

ACTEC[®]

THE AMERICAN COLLEGE OF
TRUST AND ESTATE COUNSEL

Engagement Letters

A GUIDE FOR PRACTITIONERS

Third Edition 2017

For use with the *ACTEC Commentaries on the Model Rules of
Professional Conduct*, Fifth Edition 2016

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

Online Version
April 24, 2017

Edited March 2020

Funded by the American College of Trust and Estate Counsel (“ACTEC”) Foundation. ACTEC is a registered trademark of The American College of Trust and Estate Counsel.

© 2020 The American College of Trust and Estate Counsel. All Rights Reserved. ACTEC is a registered trademark of The American College of Trust and Estate Counsel.

Third Edition: © 2017 The American College of Trust and Estate Counsel “ACTEC” Foundation. All Rights Reserved.

Second Edition: © 2007 The American College of Trust and Estate Counsel “ACTEC” Foundation. All Rights Reserved.⁶

First Edition: © 1999 The American College of Trust and Estate Counsel “ACTEC” Foundation. All Rights Reserved.

The American College of Trust and Estate Counsel
901 15th Street, N.W.
Suite 525
Washington, D.C. 20005
publications@actec.org

Table of Contents

INTRODUCTION.....	6
Purpose of the Engagement Letters and Checklists	6
Organization of the Engagement Letters	7
Caveat: Limitations Regarding the Use of the Checklists and Forms	8
User Comments.....	8
GENERAL CHECKLIST	10
CHAPTER 1. ESTATE PLANNING REPRESENTATION OF ONE PERSON OR SPOUSES.....	15
Introduction	15
References to the ACTEC Commentaries (Fifth Edition 2016):.....	15
Supplemental Checklist for Representation of Spouses.....	16
Form of an Engagement Letter for the Representation of Both Spouses Jointly in Estate Planning Matters.....	17
Form of an Engagement Letter for the Representation of One Person in Estate Planning Matters (Married or Unmarried)	22
CHAPTER 2. REPRESENTATION OF MULTIPLE MEMBERS OF THE SAME FAMILY OTHER THAN	26
OR IN ADDITION TO SPOUSES	26
Introduction	26
References to the ACTEC Commentaries (Fifth Edition 2016):.....	26
Supplemental Checklist for Representing Multiple Members of the Same Family Other Than or In Addition to Spouses	28
Form of an Engagement Letter to be Signed by a Married Couple in Connection with the Separate Representation of Other Members of the Same Family in Estate Planning Matters	29
Form of an Engagement Letter for the Joint Representation of Multiple Members of the Same Family (Other Than Spouses) in Non-Litigated Matters of Common Interest.....	35
CHAPTER 3. REPRESENTATION OF MULTIPLE PARTIES IN A BUSINESS CONTEXT.....	40
Introduction	40
References to the ACTEC Commentaries (Fifth Edition 2016):.....	40
Supplemental Checklist for the Representation of Multiple Parties in a Business Context	42

Form of an Engagement Letter for Representation in Connection with the Organization of a New Business Entity(Representing the Entity Only)	44
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)	51
Form of an Engagement Letter for Representation in Connection with the Organization of a New Business Entity (Representing Both the Entity and the Organizers Jointly)	59
CHAPTER 4. ESTATE PLANNING LAWYER SERVING AS A FIDUCIARY.....	66
Introduction	66
References to the ACTEC Commentaries (Fifth Edition 2016):.....	66
Supplemental Checklist for the Estate Planning Lawyer Serving as a Fiduciary	67
Form of a Letter Regarding the Appointment of the Lawyer as a Fiduciary	70
CHAPTER 5. REPRESENTATION OF EXECUTORS AND TRUSTEES IN ADMINISTRATION MATTERS	75
Introduction	75
References to the ACTEC Commentaries (Fifth Edition 2016):.....	75
Supplemental Checklist for the Representation of Executors (or Other Personal/Representatives) in an Estate Administration.....	77
Form of an Engagement Letter for Estate Administration	79
Supplemental Checklist for the Representation of Trustees in a Trust Administration	86
Form of an Engagement Letter for Trust Administration	89
CHAPTER 6. REPRESENTATION OF GUARDIANS/CONSERVATORS.....	96
Introduction	96
References to the ACTEC Commentaries (Fifth Edition 2016):.....	96
Supplemental Checklist for the Representation of Guardians/Conservators	98
Form of an Engagement Letter for Guardianship Petition	100
CHAPTER 7. PROBATE LITIGATION.....	107
Introduction	107
References to the ACTEC Commentaries (Fifth Edition 2016):.....	107
Supplemental Checklist for Probate Litigation	108
Form of an Engagement Letter for the Representation of One or More Beneficiaries in Litigation Matters.....	110

Form of an Engagement Letter for the Representation of One or More Fiduciaries in Litigation Matters.....	115
CHAPTER 8. DEALING WITH THE DIMINISHED CAPACITY OR DEATH OF A CLIENT NOT REPRESENTED IN A FIDUCIARY CAPACITY	120
Introduction	120
References to the ACTEC Commentaries (Fifth Edition 2016):	120
Supplemental Checklist for Dealing with Diminished Capacity or Death	121
Optional Addition to Engagement Letters Dealing with the Potential for Diminished Capacity or Death of a Client	122
CHAPTER 9. TERMINATION OF REPRESENTATION.....	124
Introduction	124
References to the ACTEC Commentaries (Fifth Edition 2016):	124
Supplemental Checklist for the Termination of Representation.....	125
Form of a Letter Withdrawing from Representation of All Clients When an Actual Conflict of Interest Arises	126
Form of a Letter Withdrawing from Representation of Certain Client(s) and Continuing Representation of Other Client(s) When an Actual Conflict of Interest Arises	128
Form of a Letter Concluding Representation of Client(s) Once Services Described in Engagement Letter Have Been Performed.....	130
CHAPTER 10. OPTIONAL ENGAGEMENT LETTER PROVISIONS	131
Introduction	131
References to the ACTEC Commentaries (Fifth Edition 2016):	131
Optional Engagement Letter Provision – Third Party Payment of Fees.....	132
Form of Paragraph to Add to Engagement Letter to Client When a Third Party is Paying the Fees and Costs.....	132
Form of Confirmation Letter to a Third Party Paying the Fees and Costs of a Client of the Firm	133

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 guidance to trust and estate lawyers about their professional responsibilities. The *ACTEC Commentaries* primarily discusses how the most relevant of the ABA’s Model Rules of Professional Conduct apply in the trust and estate practice. 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 and lawyers conducting uncontested trust and estate administrations.

The *ACTEC Commentaries* continue 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* were revised and updated in March 1995, March 1999, March 2006, and again in March 2016. Among other things, the Fifth Edition of the *ACTEC Commentaries*, published in March 2016, address changes to the Model Rules made by the Ethics 20/20 Commission and include recommendations of the Financial Action Task Force (FATF) and new commentaries on six additional Rules.

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 Model Rule 1.2, “[t]he 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 appropriate 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*”), first 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 used with, or independent of, the engagement letter forms. Trust and estate lawyers responded favorably to *Engagement Letters*, which they found to be a useful tool and reference work.

The *Engagement Letters* were updated with a Second Edition in 2007.

With the publication of the Fifth Edition of the *ACTEC Commentaries*, ACTEC is now publishing the Third Edition of *Engagement Letters*. The Third Edition builds on the initial editions by updating the forms and checklists to address the latest version of the Model Rules and modern challenges to a lawyer's ethical responsibilities, to respond to other changes in the law, and to provide cross references to the latest edition of the *ACTEC Commentaries*. In addition, this Third Edition includes checklists and forms that address a variety of engagement scenarios that were not dealt with in the prior Edition, and by offering 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 nine 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: Estate Planning Representation of One Person or Spouses;
- Chapter 2: Representation of Multiple Members of the Same Family Other Than or in Addition to Spouses;
- 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 in Administration Matters;
- Chapter 6: Representation of Guardians/Conservators;
- Chapter 7: Probate Litigation;
- Chapter 8: Dealing with Diminished Capacity or Death of a Client Not Represented in a Fiduciary Capacity;
- Chapter 9: Termination of Representation.

Each chapter begins with an introduction and cross references 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. Engagement letter forms and/or optional provisions then complete the chapter.

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 the general checklist, the supplemental 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 presume that an engagement letter will be sent from a law firm to a client, as opposed to being sent by an individual lawyer to a client. Many forms assume that more than one client will be represented or contain options for the representation of multiple clients. Accordingly, these forms and checklists represent a starting point only and should be modified as necessary, in a lawyer's independent professional judgment, 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 progress. 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
901 15th Street NW, Suite 525
Washington, DC 20005

By fax to:

(202) 684-8459

Attention: Chair of the Professional Responsibility Committee

By e-mail 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 families or their business or domestic partners? If so, does the lawyer have a conflict in representing any of the parties?
- b) If the lawyer (or the lawyer's firm) has represented any of the parties, their families or their business or domestic partners, in what capacity (e.g., individually, as an officer director or manager of an organization, or as a fiduciary or beneficiary of an estate or trust)? What connections do the parties have with each other (e.g., familial, business or personal relationships, fiduciaries or beneficiaries of an estate or trust)?
- c) How well does the lawyer know the parties?
- d) Are the parties U.S. citizens? Are the parties U.S. residents? What are the domiciles 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? If a trust or estate is involved, in what jurisdiction is it being or will it be administered?
- e) Under guidelines issued by the Financial Action Task Force on Money Laundering, before agreeing to represent a person or entity, the best practice consists of:
 1. Confirming the prospective client's identity by examining a government issued identification containing his or her photograph.
 2. Identifying the persons managing and the persons having beneficial interests in business entities and trusts.
 3. Making sure the client's circumstances and businesses are understood.
 4. At a minimum, doing an internet search for suspicious circumstances or activities in which the prospective client is or may be involved. The Task Force also recommends checking the website for the Treasury Department's Office of Foreign Assets Control to see if the prospective client's name appears on its list of individuals with whom U.S. persons are prohibited from dealing.
- f) Do all parties appear to have adequate capacity to enter into the engagement?
- g) What other professionals are involved (e.g., accountants, appraisers, brokers, financial advisors)? Are they known to be competent? What referral relationships exist?
- h) Are the expectations of the parties as to the outcome and timing of the lawyer's work reasonable and obtainable? Do the parties have a common goal and agree on the way to go

about achieving it?

