expenses, and consequently our fees. Because you will have been furnished with the originals and/or copies of all relevant materials contained in our files during the course of the active phase of our representation, in the event that we are asked by you to recover materials contained in a file that has been closed and placed in off-site storage, you agree that we shall be entitled to be paid by the requesting party a reasonable charge for the cost of the recovery of the file and the identification, reproduction, and delivery of the requested materials.

Unless our firm is engaged to provide on-going representation in connection with the [subject matter of the engagement], it is our firm's policy to destroy all copies of correspondence, notes, and documents retained in our file created in connection with the representation ten (10) years after the completion of the engagement. Before destroying the file, we will attempt to contact our client, as identified in this letter, to make arrangements for delivery of any original documents and the other contents of the file to our client. This letter will serve as notice to you that if we are unable to contact our client at the most recent address contained in our file, we will destroy the file without further notice. It will be your responsibility to notify us of any change in your address or contact information as the same may change from time to time.

Consent to the Terms of the Engagement

Before we begin, you must consider all of the factors discussed in this letter and consent to the form of the representation. After you have considered this decision carefully, we ask that you please sign the statement that follows this letter to indicate your consent to the conditions of the representation. If, after considering this matter, you prefer a different form of representation, please let us know.

Because any change in legal representation after we begin will result in an increase in the time and expense needed to complete the administration of the estate, for which you would be financially responsible, we urge you to give careful consideration to the structure of the representation before we begin.

[OPTIONAL PROVISION:]

As a condition of this representation, we require that, notwithstanding normal rules of confidentiality, you authorize us to notify the beneficiaries of the trust of any actions or omissions on your part that have a material effect on their interests in the trust, including acts or omissions that may constitute negligence, bad faith, or breach of your fiduciary duties.

[NOTE: In many jurisdictions the attorney-client communications privilege might preclude this type of disclosure without the trustee's informed waiver. Reference should be made to the law of the jurisdiction in which the estate proceeding is pending.]

We are enclosing an extra copy of this letter to be signed and returned to us consenting to the conditions of the representation as described in this letter. The return of a copy of this letter signed by you will serve as authorization for us to proceed with the administration of the trust. Also enclosed is a return-address envelope for your convenience in returning the signed copy of this letter.

If you have any questions about anything discussed in this letter, please call us. You should also feel free to contact an attorney in another firm to discuss the effect of agreeing to the terms of the representation as outlined in this letter.

We appreciate the opportunity to work with you on the administration of the trust, and we look forward to hearing from you soon.

Sincerely,

[Lawyer]

Consent to the Representation and the Terms of the Engagement

I have reviewed the foregoing letter concerning the various aspects of the representation, and I choose to have [Lawyer] represent me in connection with the administration of the [name of the trust] on the terms described above. [OPTIONAL PROVISION: I expressly waive the attorney-client privilege, my attorneys' duty to protect and preserve my confidences and secrets, and any other rule that may exist with respect to confidential information or secrets relating to my actions and activities as trustee of the trust; and authorize and direct my attorneys to notify the beneficiaries of the trust of all actions by me as trustee of the trust that have any material effect on their interests in the trust, including actions that may constitute negligence, bad faith, or a breach of my fiduciary duties.]

Signed: _____, 20____
 (Trustee)

CHAPTER 6. FIDUCIARY LITIGATION

Introduction

These forms illustrate specific issues that should be addressed when the lawyer is about to undertake general representation of an executor, administrator, or trustee in connection with litigation involving the estate or trust.

These forms are appropriate when the lawyer is representing the fiduciary in the fiduciary's representative capacity or when the lawyer is representing the fiduciary personally. However, the lawyer must consider carefully the fundamental aspects of such differing styles of representation and make it clear which form of representation is being undertaken, specifying the conditions of such representation, including the extent, if any, to which reimbursement of the lawyer's fees may be sought from the assets of the estate or trust.

These letters are not designed to describe every situation in which lawyers represent fiduciaries in the context of fiduciary litigation and should be modified as appropriate for applicable state laws, rules of practice, and particular circumstances.

References to the *ACTEC Commentaries* (Fourth Edition):

(Note that the page numbers shown below refer to the printed version of the *ACTEC Commentaries*.)

General Principles (re Scope of Representation), p. 13
 Representation of Fiduciary in Representative and Individual Capacities, p. 33
 Representation of Fiduciary in Representative, Not Individual, Capacity, p. 35
 General and Individual Representation Distinguished, p. 35
 Advising Fiduciary Regarding Administration, p. 57
 Termination of Representation, pp. 57-58
 Basis of Fees for Trusts and Estates Services, p. 63

Supplemental Checklist for Fiduciary Litigation

(Refer also to the General Checklist on pp. 4-8.)

1. ISSUES THE LAWYER SHOULD CONSIDER BEFORE ACCEPTING THE REPRESENTATION
 - (a) Describe the nature and consequences of any limitations on the scope of the representation and obtain the clients' consent to such limitations (e.g., retained to try to resolve case without litigation, retained to handle litigation but not related estate administration or trust administration, retained to handle part of larger litigation such as tax aspects, retained to address issues under one state's laws but not another, litigation does/does not include appellate work, etc.).
 - (b) What do the clients expect the "style" of the representation to be? (e.g., desire to try to retain family relationship to extent possible; desire to wage all out war, "no matter the cost")

- (c) If appropriate, describe the possible conflict of interest that might arise if the lawyer is to be paid on a contingent (including partially contingent) fee basis.

2. IDENTIFY THE CLIENT.

- (a) Is the client a fiduciary involved in the matter? If so, is the lawyer representing the fiduciary in its individual or representative capacity?
- (b) Is the client a beneficiary of an estate or trust in the matter?
- (c) Is the client a fiduciary and a beneficiary, and does the lawyer represent the client in both capacities? (If so, the lawyer must be prepared to explain the consequences of those dual capacities.)

3. EXPLAIN HOW CONFIDENTIAL INFORMATION WILL BE HANDLED.

- (a) Explain ramifications of any of the clients revealing tactics, research and other information with parties on the “other” side or sides of a dispute and possible agreement among joint clients about “leaking” information.
- (b) As appropriate, explain effects of a joint defense or plaintiffs agreement on confidentiality among co-parties (e.g. communications are confidential as to all others but not as among co-parties).

Form of an Engagement Letter for Representation of One Beneficiary in Trust and Estate Litigation

[Date]

[Name and Address]

Subject: [Subject Matter of the Engagement]

Dear [Client]:

Thank you for your confidence in selecting our firm to perform legal services in connection with the [subject matter of the engagement].

Scope of the Engagement

We will provide legal services in connection with [specific description of the subject matter].