- 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. Define the scope as narrowly as possible (to avoid having clients expect more than you can deliver or that it is cost-effective to deliver).
- b) Make it clear that the lawyer (or the firm) will not be obligated to provide services beyond the scope of the engagement described in the original letter absent an updated or separate engagement letter by which the lawyer (or the firm) agrees to render other services.
- c) Describe the nature and consequences of any limitations on the scope of the representation, and obtain the clients' consent to those limitations. For example, if the laws of another jurisdiction come into play in the legal services to be performed and the lawyer is not licensed to practice in that jurisdiction, point out to the client that he or she may have to retain legal counsel in that jurisdiction. Similarly, if due to the nature of estate or trust assets (e.g., intellectual property) or a client's personal circumstances (e.g., a child custody dispute) the lawyer or firm lacks the expertise to attend to all of the client's legal needs, consider pointing out what issues must be addressed by lawyers of different disciplines.
- d) What do the parties expect the "style" of the representation to be (e.g., separate meetings with each party or some parties or are meetings to be attended by all interested parties)? Is one party to be placed in charge of making certain types of decisions?
- e) Consider describing the time frame within which the various phases of the engagement will be completed and mentioning any foreseeable delays or periods during which the lawyer may not be available during the engagement. Also consider identifying 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) 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).

3. IDENTIFY THE CLIENT OR CLIENTS.

(See also the Supplemental Checklist for each Chapter.)

- a) If a prospective client is married, will the lawyer (or firm) represent one spouse or both spouses?

- b) If two or more prospective clients are related (personally or professionally) but not married, will the lawyer (or firm) represent one, some or all of the parties affected by the subject matter of the engagement?
- c) Are there any doubts about a prospective client's capacity? If so, how will they be resolved? If the doubts cannot be resolved, will the lawyer (or firm) represent the prospective client's legal representative instead?
- d) Identify all clients. See the *ACTEC Commentaries* on Model Rule 1.7 as to who can sign on behalf of an entity (someone other than the represented principal). Consider having the clients represent that their interests are not adversarial.
- e) Consider describing how the diminished capacity or death of a client will affect the representation, including those persons who may be given copies of an estate planning client's documents.

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 potential conflicts of interest. Note that some jurisdictions may require the lawyer to give examples of conflicts of interest that can arise under the circumstances.
- b) Describe how an actual conflict of interest will be resolved, the fact that the firm may have to withdraw from representing some or all parties if an actual conflict arises and the adverse consequences that may result from the firm's withdrawal. (If the lawyer plans to continue to represent some but not all parties if an actual conflict arises, presumably this is because the lawyer has a pre-existing, long-standing relationship with the party or parties whom the lawyer will continue to represent.)
- c) Obtain the informed consent of all clients to the specific type of a simultaneous representation of multiple clients (joint or separate). Confirm in the engagement letter that the lawyer discussed the implications of joint versus separate representation with the clients.
- d) If appropriate, describe how a *prior* representation may give rise to a conflict of interest. (See Model Rule of Professional Conduct 1.8 concerning conflicts of interest among current clients and Model Rule 1.9 concerning duties to former clients.)
- e) Consider requesting authorization from all of the clients to disclose to all interested parties the actions of any one of the clients constituting fraud, a breach of trust, a violation of the governing documents of any entity involved, or in contravention of a mutual estate plan (if permitted in the jurisdiction in which you practice).
- 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) Consider whether each party should be advised 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 whether and to what extent confidential information will be shared with the various clients. Obtain the clients' consent to the sharing of information (or refusal to share) in this manner.
- b) Describe how electronic communications and the inclusion of non-clients in meetings can compromise confidentiality and the attorney-client privilege.
- c) Consider describing how the diminished capacity or death of a client will affect the disclosure of confidential information.

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

- a) If a contingent fee is involved, obtain the client's consent in writing. (Check local rules to determine the extent to which other types of engagements must be agreed to in writing.)
- b) 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.
- c) If appropriate, describe how the fee will be shared with other lawyers outside the firm.
- d) If someone other than the client will pay the lawyer's fees, then in keeping with Model Rule of Professional Conduct 1.8(f): (i) Make sure that the client gives his or her informed consent to the arrangement; and (ii) consider having the person paying the fees acknowledge in writing that all communications with the client are strictly confidential and that he or she may in no way interfere with the lawyer's relationship with his or her client or with the lawyer's independent professional judgment.
- e) Describe who is responsible for paying 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.
- f) Describe the lawyer's billing and collection policies.
- g) Verify the client's billing address and contact information.
- h) Consider whether you want to ask clients to agree to arbitrate or mediate any fee dispute. (Check local rules on the enforceability of an agreement of this kind.)

7. FIRM POLICIES OF WHICH CLIENTS SHOULD BE MADE AWARE.
 - a) Retention, destruction and sharing of clients' files and original documents. (Check local rules about the transfer of files on a lawyer's retirement or death.)
 - b) Some jurisdictions may require a lawyer who does not carry professional liability insurance to reveal the lack of coverage to clients.
8. TERMINATION OF THE REPRESENTATION
 - a) Describe the events, dates, or circumstances that will terminate the representation.
 - b) Describe the difference between mandatory and permissive withdrawal and any prior Court approval that may be needed before the lawyer (or firm) may cease representing the client(s).
 - c) If the representation involves multiple clients, consider describing 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.
9. RECOMMENDED PROCEDURES.
 - a) Send an engagement letter to all of the prospective clients prior to the first meeting or telephone conference or immediately following it.
 - b) Review the more important terms of the engagement letter with the client.
 - c) Require that all clients sign the engagement letter or agreement or otherwise acknowledge the terms of any multiple representation.

CHAPTER 1. ESTATE PLANNING REPRESENTATION OF ONE PERSON OR SPOUSES

Introduction

Two forms follow for the representation of clients in their estate planning affairs. One form is for use in the joint representation of spouses (where the lawyer shares all information affecting a spouse with both spouses while they are both represented). That form lends itself to modification for couples who are registered domestic partners but not legally married. ACTEC does not encourage the separate representation by one law firm of two spouses (where information may be withheld selectively from a spouse while both spouses are represented). The second form can be used for the representation of one spouse (but not the other) or of an unmarried person.

References to the ACTEC Commentaries (Fifth Edition 2016):

Each page number below refers to the first page of the *ACTEC Commentaries* for the subject in question.

Terminology (re Informed Consent and Writing),	p. 14
General Principles (re Scope of Representation),	p. 36
Formal and Informal Agreements,	p. 37
Limitation on the Representation Must be Reasonable,	p. 38
Avoiding Misunderstandings as to Scope of Representation,	p. 40
Encouraging Communication; Discretion Regarding Content,	p. 61
Communications During Active Phase of Representation,	p. 62
Dormant Representation,	p. 62
Termination of Representation,	p. 63
Basis of Fees for Trusts and Estates Services,	p. 66
Disclosures to Client's Agent,	p. 80
Joint and Separate Clients,	p. 83
Confidences Imparted by One Joint Client,	p. 84
General Nonadversary Character of Estates and Trusts Practice; Representation of Multiple Clients,	p. 101
Disclosures to Multiple Clients,	p. 102
Joint or Separate Representation,	p. 102
Consider Possible Presence and Impact of Any Conflict of Interest,	p. 103
Conflicts of Interest May Preclude Multiple Representation,	p. 104
Prospective Waivers (of Conflicts),	p. 105
Duties to Former Clients	p. 138
Retention of Original Documents,	p. 170
Mandatory Withdrawal/Prohibited Representation,	p. 173

Supplemental Checklist for Representation of Spouses

(Refer also to the General Checklist on pages 4 through 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 the obligations of either spouse to third parties (such as child, spousal or parental support) arising, for example, under an agreement, divorce decree, or 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, that possible future actions by one spouse might defeat the plan or adversely affect the interests of the other, or 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.

- a) Will the lawyer represent one spouse or both spouses?
- b) If and when an actual conflict of interest arises, it is imperative that another letter be sent to the clients informing them that an actual conflict has arisen which requires the lawyer to withdraw from the representation of either or both of them and indicating who the lawyer will represent going forward (if anyone). See Chapter 9.

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

If a joint representation fails, the lawyer should address which, if either, of the clients the lawyer may continue to represent in the matter at hand or in related matters. (If the lawyer will continue to represent one spouse, presumably that is due to a long-standing relationship the lawyer had with one of the clients before the lawyer agreed to represent the other spouse.) In the alternative, will the lawyer withdraw from representing either spouse in the matter at hand or in related matters? Describe the possibility of a future prohibition on the lawyer's representation of either one of the spouses in the matter at hand or in related matters.

***Form of an Engagement Letter for the Representation of Both Spouses Jointly
in Estate Planning Matters***
(Sample in Word)

[DATE]

[NAME(S) and ADDRESS]

Subject: Representation of Both of You in Estate Planning Matters

Dear [CLIENTS]:

Thank you for asking our firm, [NAME OF FIRM], to represent you in your estate planning affairs. This will confirm the terms of our agreement to represent you.

Scope of the Engagement. The legal services to be rendered consist of the following: [DESCRIBE SERVICES TO BE RENDERED].

Fees for Legal Services and Costs. We will bill for our legal services and costs in the following manner: [DESCRIBE ARRANGEMENTS PERTAINING TO FEES, COSTS, RETAINERS, BILLING, ETC.].

[OPTION - for use in jurisdictions allowing drafting attorneys to be paid their hourly rates for testimony in a Will or Trust Contest.]

You agree that if a member of or person rendering services to our firm is deposed, called to testify or required to respond to discovery in the context of legal proceedings concerning any aspect of your estate plan, we will be compensated for that person's services at his or her hourly rate to clients at the time of the deposition, other testimony or other discovery. You also agree that we will be entitled to full reimbursement for costs incurred in connection with the production of documents in response to subpoenas and demands for the production of documents issued in any such legal proceedings. This agreement will bind not only you but also anyone managing your financial affairs (before and after your death), your heirs and the beneficiaries under your estate planning documents.

Waiver of Potential Conflicts of Interest. It is common for spouses to employ the same law firm to assist them in planning their estates, as you have requested us to do. Please understand that, because we will represent the two of you jointly, it would be unethical for us to withhold information from either of you that is relevant and material to the subject matter of the engagement. Accordingly, by agreeing to this form of representation, each of you authorizes us to disclose to the other information that one of you shares with us or that we acquire from another source which, in our judgment, falls into this category.

We will not take any action or refrain from taking an action (pertaining to the subject matter of our representation of you) that affects one of you without the other's knowledge and consent. Of course, anything either of you discusses with us is confidential, and will not be disclosed to third parties, unless you authorize us to disclose the information or disclosure is required or permitted by law or the rules governing our professional conduct.

If a conflict of interest arises between you during the course of your planning or if the two of you have a difference of opinion on any subject, we can point out the pros and cons of your respective positions. However, we cannot advocate one of your positions over the other. Furthermore, we cannot advocate one of your positions over the other if there is a disagreement as to your respective property rights or interests or as to other legal issues. *[NOTE THAT IN SOME JURISDICTIONS, IT MAY BE NECESSARY TO PROVIDE EXAMPLES OF POTENTIAL CONFLICTS.]* By signing this letter, you waive potential conflicts of interest that can arise by virtue of the fact that we represent the two of you together.

[Pick OPTION 1 or OPTION 2]

[Option 1: If an actual conflict arises, lawyer withdraws from representation of either spouse]

If an actual conflict of interest arises between you that, in our judgment, makes it impossible for us to live up to our ethical obligations to both of you, we will withdraw as your joint attorney and advise each of you to seek other legal counsel.

[Option 2: If an actual conflict arises, lawyer will continue to represent one spouse but not the other]

If an actual conflict of interest arises between you that, in our judgment, makes it impossible for us to live up to our ethical obligations to both of you, we will seek to continue to represent *[NAME OF SPOUSE LAWYER WILL CONTINUE TO REPRESENT]*, to the extent that we determine that we may appropriately do so, and withdraw as *[NAME OF SPOUSE LAWYER WILL NO LONGER REPRESENT]*'s legal counsel. Your signature below constitutes your consent to our continued future representation of *[NAME OF SPOUSE LAWYER WILL CONTINUE TO REPRESENT]* and each of you agrees not to seek to disqualify us from representing *[HIM/HER]* in the future. Notwithstanding this agreement, we may be required to withdraw or be disqualified from representing *[NAME OF SPOUSE FIRM WISHES TO CONTINUE TO REPRESENT]* after an actual conflict arises.

[OPTION if firm may represent charitable beneficiary or fiduciaries]

Kindly note that we represent several charitable organizations. You may decide to name one or more of these organizations to receive a gift or bequest. We also represent banks and trust companies which serve as professional executors and trustees, as well as lawyers, accountants, business managers and other professional advisors. You may decide to name one or more of these

companies or individuals as an Executor or Trustee and may excuse them from being sued for their actions as Trustees or Executors (to the extent permitted by law). In addition, the estate planning documents we prepare for you may allow a professional advisor who serves as an Executor or Trustee to be paid for services rendered in that capacity, in addition to his or her professional services. By signing this letter, you waive any conflict of interest which may arise from these circumstances.

Attorney-Client Communications. Generally, communications made via fax, computer transmission or cellular phone are not as secure from inadvertent disclosure to others as other forms of communication. You acknowledge that by furnishing us with an e-mail address or cell phone or fax number, you authorize us to communicate with you using this mode of communication notwithstanding the inherent confidentiality risks.

With few exceptions under the law, communications among us are protected by the attorney - client privilege. However, if someone else whom we do not represent (such as a family member of yours or financial planner) is included in a meeting or phone call or is copied on correspondence, then the attorney-client privilege may be lost as to things disclosed in that meeting or correspondence. Similarly, if you choose to communicate with us or authorize us to communicate with you using an e-mail address or fax machine to which others have access, the attorney-client privilege may be lost as well. As a result, you or the third party may be forced to disclose the content of a communication in a Court of law or otherwise in the context of litigation. Please keep this in mind when asking us to share information with third parties or when you share information with (or grant access to) others who are not part of our attorney-client relationship.

[OPTION: Firm's Policies on File Storage and Safekeeping of Original Documents. Make sure the definition of "client files" is consistent with local rules.]

Our Policies Concerning Client Files and Original Documents. You agree that we have the right to destroy the client file we create for you [NUMBER] years after we cease to actively represent you (i.e., after we last perform legal services for you). Your "client file" consists of all paper and electronic copies of your signed estate planning documents, drafts of any estate planning documents prepared for you which have not yet been signed, documents sent to us by you or third parties (such as recorded deeds, beneficiary designations and business and property agreements), correspondence and other written communications between us and others that pertain to your estate plan. You agree that all other materials pertinent to your estate plan (such as our notes and internal memoranda) are proprietary to us and not part of your client file.

Before destroying your client file, we will attempt to contact you to make arrangements for its delivery to you. If we are unable to contact you at the most recent address contained in our file, subject to applicable law, we may destroy your file without further notice. It will be your responsibility to notify us of any change in your address and other contact information.

[Pick *OPTION 1* or *OPTION 2*]

[*Option 1: Firm does not hold clients' original documents*]

We do not hold original estate planning documents for clients. Therefore, you will have to make arrangements to safeguard your own original documents. If you leave original documents with us, we cannot find you, and it has been more than [NUMBER] years since our last contact with you, then we have the right to destroy those documents.

[*Option 2: Firm will hold clients' original documents. Be sure to consult applicable state law about firm's safekeeping responsibilities and modify option 2 accordingly.*]

At your request, we will retain your original estate planning documents other than documents associated with your health care. It is important that you place original documents pertaining to your health care in a safe place that is accessible by your health care agents twenty-four hours a day, seven days a week. Original documents retained by us may be requested by you during normal business hours. Kindly request documents at least [NUMBER] days before they are needed.

If you die or someone claims that you are no longer competent and we receive a request for an original document of yours, the document will be released only to the person legally entitled to it in our sole discretion. We reserve the right to petition the Court to determine the person legally entitled to the document. It will be your responsibility to inform the trustees, executors and agents named in your estate planning documents that we hold your original estate planning documents and to instruct them to notify us immediately of your death or inability to continue to manage your financial affairs. We can assume no responsibility for keeping abreast of changes in your personal circumstances.

Following the conclusion (or termination) of our representation of you, if one or both of you request your client file or any original documents in our possession and you are unable to agree on which of you is entitled to these things, we may petition the Court to make that determination. If you agree that your client file or any such original documents will be sent to one of you (or that party's legal counsel) and copies will be sent to the other (or the other's legal counsel), then you agree to reimburse us for the reasonable costs of preparing those copies and delivering them.

No Guarantee of Favorable Outcomes. Although your estate plan may be designed to achieve certain goals such as tax savings or the avoidance of conservatorship or probate proceedings, these and other favorable outcomes cannot be guaranteed. This is because favorable outcomes depend on a variety of factors (such as your diligence in keeping assets titled in the name of the Trustee of a particular trust, the proper management of a trust and changes in the law).

In connection with planning your estate, we will make certain recommendations that it will be up to you to implement (for example, changing beneficiary designations or transferring assets to a trust that may be created as part of your estate plan). Once the recommendations have been made,

it is understood and agreed that we will have no responsibility to make sure that you follow our advice.

Conclusion of Representation. Once the following documents are executed, the engagement of this firm will be concluded: [*LIST DOCUMENTS TO BE PREPARED.*] We will be happy to provide additional or continuing legal services. But unless arrangements for such services are made and agreed upon in writing, we will have no further responsibility to either of you with respect to future or ongoing legal issues, nor will we have any duty to notify you of changes in the law or upcoming filing or other deadlines.