As your attorneys, we will assist you in all issues pertaining to this matter, including [LIST ANY SERVICES YOU ANTICIPATE THIS PARTICULAR DISPUTE/LITIGATION WILL ENTAIL, INCLUDING WHETHER YOU WILL REPRESENT CLIENT ON APPEAL; BE AS SPECIFIC AS POSSIBLE.]. We will counsel you on the legal and strategic aspects of the litigation and advise you as necessary. We will also prepare any required documentation and will provide legal advice to you pertaining to this dispute.

In matters that involve litigation, negotiations, or other interactions with third parties, our discussions with you may include assessments of the strengths and weaknesses of your case. Please note carefully that we can make no promises regarding the outcome of any part of this engagement. All legal matters, whether or not involving litigation, entail uncertainty because we can never be sure how other parties will behave or how the court will react to our arguments and the evidence presented. In addition, the discovery process may uncover facts detrimental to your position. Therefore, it is important that you understand at the outset that we cannot guarantee a favorable result. However, we can assure you of our best efforts on your behalf.

Alternatives to Litigation

Please know that there are alternative forms of dispute resolution, such as informal settlement negotiations, mediation and arbitration, and these alternatives may be less expensive and time-consuming than litigation. We will be happy to discuss these alternatives with you at any point during our representation. [NOTE ANY APPLICABLE STATUTORY OR LOCAL REQUIREMENT TO MAKE AN EFFORT TO MEDIATE.]

Identification of the Client

You are our client. When we represent an individual client separately, we become an advocate for our client's personal interests, and we give our client totally independent advice. We have a duty to act solely in the best

interests of our client, without being influenced by the conflicting personal interests of any other clients or anyone else.

Confidentiality and Privilege

As your attorneys, we owe you a duty to preserve any confidential information you share with us, unless you authorize us to disclose such information or we are compelled legally to do so. It is critical that you engage in full disclosure in the matter at issue and inform us of any of your acts and doings, past and present, regarding this matter in order to avoid any problems that might otherwise arise from any failure to communicate fully. Such separate representation ensures the preservation of your confidences and the elimination of any conflicts of interest between you and any other person as related to our representation of you. Please note that you will lose the protection of the attorney-client privilege if you disclose communications between you and us to persons other than those who need to know the information in order to implement our advice. Generally, the law does not provide privileges for communications with other professional service providers, including accountants and financial and business consultants. We therefore recommend that you guard your attorney-client privilege closely and consult with us before disclosing confidential communications to anyone else.

Fees and Billing

Our fee in connection with the [subject matter of the engagement] will be the product of the time spent by our lawyers and other professionals multiplied by their respective hourly rates. The time for which we are to be paid includes not only normal office conferences, research, analysis, and advice associated with the [subject matter of the engagement], but also the time involved in telephone calls, faxes, e-mail, and other forms of communication. We will generally bill you for our services on a monthly basis.

We adjust our hourly rates periodically. We consider the ability, experience, and reputation of our lawyers and paralegals when we set hourly rates. Changes are usually made each January 1, but sometimes they are made at other times. Any increase in rates will apply to all time beginning with the month when the rates are changed. Work done before that month will be billed at the hourly rates previously in effect. Different lawyers and paralegals in our firm may be involved in your work if that will result in lower fees, provide a specialized legal talent, or help us do your work more efficiently. We will try to assign lawyers and paralegals having the lowest hourly rates consistent with the skills, time demands, and other factors required for your work. We might not assign a lawyer or paralegal with the lowest hourly rate if, in our judgment, it may be in your best interests to assign a lawyer or paralegal with a higher hourly rate because of that lawyer's or paralegal's skill and experience or because of the time constraints of the work. We record and bill our time in one-tenth hour (six-minute) units. [OPTIONAL: If a lawyer's or paralegal's total time on your work is less than three-tenths of an hour for the entire day, three-tenths of an hour will be billed for that day. If the lawyer's or paralegal's total time on your work is more than three-tenths of an hour for that day (whether done at one time or not), only the time actually spent will be billed.]

[INSERT CONTINGENT FEE ALTERNATIVE, IF APPLICABLE; CONSIDER ANY STATE STATUTE OR LAW THAT MAY APPLY; TAKE INTO ACCOUNT RESOLUTION BY SETTLEMENT AND THE POSSIBILITY OF APPEALS.]

You should note that there are certain limited circumstances in which there is a possibility that the opposing party's costs and/or fees could be awarded against you, for instance if [INSERT APPLICABLE ELEMENTS, FOR INSTANCE, "you are removed as a fiduciary or are found to have breached fiduciary duties, or if your suit is deemed to have been frivolous, vexatious, groundless, or without substantial justification."] We will be discussing these issues with you from time to time during our representation, so you should not hesitate to ask about this if you have any concerns.

In addition to our legal fees, as described above, we will charge you for out-of-pocket expenses that we pay on your behalf and for our internal costs. Out-of-pocket expenses include items such as filing fees charged by government agencies, witness fees, transcriptions costs, and travel expenses. Our internal costs include items such as photocopying, long-distance telephone calls, fax transmissions, document scanning and electronic transmission, storage and retrieval, postage, overnight delivery, courier services, computer research charges, and complex document production. Rather than tracking precise costs for every single internal charge (which would ultimately result in higher hourly rates for our clients), we charge fixed costs for these types of expenses. Our charges for these internal costs may exceed the actual direct costs that we pay to outsiders (such as the telephone company or photocopying contractors).

Sometimes it is necessary to hire other persons to provide services for you, such as accounting or appraisal firms and other experts. Their work may have more confidentiality if we (rather than you) request their services, and so we may hire them. However, you will be responsible for paying their fees and expenses, whether paid directly to them or to us in reimbursement. We will seek your prior authorization to hire such persons if the anticipated expense will exceed \$____. We have no obligation to incur or advance any expense exceeding \$____ unless reimbursement is fully secured by an advance cost deposit.

Our bills are due when rendered. If a bill is not paid within 30 days after it is mailed to you, interest will accrue on the unpaid balance of that bill beginning on the thirty-first (31st) day and accruing thereafter at the rate of one percent (1%) per month. Interest charges will apply to specific monthly bills. Payments made on past-due accounts will be applied first to the oldest outstanding bill. If our bills are not paid reasonably soon after they are rendered, we reserve the right to stop work until your account is brought current and appropriate measures are taken to ensure prompt payment in the future. If we have to bring collection efforts for payment, you agree that you will pay the costs of collection procedures, including reasonable attorney fees and costs incurred by us (whether paid to our firm or another firm retained by us).

We may require a retainer or advance fee deposit for your work. Unless you and we agree otherwise, the retainer or advance fee deposit will be applied to our final statement, and any unused portion will be returned to you. We may also request an advance cost deposit (in addition to the retainer or advance fee deposit) when we expect that we will incur substantial costs on your behalf.

[RETAINER ALTERNATIVE 1: *Current Billing Option*]

The firm requests a retainer of \$____. This retainer will be placed in the firm's trust account. [OPTIONAL: This retainer will be placed in a special trust account in your name.] The retainer amount will be disbursed from the trust account for the payment of your current fees and costs. You will be expected to

replenish the trust account to the required retainer level prior to the next billing period. All monies will be retained in the firm's trust account until earned and will be paid from the trust account after you have approved each statement we send to you. Any balance remaining at the end of the representation will be returned to you.

[RETAINER ALTERNATIVE 2: *Deposit Option*]

The firm requests a retainer of \$____. This retainer will be placed in the firm's trust account. The retainer amount will be applied to our final statement, and any balance remaining at the end of the representation will be returned to you.

[INTEREST ALTERNATIVE 1: *Interest Bearing*]

Funds we retain in the firm's trust account bear interest, but interest is paid to the _____ Lawyer Trust Account Fund, rather than being disbursed to you. [CHECK APPLICABLE REQUIREMENTS.]

[INTEREST ALTERNATIVE 2: *Non-interest Bearing*]

Funds we retain in the firm's trust account bear interest, and we will disburse that interest to you at the end of the representation, or apply it to our final statement, as the case may be. [CHECK APPLICABLE REQUIREMENTS.]

It is understood that our fees and costs will be paid by you personally and will not be paid by, or from, the [trust/estate]. However, if the facts of this matter develop such that we believe that there is a basis for you to seek reimbursement from [the trust/estate/or other party] for some, or even all, of our fees and costs, then we will advise you accordingly.

Agreement to Arbitrate

If you have any questions about our fees or costs or the quality or appropriateness of our services, we encourage you to discuss them with us. However, if a dispute arises about any such matter and we cannot amicably resolve that dispute, then the dispute will be decided by the _____ Bar Association _____ Committee. [INSERT METHOD FOR SELECTING ARBITRATOR OR ARBITRATION ORGANIZATION.] If there is such an arbitration, each party will be responsible for paying his, her or its own fees and costs, including a share of the expenses charged by the arbitrator. Any such arbitration shall be governed by the Uniform Arbitration Act, as adopted by _____. By agreeing to arbitration, you are relinquishing your right to bring an action in court and to a jury trial. Also, discovery in an arbitration proceeding can be limited, and the grounds for appealing the arbitrator's decision are limited.

[OPTIONAL:] These provisions will apply to all claims or disputes between us, including claims for professional negligence.

Effect of Disability

[WARNING: YOU MUST DETERMINE WHETHER THE ETHICS RULES OF YOUR JURISDICTION WOULD ALLOW THE FOLLOWING PROVISIONS.] If you become unable to make adequately-considered decisions regarding the [subject matter of the engagement] because of mental disability or other reasons, the ethics rules that govern the practice of law in this jurisdiction provide that we may attempt to continue a normal attorney-client relationship with you as much as is possible. Those rules also authorize us to seek the appointment of a guardian, or to take other actions to protect your interests, if we consider that to be necessary. You should be aware that, by means of a durable power of attorney, you can designate one or more other persons to make decisions for you about the [subject matter of the engagement] and to sign documents on your behalf. If you authorize someone to act as your agent, and if his or her authority is broad enough to allow him or her to instruct us with regard to your interest in the [subject matter of the engagement], we can continue to do work on your behalf by dealing with your agent, and we can rely on instructions from your agent. We can communicate with your agent and disclose information he or she needs to make informed decisions on your behalf, including information that is protected by the attorney-client privilege or the attorney work-product privilege, without those privileges being waived.

Termination of the Engagement

When the [subject matter of the engagement] has been completed, our representation will be concluded, unless arrangements for a continuing representation are made. We will be happy to provide additional or continuing services, but unless such arrangements are made and agreed upon in writing, we will have no further responsibility to you in connection with any future or ongoing legal issues affecting the [subject matter of the engagement], including any duty to notify you of changes in applicable law or the necessity to make any periodic or renewal filings or registrations.

You may terminate this engagement at any time by providing us with some form of written notice. Subject to any court approval that may be required, upon receipt of this notice, we will promptly cease providing services to you. You will be responsible for paying for our services rendered to you and costs incurred on your behalf up until the day we receive such notice, and for any services and costs we must necessarily provide or incur thereafter in connection with the transfer of responsibility to your new counsel for the matters we have been handling.

Similarly, we may terminate this engagement at any time by providing you with written notice. Subject to any court approval that may be required, upon your receipt of this notice, you will be responsible for paying for any services we have rendered and costs we have incurred on your behalf up to the point of termination, and any other services we must necessarily render to transfer the responsibilities of the matter to your new counsel or otherwise end our representation.

Retention, Delivery, Retrieval, and Destruction of the Files

You should understand that the file that will be created by our firm in connection with the [subject matter of the engagement] will belong to you. During the course of this engagement, you will be furnished copies of

all documents and of all significant correspondence. [OPTIONAL: When the [subject matter of the engagement] is completed, we will deliver the originals of all documents to you.] We will retain physical and/or electronic copies of all of the documents, all correspondence, and, to the extent we deem appropriate, all notes made in connection with this engagement in our file. You may direct us to turn over our file to you, or to anyone else that you designate, at any time. In such case, we may retain in our possession all internal communications and notes prepared by our firm and, at your expense, make, retain, and store physical and/or electronic copies of our file to be delivered to you or at your request.

It is the policy of our firm that client files that are no longer needed by our lawyers and other professionals on a recurring basis are closed and placed in storage in a location away from our offices. The off-site storage of closed files helps us to reduce our operating expenses, and consequently, our fees. Because you will have been furnished with [OPTIONAL (see above): the originals and/or] copies of all relevant materials contained in our files during the course of the active phase of our representation, if you ask us to retrieve materials contained in a file that has been closed and placed in off-site storage, you agree that we shall be entitled to be paid by the requesting party a reasonable charge for the cost of retrieving the file and identifying, reproducing, and delivering the requested materials.

Unless our firm is engaged to provide ongoing representation in connection with the [subject matter of the engagement], it is our firm's policy to destroy all copies of correspondence, notes, and documents retained in our file created in connection with the representation ten (10) years after the completion of the engagement. Before destroying the file, we will attempt to contact our client, as identified in this letter, to make arrangements for delivery of any original documents and the other contents of the file to our client. This letter will serve as notice to you that if we are unable to contact our client at the most recent address contained in our file, subject to applicable law, we will destroy the file without further notice. It will be your responsibility to notify us of any change in your address or contact information.