[*OPTION for Voluntary Termination*]

You may terminate our representation of you at any time by providing us with written notice of the termination. Upon our receipt of this notice, we will promptly cease providing services to you. Similarly, we may terminate our representation of you at any time by providing you with written notices of the termination. Upon your receipt of this notice, we will promptly cease

providing services. However, whether you terminate or we terminate the representation, if we represent you in Court proceedings and prior Court approval is needed in order for us to cease rendering legal services, we will continue to render legal services to you until such time as the Court determines that we may cease rendering services. You will pay for our services rendered to you and costs incurred on your behalf until the cessation of legal services and for any services we must render and costs we must incur thereafter to transfer responsibility for legal affairs we handle to your new counsel.

If you consent to our representation of both of you on these terms, please sign and return the enclosed copy of this letter. If you have any questions about this letter, please let me know. Feel free to consult another lawyer about this letter before signing it.

Sincerely,

[*NAME OF ATTORNEY IN CHARGE*]

CONSENT

Each of us has read this letter and understands its contents. We consent to [*NAME OF FIRM*]'s representation of both of us on the terms and conditions set forth in it.

Signed: _____, 20____

(Client 1)

Signed: _____, 20____

(Client 2)

*Form of an Engagement Letter for the Representation of One Person in Estate
Planning Matters (Married or Unmarried)*
(Sample in Word)

[DATE]

[NAME(S) and ADDRESS]

Subject: Representation of You in Estate Planning Matters

Dear [CLIENT]:

Thank you for asking our firm, [NAME OF FIRM], to represent you in your estate planning affairs. This will confirm the terms of our agreement to represent you.

Scope of the Engagement. The legal services to be rendered consist of the following: [DESCRIBE SERVICES TO BE RENDERED].

Fees for Legal Services and Costs. We will bill for our legal services and costs in the following manner: [DESCRIBE ARRANGEMENTS PERTAINING TO FEES, COSTS, RETAINERS, BILLING, ETC.].

[OPTION - for use in jurisdictions allowing drafting attorneys to be paid their hourly rates for testimony in a Will or Trust contest.]

You agree that if a member of or person rendering services to our firm is deposed, called to testify or required to respond to discovery in the context of legal proceedings concerning any aspect of your estate plan, we will be compensated for that person's services at his or her hourly rate to clients at the time of the deposition, other testimony or other discovery by you or from your assets. You also agree that we will be entitled to full reimbursement for costs incurred in connection with the production of documents in response to subpoenas and demands for the production of documents issued in any such legal proceedings. This agreement will bind not only you but also anyone managing your financial affairs (before and after your death), your heirs and the beneficiaries under your estate planning documents.

[OPTION – if married.]

Confidentiality of Information. It is common for spouses to employ the same law firm to assist them in planning their estates. However, you have requested that we not represent your spouse at this time. Since we will not represent your spouse, anything you tell us is confidential and it would be unethical for us to disclose information to your spouse or anyone else without your consent. Accordingly, if you want us to discuss any aspect of your estate plan or related issues with your spouse, you will need to direct us to do so.

Of course, anything you discuss with us is confidential, and will not be disclosed to any other third parties, unless you authorize us to disclose the information or disclosure is required or permitted by law or the rules governing our professional conduct.

[OPTION if firm may represent charitable beneficiary or fiduciaries]

Waiver of Potential Conflicts of Interest. Kindly note that we represent several charitable organizations. You may decide to name one or more of these organizations to receive a gift or bequest. We also represent banks and trust companies which serve as professional executors and trustees, as well as lawyers, accountants, business managers and other professional advisors. You may decide to name one or more of these companies or individuals as an Executor or Trustee and may excuse them from being sued for their actions as Trustees or Executors (to the extent permitted by law). In addition, the estate planning documents we prepare for you may allow a professional advisor who serves as an Executor or Trustee to be paid for services rendered in that capacity, in addition to his or her professional services. By signing this letter, you waive any conflict of interest which may arise from these circumstances.

Attorney-Client Communications. Generally, communications made via fax, computer transmission or cellular phone are not as secure from inadvertent disclosure to others as other forms of communication. You acknowledge that by furnishing us with an e-mail address or cell phone or fax number, you authorize us to communicate with you using this mode of communication notwithstanding the inherent confidentiality risks.

With few exceptions under the law, communications among us are protected by the attorney - client privilege. However, if someone else whom we do not represent (such as a family member of yours or financial planner) is included in a meeting or phone call or is copied on correspondence, then the attorney-client privilege may be lost as to things disclosed in that meeting or correspondence. Similarly, if you choose to communicate with us or authorize us to communicate with you using an e-mail address or fax machine to which others have access, the attorney-client privilege may be lost as well. As a result, you or the third party may be forced to disclose the content of a communication in a Court of law or otherwise in the context of litigation. Please keep this in mind when asking us to share information with third parties or when you share information with (or grant access to) others who are not part of our attorney-client relationship.

[OPTION: Firm's Policies on File Storage and Safekeeping of Original Documents. Make sure the definition of "client files" is consistent with local rules.]

Our Policies Concerning Client Files and Original Documents. You agree that we have the right to destroy the client file we create for you [NUMBER] years after we cease to actively represent you (i.e., after we last perform legal services for you). Your "client file" consists of all paper and electronic copies of your signed estate planning documents, drafts of any estate planning documents prepared for you which have not yet been signed, documents sent to us by you or third

parties (such as recorded deeds, beneficiary designations and business and property agreements), correspondence and other written communications between us and others that pertain to your estate plan. You agree that all other materials pertinent to your estate plan (such as our notes and internal memoranda) are proprietary to us and not part of your client file.

Before destroying your client file, we will attempt to contact you to make arrangements for its delivery to you. If we are unable to contact you at the most recent address contained in our file, subject to applicable law, we may destroy your file without further notice. It will be your responsibility to notify us of any change in your address and other contact information.

[Pick OPTION 1 or OPTION 2]

[Option 1: Firm does not hold clients' original documents]

We do not hold original estate planning documents for clients. Therefore, you will have to make arrangements to safeguard your own original documents. If you leave original documents with us, we cannot find you, and it has been more than *[NUMBER]* years since our last contact with you, then we have the right to destroy those documents.

[Option 2: Firm will hold clients' original documents. Be sure to consult applicable state law about firm's safekeeping responsibilities and modify option 2 accordingly.]

At your request, we will retain your original estate planning documents other than documents associated with your health care. It is important that you place original documents pertaining to your health care in a safe place that is accessible by your health care agents twenty-four hours a day, seven days a week. Original documents retained by us may be requested by you during normal business hours. Kindly request documents at least *[NUMBER]* days before they are needed.

If you die or someone claims that you are no longer competent and we receive a request for an original document of yours, the document will be released only to the person legally entitled to it in our sole discretion. We reserve the right to petition the Court to determine the person legally entitled to the document. It will be your responsibility to inform the trustees, executors and agents named in your estate planning documents that we hold your original estate planning documents and to instruct them to notify us immediately of your death or inability to continue to manage your financial affairs. We can assume no responsibility for keeping abreast of changes in your personal circumstances.

No Guarantee of Favorable Outcomes. Although your estate plan may be designed to achieve certain goals such as tax savings or the avoidance of conservatorship or probate proceedings, these and other favorable outcomes cannot be guaranteed. This is because favorable outcomes depend on a variety of factors (such as your diligence in keeping assets titled in the name of the Trustee of a particular trust, the proper management of a trust and changes in the law).

In connection with planning your estate, we will make certain recommendations that it will be up to you to implement (for example, changing beneficiary designations or transferring assets to a trust that may be created as part of your estate plan). Once the recommendations have been made, it is understood and agreed that we will have no responsibility to make sure that you follow our advice.

Conclusion of Representation. Once the following documents are executed, the engagement of this firm will be concluded: [*LIST DOCUMENTS TO BE PREPARED.*] We will be happy to provide additional or continuing legal services. But unless arrangements for such services are made and agreed upon in writing, we will have no further responsibility to you with respect to future or ongoing legal issues, nor will we have any duty to notify you of changes in the law or upcoming filing or other deadlines.

[*OPTION for Voluntary Termination*]

You may terminate our representation of you at any time by providing us with written notice of the termination. Upon our receipt of this notice, we will promptly cease providing services to you. Similarly, we may terminate our representation of you at any time by providing you with written notices of the termination. Upon your receipt of this notice, we will promptly cease providing services. However, whether you terminate or we terminate the representation, if we represent you in Court proceedings and prior Court approval is needed in order for us to cease rendering legal services, we will continue to render legal services to you until such time as the Court determines that we may cease rendering services. You will pay for our services rendered to you and costs incurred on your behalf until the cessation of legal services and for any services we must render and costs we must incur thereafter to transfer responsibility for legal affairs we handle to your new counsel.

If you consent to our representation of you on these terms, please sign and return the enclosed copy of this letter. If you have any questions about this letter, please let me know. Feel free to consult another lawyer about this letter before signing it.

Sincerely,

[*NAME OF ATTORNEY IN CHARGE*]

CONSENT

I have read this letter and understands its contents. I consent to [*NAME OF FIRM*]'s representation of me on the terms and conditions set forth in it.

Signed: _____, 20____
(Client)

CHAPTER 2. REPRESENTATION OF MULTIPLE MEMBERS OF THE SAME FAMILY OTHER THAN OR IN ADDITION TO SPOUSES

Introduction

Two forms follow for the representation of relatives other than or in addition to spouses. The first form is for use when two couples will be represented in their estate planning affairs, *e.g.*, parents and a child and that child's spouse. Each married couple will be represented jointly, with the lawyer sharing all information affecting a spouse with both spouses while they are both represented. (ACTEC does not encourage the separate representation by one law firm of two spouses, where information can be withheld selectively from a spouse while both spouses are represented.) However, each couple will be represented separately from the other couple (with no information being conveyed about one couple's estate plan to the other without the express permission of the couple for whom the planning is being done).