[OPTIONAL PROVISION: *Conflicts with other clients*]

Sometimes our lawyers are asked to represent a client who has interests that are adverse to another client whom we represent in other matters. The ethics rules that govern the practice of law in this jurisdiction permit us to accept multiple representations if certain requirements are met. While we represent you, we will not represent another client in matters that are directly adverse to your interests, unless and until we have made full disclosure to you and to the other client of all relevant facts, circumstances, and implications. [You agree/each of you agrees] that we can represent those other clients whose interests are adverse to yours if we confirm to [you/each of you] in good faith that the following conditions are met: (1) there is no substantial relationship between the other client's matter and our work for you; (2) our representation of the other client will not involve a disclosure of any confidential information we have received from you or relating to our representation of you (with the use of any ethically-approved screening measures, if appropriate); and (3) the other client also consents to our continuing representation of you. If you make a good-faith objection to our statement, we will have the burden of proving that these conditions have been met.

Form of an Engagement Letter for Representation of Multiple Beneficiaries in Trust and Estate Litigation

[Date]

[Name(s) and Address(es)]

Subject: [Subject Matter of the Engagement]

Dear [Client(s)]:

Thank you for your confidence in selecting our firm to perform legal services in connection with the [subject matter of the engagement].

Scope of the Engagement

We will provide legal services in connection with [specific description of the subject matter].

As your attorneys, we will assist you in all issues pertaining to this matter, including [LIST ANY SERVICES YOU ANTICIPATE THIS PARTICULAR DISPUTE/LITIGATION WILL ENTAIL, INCLUDING WHETHER YOU WILL REPRESENT CLIENT ON APPEAL; BE AS SPECIFIC AS POSSIBLE.]. We will counsel you on the legal and strategic aspects of the litigation and advise you as necessary. We will also prepare any required documentation and will provide legal advice to you pertaining to this dispute.

In matters that involve litigation, negotiations, or other interactions with third parties, our discussions with you may include assessments of the strengths and weaknesses of your case. Please note carefully that we can make no promises regarding the outcome of any part of this engagement. All legal matters, whether or not involving litigation, entail uncertainty because we can never be sure how other parties will behave or how the court will react to our arguments and the evidence presented. In addition, the discovery process may uncover facts detrimental to your position. Therefore, it is important that you understand at the outset that we cannot guarantee a favorable result. However, we can assure you of our best efforts on your behalf.

Alternatives to Litigation

Please know that there are alternative forms of dispute resolution, such as informal settlement negotiations, mediation and arbitration, and these alternatives may be less expensive and time-consuming than litigation. We will be happy to discuss these alternatives with you at any point during our representation. [NOTE ANY APPLICABLE STATUTORY OR LOCAL REQUIREMENT TO MAKE AN EFFORT TO MEDIATE.]

Duty of Confidentiality and Loyalty; Conflicts of Interest

You have asked us to represent all of you in this matter. As we have discussed, we are pleased to do so, but it is important that all of you understand that there are certain considerations that need to be addressed in a

multiple representation situation that would not otherwise need to be addressed. We have pointed out to each of you that during the course of the contemplated litigation, conflicts of interest may arise among you with respect to your respective interests. In other words, circumstances might arise in the future in which action taken for the benefit of one of you might be to the detriment of one of the others.

As your attorneys, we owe you a duty to preserve any confidential information you share with us, unless you authorize us to disclose such information or we are compelled legally to do so. It is critical that each of you engage in full disclosure in the matter at issue and inform us of any of your acts and doings, past and present, regarding this matter, in order to avoid any problems that might otherwise arise from any failure to communicate fully. Note, however, that because we are representing all of you and each of you, matters disclosed to us by any of you may, and sometimes must, be disclosed by us to any of the others of you. In other words, nothing that any of you tells us that we believe is material to this matter will be kept confidential from the rest of you. Please note that you will lose the protection of the attorney-client privilege if you disclose communications between you and us to persons other than those who need to know the information in order to implement our advice. Generally, the law does not provide privileges for communications with other professional service providers, including accountants and financial and business consultants. We therefore recommend that you guard your attorney-client privilege closely and consult with us before disclosing confidential communications to anyone else.

We also owe you a duty to act solely in your best interests, without being influenced by the conflicting interests of other clients. Although we believe at this time that your respective interests in the [trust/estate] are the same, it could be that, as this matter proceeds, your interests could actually diverge or even become directly in conflict. Just as one example, a conflict could arise that is not even based on your interests in the trust and might simply be caused by a difference of opinion as to strategy. To illustrate, at some point one of you might want to settle the dispute out of court, and the others might not wish to do so. Based on the foregoing, in representing more than one beneficiary of the [trust/estate], potential conflicts of interest could arise resulting from our possibly conflicting duties to each of you.

Provided that each of you knowingly waives your right to separate counsel, we are prepared to represent the interests of all of you and each of you for as long as we believe we can provide competent and diligent representation to each of you and provided that all of you consent in writing to the multiple representation.

We also want to note that at our meeting we agreed that you should designate one of you to be our primary point of contact. Although all of our correspondence, email, and so on will go to all of you, and all major decisions will have to be agreed upon by all of you, it will be more economical if you agree that if we determine that it makes sense to talk with one of you, as a representative who can then caucus with the others, then that is acceptable to you. It is our understanding that you have agreed to this and that you agree that [Client 1] should be our primary point of contact for such purposes.

On the other side of the confidentiality issue, we note that because we would be representing each of you and all of you, it is also critical for each of you to maintain secrecy and confidentiality as to our discussions, strategies, etc., with respect to persons other than yourselves collectively. In fact, to the extent that any one of you violates the “group confidentiality,” that may seriously harm your case and may also cause us at some point to withdraw as counsel, whether for one of you or all of you, as the circumstances warrant.

[OPTIONAL ELEMENT: *Prior representation of one of the clients*]

As each of you is aware, our firm has previously represented [Client 1] personally and in matters related to [his/her] business interests. We have already advised [Client 1] that if we are engaged to represent all of you collectively in connection with this matter, then we may be required to disclose to each of you information regarding [Client 1 or Client 1's business, estate planning, or whatever is relevant], which we might otherwise be prohibited from disclosing; and [Client 1] has consented to any such disclosure to the extent it is relevant and material to the litigation.

If we begin with our firm representing all of you jointly, any one of you is completely free to change your mind and engage separate counsel at any time. In addition, any one of you can revoke your waiver of our duty of confidentiality as between you and the others and re-invoke the duty so as to prevent us from disclosing any confidential information received from you that we have not previously disclosed to the others. In either case, we would withdraw from representing any of you further in connection with the litigation unless all of you consented to our continued representation of one or more of you and we would communicate to all of you the reason for our withdrawal. Notwithstanding this, if we are requested by [Client 1] to continue to represent [him/her] in connection with [his/her personal matters/business matters] unrelated to the litigation, then we would do so and, by agreeing to our representation of all of you collectively as described in this letter, each of you consents to our continuing representation of [Client 1] in that event.

[NOTE: This alternative element also involves a separate letter to Client 1 to obtain his/her consent to the above provisions. That consent should include an acknowledgment that there is no guarantee that you will be able to continue to represent Client 1.]

Fees and Billing

Our fee in connection with the [subject matter of the engagement] will be the product of the time spent by our lawyers and other professionals multiplied by their respective hourly rates. The time for which we are to be paid includes not only normal office conferences, research, analysis, and advice associated with the [subject matter of the engagement], but also the time involved in telephone calls, faxes, e-mail, and other forms of communication. We will generally bill you for our services on a monthly basis.

We adjust our hourly rates periodically. We consider the ability, experience, and reputation of our lawyers and paralegals when we set hourly rates. Changes are usually made each January 1, but sometimes they are made at other times. Any increase in rates will apply to all time beginning with the month when the rates are changed. Work done before that month will be billed at the hourly rates previously in effect. Different lawyers and paralegals in our firm may be involved in your work if that will result in lower fees, provide a specialized legal talent, or help us do your work more efficiently. We will try to assign lawyers and paralegals having the lowest hourly rates consistent with the skills, time demands, and other factors required for your work. We might not assign a lawyer or paralegal with the lowest hourly rate if, in our judgment, it may be in your best interests to assign a lawyer or paralegal with a higher hourly rate because of that lawyer's or paralegal's

skill and experience or because of the time constraints of the work. We record and bill our time in one-tenth hour (six-minute) units. [OPTIONAL: If a lawyer's or paralegal's total time on your work is less than three-tenths of an hour for the entire day, three-tenths of an hour will be billed for that day. If the lawyer's or paralegal's total time on your work is more than three-tenths of an hour for that day (whether done at one time or not), only the time actually spent will be billed.]

[INSERT CONTINGENT FEE ALTERNATIVE, IF APPLICABLE; CONSIDER ANY STATE STATUTE OR LAW THAT MAY APPLY; TAKE INTO ACCOUNT RESOLUTION BY SETTLEMENT AND THE POSSIBILITY OF APPEALS.]

You should note that there are certain limited circumstances in which there is a possibility that the opposing party's costs and/or fees could be awarded against you, for instance if [INSERT APPLICABLE ELEMENTS, FOR INSTANCE, "you are removed as a fiduciary or are found to have breached fiduciary duties, or if your suit is deemed to have been frivolous, vexatious, groundless or without substantial justification."] We will be discussing these issues with you from time to time during our representation, so you should not hesitate to ask about this if you have any concerns.

In addition to our legal fees, as described above, we will charge you for out-of-pocket expenses that we pay on your behalf and for our internal costs. Out-of-pocket expenses include items such as filing fees charged by government agencies, witness fees, transcription costs, and travel expenses. Our internal costs include items such as photocopying, long-distance telephone calls, fax transmissions, document scanning and electronic transmission, storage and retrieval, postage, overnight delivery, courier services, computer research charges, and complex document production. Rather than tracking precise costs for every single internal charge (which would ultimately result in higher hourly rates for our clients), we charge fixed costs for these types of expenses. Our charges for these internal costs may exceed the actual direct costs that we pay to outsiders (such as the telephone company or photocopying contractors).

Sometimes it is necessary to hire other persons to provide services for you, such as accounting or appraisal firms and other experts. Their work may have more confidentiality if we (rather than you) request their services, and so we may hire them. However, you will be responsible for paying their fees and expenses, whether paid directly to them or to us in reimbursement. We will seek your prior authorization to hire such persons if the anticipated expense will exceed \$____. We have no obligation to incur or advance any expense exceeding \$____ unless reimbursement is fully secured by an advance cost deposit.

Our bills are due when rendered. If a bill is not paid within 30 days after it is mailed to you, interest will accrue on the unpaid balance of that bill beginning on the thirty-first (31st) day and accruing thereafter at the rate of one percent (1%) per month. Interest charges will apply to specific monthly bills. Payments made on past-due accounts will be applied first to the oldest outstanding bill. If our bills are not paid reasonably soon after they are rendered, we reserve the right to stop work until your account is brought current and appropriate measures are taken to ensure prompt payment in the future. If we have to bring collection efforts for payment, you agree that you will pay the costs of collection procedures, including reasonable attorney fees and costs incurred by us (whether paid to our firm or another firm retained by us).

We may require a retainer or advance fee deposit for your work. Unless you and we agree otherwise, the retainer or advance fee deposit will be applied to our final statement, and any unused portion will be returned to you. We may also request an advance cost deposit (in addition to the retainer or advance fee deposit) when we expect that we will incur substantial costs on your behalf.

Each of you agrees that you will all be jointly and severally responsible for the payment of all amounts owed to us, and that we can seek payment in full from any one of you at our election. Any agreement among any of you to limit your responsibility for payment of amounts owed to us will not be binding upon us unless we agree in writing to those limits. Your joint and several responsibility for the payment of our fees and expenses includes the situation in which our representation is terminated for any reason prior to the completion of the [subject matter of the engagement].

[RETAINER ALTERNATIVE 1: *Current Billing Option*]

The firm requests a retainer of \$____. This retainer will be placed in the firm's trust account. [OPTIONAL: This retainer will be placed in a special trust account in your name.] The retainer amount will be disbursed from the trust account for the payment of your current fees and costs. You will be expected to replenish the trust account to the required retainer level prior to the next billing period. All monies will be retained in the firm's trust account until earned and will be paid from the trust account after you have approved each statement we send to you. Any balance remaining at the end of the representation will be returned to you.

[RETAINER ALTERNATIVE 2: *Deposit Option*]

The firm requests a retainer of \$____. This retainer will be placed in the firm's trust account. The retainer amount will be applied to our final statement, and any balance remaining at the end of the representation will be returned to you.

[INTEREST ALTERNATIVE 1: *Interest Bearing*]

Funds we retain in the firm's trust account bear interest, but interest is paid to the _____ Lawyer Trust Account Fund, rather than being disbursed to you. [CHECK APPLICABLE REQUIREMENTS.]