The second form is for use when multiple members of the same family will be represented in a matter in which they have common goals and interests. For example, siblings who get along well and who are beneficiaries of the same Trust may want to have one attorney or firm they can consult about the proper interpretation of the Trust terms and whether a third party Trustee is carrying out the Trustee's duties properly.

References to the ACTEC Commentaries (Fifth Edition 2016):

Each page number below refers to the first page of the *ACTEC Commentaries* for the subject in question.

- Terminology (re Informed Consent and Writing), p. 14
- General Principles (re Scope of Representation), p. 36
- Formal and Informal Agreements, p. 37
- Limitation on the Representation Must be Reasonable, p. 38
- Avoiding Misunderstandings as to Scope of Representation, p. 40
- Encouraging Communication; Discretion Regarding Content, p. 61
- Communications During Active Phase of Representation, p. 62
- Termination of Representation, p. 63
- Basis of Fees for Trusts and Estates Services, p. 66
- Fee Paid by Person Other than Client, p. 67
- Joint and Separate Clients, p. 83
- Multiple Separate Clients, p. 84
- Confidences Imparted by One Joint Client, p. 84
- Separate Representation of Related Clients in Unrelated Matters, p. 85
- General Nonadversary Character of Estates and Trusts Practice; Representation of Multiple Clients, p. 101
- Disclosures to Multiple Clients, p. 102
- Existing Client Asks Lawyer to Prepare Will or Trust for Another Person, p. 102

Joint or Separate Representation, p. 102
Consider Possible Presence and Impact of Any Conflicts of Interest, p. 103
Conflicts of Interest May Preclude Multiple Representation, p. 104
Prospective Waivers (of Conflicts), p. 105
Payment of Compensation by Person Other than Client, p. 129
Duties to Former Clients, p. 138
Retention of Original Documents, p. 170
Mandatory Withdrawal/Prohibited Representation, p. 173

***Supplemental Checklist for Representing Multiple Members of the Same Family
Other Than or In Addition to Spouses***

(Refer also to the General Checklist on pages 4 through 8.)

1. IDENTIFY THE CLIENT.

- a) How are the clients related? Are they spouses, parent and child, siblings, etc.?
- b) How will the lawyer represent each client (e.g., individually, as a fiduciary, as a manager of the family business, 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?
- d) If and when an actual conflict of interest arises it is imperative that another letter be sent to the clients informing them that an actual conflict has arisen which requires the lawyer to withdraw from the representation of some or all of them and indicating who the lawyer will represent going forward (if anyone). See Chapter 9.

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., multiple marriages, pre-marital or post-marital agreements, different domiciles, children from other relationships, significant relationships outside of a marriage, different beneficiaries or philosophies about the way beneficiaries should receive their inheritances)?
- b) Do the clients have common goals? If so, are they in agreement on how to go about achieving those goals?
- c) Is one client or group of clients likely to take actions that may potentially harm the other or others?
- d) How do the parties want the lawyer to respond if the lawyer surmises that the actions of one client may disappoint another client or adversely affect another client’s interests?

***Form of an Engagement Letter to be Signed by a Married Couple in Connection
with the Separate Representation of Other Members of the Same Family in
Estate Planning Matters***

(Sample in Word)

[Date]

[Name(s) and Address(es)]

Subject: Representation of You and [*Other Family Members*] in Estate Planning Matters.

Dear [CLIENTS]:

Thank you for asking our firm to represent you in your estate planning affairs. This will confirm the terms of our agreement to represent you.

Scope of the Engagement. The legal services to be rendered consist of the following: [*DESCRIBE SERVICES TO BE RENDERED*].

Fees for Legal Services and Costs. We will bill for our legal services and costs in the following manner: [*DESCRIBE ARRANGEMENTS PERTAINING TO FEES, COSTS, RETAINERS, BILLING, ETC.*]

[*OPTION - for use in jurisdictions allowing drafting attorneys to be paid their hourly rates for testimony in a Will or Trust contest.*]

You agree that if a member of or person rendering services to our firm is deposed, called to testify or required to respond to discovery in the context of legal proceedings concerning any aspect of your estate plan, we will be compensated for that person's services at his or her hourly rate to clients at the time of the deposition, other testimony or other discovery by you or from your assets. You also agree that we will be entitled to full reimbursement for costs incurred in connection with the production of documents in response to subpoenas and demands for the production of documents issued in any such legal proceedings. This agreement will bind not only you but also anyone managing your financial affairs (before and after your death), your heirs and the beneficiaries under your estate planning documents.

Representation of Other Family Members

As you know, our firm [*REPRESENTS/HAS REPRESENTED/ HAS BEEN ASKED TO REPRESENT*] [*OTHER FAMILY MEMBERS*] in connection with their estate planning. There is no reason why we cannot represent [*OTHER FAMILY MEMBERS*] and you in your respective estate planning affairs as long as everyone is aware of the potential conflicts of interest that may 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. We will represent the two of you jointly as spouses. However, our representation of the two of you, on the one hand, will be separate and apart from our representation of [*OTHER FAMILY MEMBERS*], on the other hand. These different forms of representation have the following implications:

A. Separate Representation

We will not discuss any aspect of [*OTHER FAMILY MEMBERS*'] estate plan with you unless we are given permission to do so by [*OTHER FAMILY MEMBERS*], even if we think the information might be important to you. By the same token, we will not discuss any aspect of your estate plan with [*OTHER FAMILY MEMBERS*] unless you give us permission to do so. When we represent clients separately, we give them independent advice and we have a duty to act solely in the best interests of each client, without being influenced by the conflicting personal interests of any other clients or anyone else.

B. Joint Representation

When we represent clients jointly (as we do the two of you), we are obligated to disclose to each client any information that is relevant and material to the subject matter of the engagement. You cannot make disclosures to us and expect that information which, in our judgment, falls into this category will be withheld from the other of you.

In a joint representation, we are not permitted to become an advocate for either client's personal interests. Rather, we assist the clients in developing a coordinated plan for the accomplishment of their common and mutual objectives. We encourage the resolution of any individual differences between you in your mutual best interests. Relevant and material information shared with us by one of you, although confidential as to all third parties, will not be kept from the other of you. However, we will generally not disclose information made known to us that we do not think is relevant and material to the subject matter of our engagement.

It is important that you understand the differences in these forms of representation. We ask that you confirm by signing below that you request that we represent the two of you jointly and [*OTHER FAMILY MEMBERS*] separately from the two of you.

If a conflict of interest arises between you during the course of your estate planning or if the two of you have a difference of opinion as to your respective property rights or interests or as to other issues, we can point out the pros and cons of your respective positions. However, we cannot advocate one of your positions over the other.

By signing this letter, you waive potential conflicts of interest that can arise by virtue of the fact

that we represent the two of you jointly or that we represent you, on the one hand, and [*OTHER FAMILY MEMBERS*], on the other hand, separately. [*NOTE THAT IN SOME JURISDICTIONS, IT MAY BE NECESSARY TO PROVIDE EXAMPLES OF POTENTIAL CONFLICTS.*]

[*Pick OPTION 1 or OPTION 2*]

[*Option 1: If an actual conflict arises, lawyer withdraws from representation of all family members*]

If an actual conflict of interest arises between the two of you or between you and other clients of ours that, in our judgment, makes it impossible for us to live up to our ethical obligations to the clients in question, we will withdraw as their attorneys and advise all concerned to seek other legal counsel.

[*Option 2: If an actual conflict arises, lawyer will continue to represent one family member but not the others*]

If an actual conflict of interest arises between you or between you and other clients of ours that, in our judgment, makes it impossible for us to live up to our ethical obligations to the clients in question, we will seek to continue to represent [*NAME OF CLIENTS LAWYER WILL CONTINUE TO REPRESENT*], to the extent that we determine that we may appropriately do so, and withdraw as [*NAME OF CLIENTS LAWYER WILL NO LONGER REPRESENT*]'s legal counsel. Your signature below constitutes your consent to our continued future representation of [*NAME OF CLIENTS LAWYER WILL CONTINUE TO REPRESENT*] and each of you agrees not to seek to disqualify us from representing [*HIM/HER/THEM*] in the future. Notwithstanding this agreement, we may be required to withdraw or disqualified from representing [*NAME OF CLIENTS FIRM WISHES TO CONTINUE TO REPRESENT*] after an actual conflict arises.

[*OPTION if firm may represent charitable beneficiary or fiduciaries*]

Kindly note that we represent several charitable organizations. You may decide to name one or more of these organizations to receive a gift or bequest. We also represent banks and trust companies which serve as professional executors and trustees, as well as lawyers, accountants, business managers and other professional advisors. You may decide to name one or more of these companies or individuals as an Executor or Trustee and may excuse them from being sued for their actions as Trustees or Executors (to the extent permitted by law). In addition, the estate planning documents we prepare for you may allow a professional advisor who serves as an Executor or Trustee to be paid for services rendered in that capacity, in addition to his or her professional services. By signing this letter, you waive any conflict of interest which may arise from these circumstances.

Attorney-Client Communications. Generally, communications made via fax, computer transmission or cellular phone are not as secure from inadvertent disclosure to others as other

forms of communication. You acknowledge that by furnishing us with an e-mail address or cell phone or fax number, you authorize us to communicate with you using this mode of communication notwithstanding the inherent confidentiality risks.