[INTEREST ALTERNATIVE 2: *Non-interest Bearing*]

Funds we retain in the firm's trust account bear interest, and we will disburse that interest to you at the end of the representation, or apply it to our final statement, as the case may be. [CHECK APPLICABLE REQUIREMENTS.]

It is understood that our fees and costs will be paid by you personally and will not be paid by or from the [trust/estate]. However, if the facts of this matter develop such that we believe that there is a basis for you to seek reimbursement from [the trust/estate/or other party] for some, or even all, of our fees and costs, then we will advise you accordingly.

In terms of how our fees and costs will be divided among you, [DESCRIBE BASIS FOR FEE DIVISION, SUCH AS EQUALLY, PROPORTIONATELY, ETC.; AND IF NOT EQUALLY, CONSIDER LISTING OF EACH CLIENT'S SHARE, AND ADDRESS WHETHER OR NOT THE CLIENTS ARE JOINTLY AND SEVERALLY RESPONSIBLE FOR THE FEES AND COSTS.].

Agreement to Arbitrate

If you have any questions about our fees or costs or the quality or appropriateness of our services, we encourage you to discuss them with us. However, if a dispute arises about any such matter and we cannot amicably resolve that dispute, then the dispute will be decided by the _____ Bar Association _____ Committee [INSERT METHOD FOR SELECTING ARBITRATOR OR ARBITRATION ORGANIZATION.]. If there is such an arbitration, each party will be responsible for paying his, her or its own fees and costs, including a share of the expenses charged by the arbitrator. Any such arbitration shall be governed by the Uniform Arbitration Act, as adopted by _____. By agreeing to arbitration, you are relinquishing your right to bring an action in court and to a jury trial. Also, discovery in an arbitration proceeding can be limited and the grounds for appealing the arbitrator's decision are limited. [OPTIONAL: These provisions will apply to all claims or disputes between us, including claims for professional negligence.]

Effect of Disability

[WARNING: YOU MUST DETERMINE WHETHER THE ETHICS RULES OF YOUR JURISDICTION WOULD ALLOW THE FOLLOWING PROVISIONS.] If any of you becomes unable to make adequately-considered decisions regarding the [subject matter of the engagement] because of mental disability or other reasons, the ethics rules that govern the practice of law in this jurisdiction provide that we may attempt to continue a normal attorney-client relationship with you as much as is possible. Those rules also authorize us to seek the appointment of a guardian or to take other actions to protect your interests if we consider that to be necessary. You should be aware that, by means of a durable power of attorney, you can designate one or more other persons to make decisions for you about the [subject matter of the engagement] and to sign documents on your behalf. If you authorize someone to act as your agent, and if his or her authority is broad enough to allow him or her to instruct us with regard to your interest in the [subject matter of the engagement], we can continue to do work on your behalf by dealing with your agent, and we can rely on instructions from your agent. We can communicate with your agent and disclose information he or she needs to make informed decisions on your behalf, including information that is protected by the attorney-client privilege or the attorney work-product privilege, without those privileges being waived.

Termination of the Engagement

When the [subject matter of the engagement] has been completed, our representation will be concluded, unless arrangements for a continuing representation are made. We will be happy to provide additional or continuing services, but unless such arrangements are made and agreed upon in writing, we will have no further responsibility to you in connection with any future or ongoing legal issues affecting the [subject matter of the engagement], including any duty to notify you of changes in applicable law or the necessity to make any periodic or renewal filings or registrations.

Although we will begin with representing all of you, any one of you is completely free to change your mind and have separate counsel at any time.

[WITHDRAWAL ALTERNATIVE 1:]

In such case, we will withdraw from representing all of you, unless all of you consent to our continued representation of some or all of the others.

[WITHDRAWAL ALTERNATIVE 2:]

In such case, and depending on the circumstances, it is possible that we will have to withdraw from representing every one of you, or we may be able to continue representing all or some of the others, although it may be that our continued representation will require additional consents.

You may terminate this engagement at any time by providing us with some form of written notice. Subject to any court approval that may be required, upon receipt of this notice, we will promptly cease providing services to you. You will be responsible for paying for our services rendered to you and costs incurred on your behalf up until the day we receive such notice, and for any services and costs we must necessarily provide or incur thereafter in connection with the transfer of responsibility to your new counsel for the matters we have been handling.

Similarly, we may terminate this engagement at any time by providing you with written notice. Subject to any court approval that may be required, upon your receipt of this notice, you will be responsible for paying for any services we have rendered and costs we have incurred on your behalf up to the point of termination, and any other services we must necessarily render to transfer the responsibilities of the matter to your new counsel or otherwise end our representation.

If fewer than all of you terminate the engagement and we continue to represent the others, then a client who terminates the engagement will be responsible for paying for his or her share of our services rendered and costs incurred up until the day we receive such notice, and for any services and costs we must necessarily provide or incur on your behalf thereafter in connection with the transfer of responsibility to the terminating client's new counsel for the matters we have been handling.

If all of you terminate this engagement, then you will be responsible for paying for our services rendered to you and costs incurred on your behalf up until the day we receive such notice, and for any services and costs we must necessarily provide or incur thereafter in connection with the transfer of responsibility to your new counsel for the matters we have been handling.

Retention, Delivery, Retrieval, and Destruction of the Files

You should understand that the file that will be created by our firm in connection with the [subject matter of the engagement] will belong to you. During the course of this engagement, you will be furnished copies of all documents and of all significant correspondence. [OPTIONAL: When the [subject matter of the engage-

ment] is completed, we will deliver the originals of all documents to you.] We will retain physical and/or electronic copies of all of the documents, all correspondence, and, to the extent we deem appropriate, all notes made in connection with this engagement in our file. You may direct us to turn over our file to you or to anyone else that you designate, at any time. In such case, we may retain in our possession all internal communications and notes prepared by our firm and, at your expense, make, retain, and store physical and/or electronic copies of our file to be delivered to you or at your request. Given our representation of more than one client in this case, we reserve the right to determine which of you will receive the original file if there are competing requests for it.

It is the policy of our firm that client files that are no longer needed by our lawyers and other professionals on a recurring basis are closed and placed in storage in a location away from our offices. The off-site storage of closed files helps us to reduce our operating expenses, and consequently our fees. Because you will have been furnished with [OPTIONAL (see above): the originals and/or] copies of all relevant materials contained in our files during the course of the active phase of our representation, if you ask us to retrieve materials contained in a file that has been closed and placed in off-site storage, you agree that we shall be entitled to be paid by the requesting party a reasonable charge for the cost of retrieving the file and identifying, reproducing, and delivering the requested materials.

Unless our firm is engaged to provide ongoing representation in connection with the [subject matter of the engagement], it is our firm's policy to destroy all copies of correspondence, notes, and documents retained in our file created in connection with the representation ten (10) years after the completion of the engagement. Before destroying the file, we will attempt to contact our client, as identified in this letter, to make arrangements for delivery of any original documents and the other contents of the file to our client. This letter will serve as notice to you that if we are unable to contact our client at the most recent address contained in our file, subject to applicable law, we will destroy the file without further notice. It will be the responsibility of each of you to notify us of any change in your address or contact information.

[OPTIONAL PROVISION: *Conflicts with other clients*]

Sometimes our lawyers are asked to represent a client who has interests that are adverse to another client whom we represent in other matters. The ethics rules that govern the practice of law in this jurisdiction permit us to accept multiple representations if certain requirements are met. While we represent you, we will not represent another client in matters that are directly adverse to your interests, unless and until we have made full disclosure to you and to the other client of all relevant facts, circumstances, and implications. [You agree/each of you agrees] that we can represent those other clients whose interests are adverse to yours if we confirm to [you/each of you] in good faith that the following conditions are met: (1) there is no substantial relationship between the other client's matter and our work for you; (2) our representation of the other client will not involve a disclosure of any confidential information we have received from you or relating to our representation of you (with the use of any ethically-approved screening measures, if appropriate); and (3) the other client also consents to our continuing representation of you. If you make a good-faith objection to our statement, we will have the burden of proving that these conditions have been met.

Consent to the Terms of the Engagement

Before we begin, you must consider all of the factors discussed in this letter and consent to the form of the representation. After you have considered this decision carefully, we ask that you please sign the statement that follows this letter to indicate your consent to the conditions of the representation. If, after considering this matter, you prefer a different form of representation, please let us know.

Because any change in legal representation after we begin may result in an increase in the time and expense needed to complete the [subject matter of the engagement], for which you would be financially responsible, we urge you to give careful consideration to the structure of the representation before we begin.

We have enclosed an extra copy of this letter to be signed and returned to us consenting to the conditions of the representation as described in this letter. The return of a copy of this letter signed by you will serve as authorization for us to proceed with the [subject matter of the engagement]. Also enclosed is a return-address envelope for your convenience in returning the signed copy of this letter.

If you have any questions about anything discussed in this letter, please call us. You should also feel free to contact an attorney in another firm to discuss the effect of agreeing to the terms of the representation as outlined in this letter.

We appreciate the opportunity to work with you on the [subject matter of the engagement], and we look forward to hearing from you soon.

Sincerely,

[Lawyer]

Consent to the Representation and the Terms of the Engagement

We have each reviewed the foregoing letter concerning the various aspects of separate and joint representation, and we choose to have [Firm] represent us jointly in connection with the [subject matter of the engagement] on the terms described above.

Signed: _____, 20____
_____ (Client 1)

Signed: _____, 20____
_____ (Client 2)

Signed: _____, 20____
_____ (Client 3)

CHAPTER 7. DEALING WITH THE POTENTIAL FOR DIMINISHED CAPACITY

Introduction

With longer life expectancy, it is increasingly common for clients to experience a period of deteriorating mental abilities (“diminished capacity”) due to physical or mental disabilities. The supplemental language in this chapter is designed as an optional addition to an estate planning engagement letter. It contemplates the possibility of future diminished capacity and expresses the manner in which the lawyer may provide legal services in that eventuality. It also briefly mentions the steps that the client might take to protect the client’s interests and assure that the client’s intentions are honored. Finally, it authorizes the lawyer to communicate with others if the lawyer becomes concerned regarding the client’s capacity.

References to the *ACTEC Commentaries* (Fourth Edition):

(Note that the page numbers shown below refer to the printed version of the *ACTEC Commentaries*.)

Facilitating Informed Judgment by Clients, pp. 33-34

Client Who Apparently Has Diminished Capacity (re duty of Confidentiality), p. 75

Client with Diminished Capacity (re Conflict of Interest), p. 96

Client with Diminished Capacity, pp. 83, 96, 131-139

Supplemental Checklist for Dealing with the Potential for Diminished Capacity

(Refer also to the General Checklist on pp. 4-8.)

1. IDENTIFY THE CLIENT IF NO GUARDIANSHIP OR CONSERVATORSHIP IS INVOLVED.
 - (a) The identity of the client is ordinarily not an issue if the lawyer is providing general estate planning services for a competent client. If the lawyer will be paid by another person, the lawyer must comply with MRPC 1.8(f), which requires the client’s informed consent, maintenance of confidentiality, and preservation of the lawyer’s independence.
 - (b) If the lawyer is asked to provide services for a person whose mental capacity is in doubt, the identity of the client may be more doubtful. Some authorities suggest that a client with diminished capacity lacks authority to enter into a lawyer-client relationship. However, a client who has diminished capacity may have sufficient mental capacity to enter into or continue a lawyer-client relationship. MRPC 1.14 directs the lawyer to treat the client as a client with normal mental capacity for as long as that is possible.
 - (c) The lawyer and client may wish to discuss the advantages of pre-need planning for diminished capacity, including the possible use of revocable trusts, durable powers of attorney (both for financial and health care reasons), and health care directives.

- (d) It may be desirable that the lawyer provide the client with an engagement letter that describes the services to be performed in connection with pre-need planning for diminished capacity.

2. IDENTIFY THE CLIENT IF A GUARDIANSHIP OR CONSERVATORSHIP EXISTS OR IS CONTEMPLATED.

- (a) If the person who is, or may be, the subject of a guardianship or conservatorship was a client of the lawyer, that relationship may still exist. If so, the lawyer must determine whether the local law permits the lawyer to provide assistance to the fiduciary or person seeking appointment. Some jurisdictions permit the lawyer to seek the appointment of a guardian or conservator, while others, such as Florida, do or may not.
- (b) If the lawyer has not represented the person for whom a guardianship or conservatorship exists or for whom a guardianship or conservatorship is sought, the lawyer is generally free to represent the guardian or conservator. In such a case the fiduciary or petitioner is generally considered to be the client. However, some authorities speak of the lawyer having a direct duty to the ward or protected person. Thus, the lawyer may, as a matter of substantive law, be required to take steps contrary to the interests of the fiduciary client because of a duty owed to the ward or protected person. Also note that additional issues regarding confidentiality and conflicts may arise if there are multiple fiduciaries or petitioners. Since any such action could also be viewed as a breach of the lawyer's duty of loyalty to the fiduciary client, the lawyer should consider addressing the issue in the engagement letter and describing how the lawyer will respond if the issue arises.
- (c) The lawyer may choose to or may be required to enter into an engagement letter with the nominated or appointed fiduciary that also describes the duties the fiduciary owes to the ward or protected person and to the court and the duties that the lawyer owes to the fiduciary and to the ward or protected person.
- (d) If the lawyer is representing a competent client and the lawyer intends to discuss with the client planning to protect the client if the client suffers from diminished capacity at a future date, the following provision could be added to the engagement letter.