With few exceptions under the law, communications among us are protected by the attorney - client privilege. However, if someone else whom we do not represent (such as a family member of yours or financial planner) is included in a meeting or phone call or is copied on correspondence, then the attorney-client privilege may be lost as to things disclosed in that meeting or correspondence. Similarly, if you choose to communicate with us or authorize us to communicate with you using an e-mail address or fax machine to which others have access, the attorney-client privilege may be lost as well. As a result, you or the third party may be forced to disclose the content of a communication in a Court of law or otherwise in the context of litigation. Please keep this in mind when asking us to share information with third parties or when you share information with (or grant access to) others who are not part of our attorney-client relationship.

OPTION: Firm's Policies on File Storage and Safekeeping of Original Documents. Make sure the definition of "client files" is consistent with local rules.]

Our Policies Concerning Client Files and Original Documents. You agree that we have the right to destroy the client file we create for you [*NUMBER*] years after we cease to actively represent you (*i.e.*, after we last perform legal services for you). Your "client file" consists of all paper and electronic copies of your signed estate planning documents, drafts of any estate planning documents prepared for you which have not yet been signed, documents sent to us by you or third parties (such as recorded deeds, beneficiary designations and business and property agreements), correspondence and other written communications between us and others that pertain to your estate plan. You agree that all other materials pertinent to your estate plan (such as our notes and internal memoranda) are proprietary to us and not part of your client file.

Before destroying your client file, we will attempt to contact you to make arrangements for its delivery to you. If we are unable to contact you at the most recent address contained in our file, subject to applicable law, we may destroy your file without further notice. It will be your responsibility to notify us of any change in your address and other contact information.

[Pick OPTION 1 or OPTION 2]

[Option 1: Firm does not hold clients' original documents]

We do not hold original estate planning documents for clients. Therefore, you will have to make arrangements to safeguard your own original documents. If you leave original documents with us, we cannot find you, and it has been more than [*NUMBER*] years since our last contact with you, then we have the right to destroy those documents.

[Option 2: Firm will hold clients' original documents. Be sure to consult applicable state law

about firm's safekeeping responsibilities and modify option 2 accordingly.]

At your request, we will retain your original estate planning documents other than documents associated with your health care. It is important that you place original documents pertaining to your health care in a safe place that is accessible by your health care agents twenty-four hours a day, seven days a week. Original documents retained by us may be requested by you during normal business hours. Kindly request documents at least [*NUMBER*] days before they are needed.

If you die or someone claims that you are no longer competent and we receive a request for an original document of yours, the document will be released only to the person legally entitled to it in our sole discretion. We reserve the right to petition the Court to determine the person legally entitled to the document. It will be your responsibility to inform the trustees, executors and agents named in your estate planning documents that we hold your original estate planning documents and to instruct them to notify us immediately of your death or inability to continue to manage your financial affairs. We can assume no responsibility for keeping abreast of changes in your personal circumstances.

Following the conclusion (or termination) of our representation of you, if one or both of you request your client file or any original documents in our possession and you are unable to agree on who is entitled to these things, we may petition the Court to make that determination. If you agree that your client file or any such original documents will be sent to one of you (or that party's legal counsel) and copies will be sent to the other (or the other's legal counsel), then you agree to reimburse us for the reasonable costs of preparing those copies and delivering them.

No Guarantee of Favorable Outcomes. Although your estate plan may be designed to achieve certain goals such as tax savings or the avoidance of conservatorship or probate proceedings, these and other favorable outcomes cannot be guaranteed. This is because favorable outcomes depend on a variety of factors (such as your diligence in keeping assets titled in the name of the Trustee of a particular trust, the proper management of a trust and changes in the law).

In connection with planning your estate, we will make certain recommendations that it will be up to you to implement (for example, changing beneficiary designations or transferring assets to a trust that may be created as part of your estate plan). Once the recommendations have been made, it is understood and agreed that we will have no responsibility to make sure that you follow our advice.

Conclusion of Representation. Once the following documents are executed, the engagement of this firm will be concluded: [*LIST DOCUMENTS TO BE PREPARED.*] We will be happy to provide additional or continuing legal services. But unless arrangements for such services are made and agreed upon in writing, we will have no further responsibility to you with respect to future or ongoing legal issues, nor will we have any duty to notify you of changes in the law or upcoming filing or other deadlines.

[*OPTION for Voluntary Termination*]

You may terminate our representation of you at any time by providing us with written notice of the termination. Upon our receipt of this notice, we will promptly cease providing services to you. Similarly, we may terminate our representation of you at any time by providing you with written notices of the termination. Upon your receipt of this notice, we will promptly cease providing services. However, whether you terminate or we terminate the representation, if we represent you in Court proceedings and prior Court approval is needed in order for us to cease rendering legal services, we will continue to render legal services to you until such time as the Court determines that we may cease rendering services. You will pay for our services rendered to you and costs incurred on your behalf until the cessation of legal services and for any services we must render and costs we must incur thereafter to transfer responsibility for legal affairs we handle to your new counsel.

If you consent to our representation of the two of you jointly and to our representation of [*OTHER FAMILY MEMBERS*] separately on these terms, please sign and return the enclosed copy of this letter. If you have any questions about this letter, please let me know. Feel free to consult another lawyer about this letter before signing it.

Sincerely,

NAME OF ATTORNEY IN CHARGE

CONSENT

Each of us has read this letter and understands its contents. We consent to [*NAME OF FIRM*]'s representation of both of us jointly and to [*NAME OF FIRM*]'S representation of [*OTHER FAMILY MEMBERS*] separately on the terms and conditions set forth in it.

Signed: _____, 20____
(Client 1)

Signed: _____, 20____
(Client 2)

Form of an Engagement Letter for the Joint Representation of Multiple Members of the Same Family (Other Than Spouses) in Non-Litigated Matters of Common Interest¹
(Sample in Word)

[Date]

[Name(s) and Address(es)]

Subject: Joint Representation of All of You

Dear [CLIENTS]:

Thank you for your confidence in selecting our firm to perform legal services in connection with the [SUBJECT MATTER OF THE ENGAGEMENT]. This will confirm the terms of our agreement to represent you.

Identification of the Clients. 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 this form of representation.

Scope of the Engagement. We will provide legal services in connection with [SPECIFIC DESCRIPTION OF THE SUBJECT MATTER AND SCOPE OF THE ENGAGEMENT].

Fees for Legal Services and Costs. We will bill for our legal services and costs in the following manner: [DESCRIBE ARRANGEMENTS PERTAINING TO FEES, COSTS, RETAINERS, BILLING, ETC.]

You agree 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/AMONG] you to limit your responsibility for the payment of amounts owed to us will not be binding upon us unless we agree in writing to those limitations.

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

Lawyers may represent clients separately or jointly. We will represent [BOTH/ALL] of you jointly. Here are the basic differences between joint and separate representation:

A. Separate Representation

¹ Not intended for use when firm represents multiple family members (other than spouses) in their estate planning affairs. Intended for use in situations where clients have a common goal (e.g., beneficiaries similarly situated inquire into Trust terms and the Trustee's duties).

When clients are represented separately, we are required to preserve any confidential client information unless we are authorized by our client or by law to disclose that information to someone else. In other words, we are ordinarily prohibited from revealing 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 a client separately, we advocate for that client's personal interests and give him or her 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.

B. Joint Representation

When we represent two or more clients jointly (as we will represent you), we are obligated to disclose to each client any information made known to us that is relevant and material to the subject matter of the engagement. Information of this nature that is shared with us by any of you, although confidential as to all third parties, will not be kept from the [OTHER/OTHERS] of you. However, we would generally not disclose information made known to us that we do not think is relevant and material to the subject matter of the engagement.

If there is a difference of opinion [BETWEEN/AMONG] you, we can point out the pros and cons of your respective positions or differing opinions. However, in a joint representation, we are prohibited from advocating one of your positions over the [OTHER/OTHERS]. Instead, we will assist [BOTH/ALL] all of our clients in developing a coordinated plan for the accomplishment of their common and mutual objectives. We encourage the resolution of any individual differences in the best interests of the clients collectively.

You may have differing and conflicting interests and objectives at different points during our representation. Because each of your interests and objectives could potentially be affected by those of the [OTHER/OTHERS] of you, it is important that you understand the differences between representing clients separately and representing clients jointly.

In agreeing to our joint representation of you, each of you authorizes us to disclose to the [OTHER/OTHERS] of you information that [ANY/EITHER] of you [SHARE/SHARES] with us or that we acquire from another source which is relevant and material to our representation of you in this matter. By signing this letter, you also waive potential conflicts of interest that can arise by virtue of the fact that we represent [BOTH/ALL] of you jointly. [NOTE THAT IN SOME JURISDICTIONS, IT MAY BE NECESSARY TO PROVIDE EXAMPLES OF POTENTIAL CONFLICTS.]

[Pick Option 1 or 2]

[Option 1: If an actual conflict arises, lawyer withdraws from representation of all family members.]

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 [BOTH/ALL] of you, we will withdraw as your attorneys and advise [BOTH/ALL] of you to seek other legal counsel.

[Option 2: If an actual conflict arises, lawyer will continue to represent one family member but not the others.]

If an actual conflict of interest arises [BETWEEN/AMONG] you that, in our judgment, makes it impossible for us to live up to our ethical obligations to [BOTH/ALL] of you, we will seek to continue to represent [NAME OF CLIENTS LAWYER WILL CONTINUE TO REPRESENT], to the extent that we determine that we may appropriately do so, and withdraw as [NAME OF CLIENTS LAWYER WILL NO LONGER REPRESENT]'s legal counsel. Your signature below constitutes your consent to our continued future representation of [NAME OF CLIENTS LAWYER WILL CONTINUE TO REPRESENT] and each of you agrees not to seek to disqualify us from representing [HIM/HER/THEM] in the future. Notwithstanding this agreement, we may be required to withdraw or disqualified from representing [NAME OF CLIENTS FIRM WISHES TO CONTINUE TO REPRESENT] after an actual conflict arises.

Attorney-Client Communications. Generally, communications made via fax, computer transmission or cellular phone are not as secure from inadvertent disclosure to others as other forms of communication. You acknowledge that by furnishing us with an e-mail address or cell phone or fax number, you authorize us to communicate with you using this mode of communication notwithstanding the inherent confidentiality risks.

With few exceptions under the law, communications among us are protected by the attorney - client privilege. However, if someone else whom we do not represent (such as a family member of yours or financial planner) is included in a meeting or phone call or is copied on correspondence, then the attorney-client privilege may be lost as to things disclosed in that meeting or correspondence. Similarly, if you choose to communicate with us or authorize us to communicate with you using an e-mail address or fax machine to which others have access, the attorney-client privilege may be lost as well. As a result, you or the third party may be forced to disclose the content of a communication in a Court of law or otherwise in the context of litigation. Please keep this in mind when asking us to share information with third parties or when you share information with (or grant access to) others who are not part of our attorney-client relationship.

[OPTION: Firm's Policies on File Storage. Make sure the definition of "client files" is consistent with local rules.]

Our Policies Concerning Client Files. You agree that we have the right to destroy the client file we

create for you [NUMBER] years after we cease to actively represent you (i.e., after we last perform legal services for you). Your “client file” consists of all paper and electronic copies of your signed documents, drafts of any documents prepared for you which have not yet been signed, documents sent to us by you or third parties (such as recorded deeds, beneficiary designations and business and property agreements), correspondence and other written communications between us and others that pertain to the subject matter of our representation of you. You agree that all other pertinent materials (such as our notes and internal memoranda) are proprietary to us and not part of your client file.

Before destroying your client file, we will attempt to contact you to make arrangements for its delivery to you. If we are unable to contact you at the most recent address contained in our file, subject to applicable law, we may destroy your file without further notice. It will be your responsibility to notify us of any change in your address and other contact information.

Following the conclusion (or termination) of our representation of you, if one or both of you request your client file or any original documents in our possession and you are unable to agree on which of you is entitled to these things, we may petition the Court to make that determination. If you agree that your client file or any such original documents will be sent to one of you (or that party’s legal counsel) and copies will be sent to the [OTHER/OTHERS] (or the [OTHER’S/OTHERS’] legal counsel), then you agree to reimburse us for the reasonable costs of preparing those copies and delivering them.

No Guarantee of Favorable Outcomes. Although our mutual goal is to achieve certain outcomes such as [DESCRIBE GOALS], these and other favorable outcomes cannot be guaranteed. This is because favorable outcomes depend on a variety of factors (such as [DESCRIBE VARIABLES]).

Conclusion of Representation. After the [SUBJECT MATTER OF THE ENGAGEMENT] has been completed, the engagement of this firm will be concluded unless arrangements for a continuing representation are made. We will be happy to provide additional or continuing services. But unless arrangements for such services 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 nor will we have a duty to notify you of changes in the laws.

[OPTION for Voluntary Termination]

You may terminate our representation of you at any time by providing us with written notice of the termination. Upon our receipt of this notice, we will promptly cease providing services to you. Similarly, we may terminate our representation of you at any time by providing you with written notices of the termination. Upon your receipt of this notice, we will promptly cease providing services. However, whether you terminate or we terminate the representation, if we represent you in Court proceedings and prior Court approval is needed in order for us to cease rendering legal services, we will continue to render legal services to you until such time as the Court determines

that we may cease rendering services. You will pay for our services rendered to you and costs incurred on your behalf until the cessation of legal services and for any services we must render and costs we must incur thereafter to transfer responsibility for legal affairs we handle to your new counsel.

Consent to the Terms of the Engagement. Before we begin, it is important that you consider all of the factors discussed in this letter and consent to the joint form of our representation of you. After each of you has considered this decision carefully, we ask that each of you sign the statement that follows this letter to indicate your consent to the terms and conditions of the representation. If, after considering this matter, any one of you prefers a different form of representation, please let us know.

If any one of you has any questions about in this letter, please let me know. Feel free to consult another lawyer about this letter before signing it.

Sincerely,

[NAME OF ATTORNEY IN CHARGE]

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 [LAW FIRM] represent all of us jointly in connection with [SUBJECT MATTER OF THE ENGAGEMENT] on the terms and conditions set forth in it.

Signed: _____, 20____

(Client 1)

Signed: _____, 20____

(Client 2)

Signed: _____, 20____

(Client 3)

Signed: _____, 20____

(Client 4)

CHAPTER 3. REPRESENTATION OF MULTIPLE PARTIES IN A BUSINESS CONTEXT

Introduction

These forms illustrate some of the issues to be addressed in the representation of business interests. The focus of the forms 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 significantly impact 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 (Fifth Edition 2016):

Each page number below refers to the first page of the *ACTEC Commentaries* for the subject in question.

General Principles (re Scope of Representation), p. 36

Defining and Refining the Scope of Representation, p. 37

Time Constraints Imposed by Client, p. 57

Encouraging Communication; Discretion Regarding Content, p. 61

Communications During Active Phase of Representation, p. 62
Termination of Representation, p. 63
Fee Paid by Person Other than Client, p. 67
Joint and Separate Clients, p. 83
Multiple Separate Clients, p. 84
Confidences Imparted by One Joint Client, p. 84
Separate Representation of Related Clients in Unrelated Matters, p. 85
General Non-adversary Character of Estates and Trusts Practice;
Representation of Multiple Clients, p. 101
Disclosures to Multiple Clients, p. 102
Joint or Separate Representation, p. 102
Consider Possible Presence and Impact of Any Conflicts of Interest, p. 103
Conflicts of Interest May Preclude Multiple Representation, p. 104
Prospective Waivers (of Conflicts), p. 105
Organization as Client, p. 156
Declining or Terminating Representation, p. 174
Duties to Prospective Client, p. 177

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

(Refer also to the General Checklist on pages 4 through 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) Make it clear whether the lawyer will represent the business entity, the individual constituents of the business or both.
- b) Describe the potential conflicts of interest resulting from the lawyer's representation of the entity or the lawyer's representation of the constituents individually.
- c) 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.
- d) 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.
- e) 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.
- 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

3. CONCLUSION OF THE REPRESENTATION

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

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 (Rules 1.5 and 1.8).
- b) Describe who will be responsible for the fees and expenses if the new entity is never organized.

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

[Date]

[Addressees]

Subject: Organization of [NEW ENTITY]

Dear [Client(s)]:

The purpose of this letter is to confirm the terms of our firm's engagement to perform legal services in connection with the organization of [NEW ENTITY]. We appreciate your confidence and trust in engaging us. I will be primarily responsible for this representation, but other lawyers or paralegals within the firm will assist me.

Summary of Services to be Performed

We will provide those legal services that are necessary and appropriate in connection with the formation of [NEW ENTITY] as a [CORPORATION/PARTNERSHIP/LIMITED LIABILITY COMPANY/ETC.] under the laws of the State of [NAME OF STATE], including providing advice and counsel regarding the choice of a business entity, the ownership and management structure of the company, the funding and financing of the company and its operations, 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.

[Optional]: 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 may need to consider retaining independent counsel to advise and represent you separately from [*NEW ENTITY*] and from the others.

Separate Representation of Entity Only – 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 [*OWNERS/MEMBERS/GOVERNING CONSTITUENTS*], even though we will not represent any of you individually, we are obligated to disclose to each of you any information any one 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 divided 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 situations and interests are unique. However, because our client is [*NEW ENTITY*] and not any of you individually, we cannot advise any of you whether a proposal made by one of you might be adverse to your own personal interests.

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

Conclusion 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 concluded 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.

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 concluded by the appropriate action of its duly authorized constituents or unless [CLIENT-ORGANIZER] chooses to engage separate counsel or requests that we conclude 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 [Alternative 2 only: ,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].

[Alternative 2 only: 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] 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.

[Alternative 2 only: If an actual conflict of interest arises between [NEW ENTITY] and [CLIENT-ORGANIZER] that, in our judgment, makes it impossible for us to continue ethically to represent [NEW ENTITY], we will continue to represent [CLIENT-ORGANIZER] and withdraw as counsel for [NEW ENTITY]

In addition to the above provisions regarding conclusion of engagement:

- a) [NEW ENTITY] may terminate this engagement at any time by notice in writing to us. If we receive notice of termination from [NEW ENTITY], we will promptly cease providing any service to [NEW ENTITY], subject to court approval as may be necessary. [NEW ENTITY] will be responsible for paying for our services rendered up to the time we receive such notice and for additional reasonable services that we provide after that in connection with the transfer of responsibility for the matters to other counsel or to obtain court approval of our withdrawal.
- b) We may terminate this engagement by giving [NEW ENTITY] written notice. If we send [NEW ENTITY] notice of termination, [NEW ENTITY] will be responsible for paying for our services rendered up to the time we terminate our engagement, and for reasonable services that we provide to transfer responsibility for the matter to your new counsel.

Fees and Billing

[DESCRIBE ARRANGEMENTS PERTAINING TO FEES, COSTS, RETAINERS, BILLING, ETC.]