Optional Addition to the Basic Engagement Letter Dealing with the Potential for Diminished Capacity

As part of our services, we will discuss with you the steps you might take to protect your interests and to see that your wishes are carried out if your capacity to make either financial or health care decisions diminishes (either abruptly or over time). In particular, we will review with you the advantages and disadvantages of: (1) a durable power of attorney authorizing others to act on your behalf with respect to your financial interests or your health care; (2) a directive to physicians (often called a “Living Will”); and (3) a revocable trust. Using one or more of those tools may eliminate the necessity of appointing a guardian or conservator if you become unable to care for your own financial or personal needs. Importantly, using these tools, you may nominate a person to act for your benefit as your legal representative if the need arises. In any event, you may nominate a person to act as the guardian or conservator of you and your property if the appointment of a guardian or conservator is ever required.

If concerns develop regarding your capacity, [OPTIONAL: and our representation of you has not been terminated either by you or pursuant to your engagement letter with us,] we will continue to represent you and to protect your interests to the extent consistent with our standards of practice and our ethical responsibilities. To the extent we can continue to act on your behalf, we will only take actions that we reasonably believe to be in your best interests and consistent with your previously expressed wishes. Unless you direct us otherwise in writing, by signing this engagement letter, you will be authorizing us in such representation: (1) to communicate with your family, your physicians, and your other advisors and to disclose to them such pertinent, but limited, confidential information as we may determine to be reasonably appropriate under the circumstances; and (2) to represent any person you have chosen to be your legal representative in the event your mental capacity diminishes and a legal representative is needed. However, if legal action is taken to obtain a guardian or conservator for you, we will continue to represent your interests until such time as the guardian or conservator is appointed. If the person appointed is a person you have designated to be your guardian or conservator, by signing this engagement letter you will be authorizing us to represent the guardian or conservator. Please note that we may not be able to represent the person you have chosen for a variety of reasons, including conflicts of interest. Moreover, the person you have chosen to be your guardian or conservator is free to choose counsel of his or her choice. Accordingly, your authorization to act does not bind us to act for the person you choose, nor does it bind that person to use our services.

CHAPTER 8. WITHDRAWING FROM REPRESENTATION

Form of a Letter Withdrawing from Representation of All Clients

[Date]

[Name and Address of Client 1]

[Name and Address of Client 2]

Re: [Subject Matter of the Engagement]

Dear [Client 1] and [Client 2]:

You requested that our firm represent you both simultaneously in this matter in which you have a common interest.

When we began this representation, we explained to both of you that if, during the course of the representation, either one of you should revoke his or her consent to the sharing of all confidential information that we consider relevant and material to the representation; or if other conflicts of interest should arise between you with respect to your respective interests in this matter that lead us to believe that our representation of either one of you would be adversely affected by our continued representation of the other of you, we would withdraw from the representation of both of you in this matter; and each of you would then have to obtain separate counsel.

[ALTERNATIVE 1: *Noisy Withdrawal*]

We have become aware that [DESCRIBE NATURE OF THE CONFLICT.]. We believe that this represents a conflict that prevents us from representing and advising you both any further in this matter. Accordingly, we are hereby notifying both of you that we are withdrawing immediately from any further representation of either one of you in this matter. It will now be necessary for each of you to consider obtaining separate counsel.

[ALTERNATIVE 2: *Silent Withdrawal*]

We have become aware of circumstances that we believe represent a conflict that prevents us from representing and advising you both any further in this matter. Accordingly, we are hereby notifying both of you that we are withdrawing immediately from any further representation of either one of you in this matter. It will now be necessary for each of you to consider obtaining separate counsel.

[IF THE MATTER INVOLVES LITIGATION AND COURT APPROVAL IS REQUIRED, DESCRIBE THE PROCESS.]

Please acknowledge receipt of a copy of this letter by dating, signing, and returning one copy of this letter to our office.

Sincerely,

[Lawyer]

Acknowledgment of Receipt

I acknowledge receipt of a copy of this letter.

Signed: _____, 20____
_____ (Client 1)

Signed: _____, 20____
_____ (Client 2)

**Form of a Letter Withdrawing from Representation of One Client
and Continuing Representation of Another Client**

[Date]

[Name and Address of Client 1]

[Name and Address of Client 2]

Re: [Subject Matter of the Engagement]

Dear [Client 1] and [Client 2]:

You requested that our firm represent you both simultaneously in this matter in which you have a common interest.

When we began this representation, we explained to [Client 2] that our firm has represented and advised [Client 1] and [his/her] family and businesses for many years, and we further advised both of you that if, during the course of the representation, either one of you should revoke his or her consent to the sharing of all confidential information that we consider relevant and material to the representation; or if other conflicts of interest should arise between you with respect to your respective interests in this matter that lead us to believe that our representation of either one of you would be adversely affected by our continued representation of the other of you, we would withdraw from the representation of [Client 2], but would continue to represent [Client 1]; and that [Client 2] would then have to obtain separate counsel.

[ALTERNATIVE 1: Noisy Withdrawal]

We have become aware that [DESCRIBE NATURE OF THE CONFLICT.]. We believe that this represents a conflict that prevents us from representing and advising you both any further in this matter. Accordingly, we are hereby notifying both of you that we are withdrawing immediately from any further representation of [Client 2] in this matter but will continue to represent [Client 1] in this and other matters. It will now be necessary for [Client 2] to consider obtaining separate counsel.

[ALTERNATIVE 2: Silent Withdrawal]

We have become aware of circumstances that we believe represent a conflict that prevents us from representing and advising you both any further in this matter. Accordingly, we are hereby notifying both of you that we are withdrawing immediately from any further representation of [Client 2] in this matter but will continue to represent [Client 1] in this and other matters. It will now be necessary for [Client 2] to consider obtaining separate counsel.

[IF THE MATTER INVOLVES LITIGATION AND COURT APPROVAL IS REQUIRED, DESCRIBE THE PROCESS.]

Please acknowledge receipt of a copy of this letter by dating, signing, and returning one copy of this letter to our office.

Sincerely,

[Lawyer]

Acknowledgment of Receipt

I acknowledge receipt of a copy of this letter.

Signed: _____, 20____ _____
(Client 1)

Signed: _____, 20____ _____
(Client 2)