Attorney-Client Communications.

Generally, communications made via fax, e-mail, computer transmission or cellular phone are not completely secure from inadvertent disclosure to others. Unless you tell us otherwise, you

acknowledge that by furnishing us with an e-mail address or cell phone or fax number, you authorize us to communicate with you using these modes of communication notwithstanding the inherent confidentiality risks.

With few exceptions under the law, communications among us are protected by the attorney - client privilege. However, if someone else whom we do not represent (such as a family member of yours or financial planner) is included in a meeting or phone call or is copied on correspondence, then the attorney-client privilege may be lost as to things disclosed in that meeting or correspondence. Similarly, if you choose to communicate with us or authorize us to communicate with you using an email address or fax machine to which others have access, the attorney-client privilege may be lost as well. As a result, you or the third party may be forced to disclose the content of that communication in a Court of law or otherwise in the context of litigation. Please keep this in mind when asking us to share information with third parties or when you share information with (or grant access to) others who are not part of our attorney-client relationship.

No Guarantee of Favorable Outcome

Although we will endeavor to achieve your mutual goals as organizers of the [NEW ENTITY], we cannot guarantee a favorable outcome. This is because favorable outcomes depend on a variety of factors (such as [PROVIDE EXAMPLES OF FACTORS]). We will make certain recommendations that will be up to you to implement (for example, [RECOMMENDATIONS CLIENT IS TO IMPLEMENT]). Once we make recommendations, you understand and agree that we will have no responsibility to make sure that you follow our advice.

[OPTION: Firm's Policies on File Storage and Safekeeping of Original Documents. Make sure the definition of "client files" is consistent with local rules.]

Our Policies Concerning Client Files and Original Documents.

You agree that we have the right to destroy the client file we create for you [NUMBER] years after we cease to actively represent you (i.e., after we last perform legal services for you). Your "client file" consists of all paper and electronic copies of your signed business documents, drafts of any business documents prepared for you which have not yet been signed, documents sent to us by you or third parties (such as recorded deeds, tax documents and business and property agreements), correspondence and other written communications between us and others that pertain to [NEW ENTITY]. You agree that all other materials pertinent to the organization of [NEW ENTITY] (such as our notes and internal memoranda) are proprietary to us and not part of your client file.

Before destroying your client file, we will attempt to contact you to make arrangements for its delivery to you. If we are unable to contact you at the most recent address contained in our file, subject to applicable law, we may destroy your file without further notice. It will be your responsibility to notify us of any change in your address and other contact information

[OPTION for use when more than one client will be represented]

Following the conclusion or termination of our representation of you, if one or *[BOTH/ALL]* of you request your client file or any original documents in our possession and you are unable to agree on which of you is entitled to the file, we may petition the court to make that determination, and you agree to be responsible for the costs of our doing that. If you agree that your file or any such original documents will be sent to one of you (or that party's legal counsel) and copies will be sent to the *[OTHER/OTHERS]* (or the *[OTHER'S/OTHERS']* legal counsel), then you agree to reimburse us for the reasonable costs of preparing those copies and delivering them.

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 *[NEW ENTITY]*, we will not represent another client in matters that are directly adverse to the interests of *[NEW ENTITY]* unless and until we have made full disclosure to *[NEW ENTITY]* of all relevant facts, circumstances, and implications. You agree that we can represent those other clients whose interests are adverse 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 *[NEW ENTITY]*;
- 2) Our representation of the other client will not involve or disclose any confidential information we have received from *[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 *[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.

[Note: This provision for advance waiver of conflicts may not be enforceable in all jurisdictions.]

Consent to the Terms of the Engagement

Before our firm can begin its representation of *[NEW ENTITY]*, each of you must consider all of the factors discussed in this letter and consent to the form and terms 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 or if you have any questions regarding this letter, please let me know.

We are enclosing an extra copy of this letter to be signed and returned to me consenting to the

terms and 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.

We appreciate the opportunity to work with you on the organization of [NEW ENTITY], and we welcome and look forward to the opportunity to serve you.

Sincerely,

[NAME OF ATTORNEY IN CHARGE]

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)***
(Sample in Word)

[Date]

[Addressees]

Subject: Organization of [NEW ENTITY]

Dear [Client(s)]:

The purpose of this letter is to confirm the terms of our firm's engagement to represent the [NUMBER] of you collectively in connection with the organization of [NEW ENTITY]. We appreciate your confidence and trust in engaging us as your lawyers. I will be primarily responsible for this representation, but other lawyers or paralegals will assist me.

Summary of Services to be Performed

We will provide those legal services that are necessary and appropriate in connection with the formation of [NEW ENTITY] as a [CORPORATION/PARTNERSHIP/LIMITED LIABILITY COMPANY, ETC.] under the laws of the State of [NAME 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; 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.

[Optional]: 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 Clients

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 represent 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 may need to consider retaining independent counsel to advise and represent you separately from [*NEW ENTITY*] and from the others. It is also likely that [*NEW ENTITY*] will need separate representation at some point.

Joint vs. Separate 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 because 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 divided among you; and 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 situations and interests are unique.

Joint Representation

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 ongoing 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, 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.

Because each of your individual 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 described above under the "Joint Representation" heading.

Conclusion of the Engagement

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

As our firm will represent all of you jointly from the beginning, 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].

As our firm begins 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.

[Alternative 2 only: If an actual conflict of interest arises between any one or more of you and [CLIENT-ORGANIZER] that, in our judgment, makes it impossible for us to continue ethically to represent all or any of you, we will continue to represent [CLIENT-ORGANIZER] and withdraw as counsel for the rest of you.]

In addition to the above provisions regarding conclusion of engagement:

- a) [NEW ENTITY] or its organizers may terminate this engagement at any time by notice in writing to us. If we receive notice of termination from [NEW ENTITY] or its organizers, we will promptly cease providing any service to [NEW ENTITY] or its organizers, subject to court approval as may be necessary. [NEW ENTITY] and/or its organizers will remain responsible for paying for our services rendered up to the time we receive such notice and for additional reasonable services that we provide after that in connection with the transfer of responsibility for the matters to other counsel or to obtain court approval of our withdrawal.
- b) The firm may terminate this engagement by giving [NEW ENTITY] and its organizers written notice. If we send [NEW ENTITY] and its organizers notice of termination, [NEW ENTITY] and/or its organizers will be responsible for paying for our services rendered up to the time we terminate our engagement, and for reasonable services that we provide to transfer responsibility for the matter to your new counsel.

When the organization of [NEW ENTITY] has been completed, our representation 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

[*DESCRIBE ARRANGEMENTS PERTAINING TO FEES, COSTS, RETAINERS, BILLING, ETC.*]

Attorney-Client Communications

Generally, communications made via fax, e-mail, computer transmission, or cellular phone are not completely secure from inadvertent disclosure to others. Unless you tell us otherwise, you acknowledge that by furnishing us with an e-mail address or cell phone or fax number, you authorize us to communicate with you using these modes of communication notwithstanding the inherent confidentiality risks.

With few exceptions under the law, communications among us are protected by the attorney-client privilege. However, if someone else whom we do not represent (such as a family member of yours or financial planner) is included in a meeting or phone call or is copied on correspondence, then the attorney-client privilege may be lost as to things disclosed in that meeting or correspondence. Similarly, if you choose to communicate with us or authorize us to communicate with you using an e-mail address or fax machine to which others have access, the attorney-client privilege may be lost as well. As a result, you or the third party may be forced to disclose the content of that communication in a Court of law or otherwise in the context of litigation. Please keep this in mind when asking us to share information with third parties or when you share information with (or grant access to) others who are not part of our attorney-client relationship.

No Guarantee of Favorable Outcome

Although we will endeavor to achieve your mutual goals as organizers of the [*NEW ENTITY*], we cannot guarantee a favorable outcome. This is because favorable outcomes depend on a variety of factors (such as [*PROVIDE EXAMPLES OF FACTORS*]). We will make certain recommendations that will be up to you to implement (for example, [*RECOMMENDATIONS CLIENT IS TO IMPLEMENT*]). Once we make recommendations, you understand and agree that we will have no responsibility to make sure that you follow our advice.

[*Optional: Firm's Policies on File Storage and Safekeeping of Original Documents. Make sure the definition of "client files" is consistent with local rules.*]

Our Policies Concerning Client Files and Original Documents

You agree that we have the right to destroy the client file we create for you [NUMBER] years after we cease to actively represent you (i.e., after we last perform legal services for you). Your “client file” consists of all paper and electronic copies of your signed business documents, drafts of any business documents prepared for you which have not yet been signed, documents sent to us by you or third parties (such as recorded deeds, tax documents, and business and property agreements), correspondence and other written communications between us and others that pertain to you and/or [NEW ENTITY]. You agree that all other materials pertinent to the organization of [NEW ENTITY] (such as our notes and internal memoranda) are proprietary to us and not part of your client file.

Before destroying your client file, we will attempt to contact you to make arrangements for its delivery to you. If we are unable to contact you at the most recent address contained in our file, subject to applicable law, we may destroy your file without further notice. It will be your responsibility to notify us of any change in your address and other contact information.

[OPTION for use when more than one client will be represented]

Following the conclusion or termination of our representation of you, if one or [BOTH/ALL] of you request your client file or any original documents in our possession and you are unable to agree on which of you is entitled to the file, we may petition the court to make that determination, and you agree to be responsible for the costs of our doing that. If you agree that your file or any such original documents will be sent to one of you (or that party’s legal counsel) and copies will be sent to the [OTHER/OTHERS] (or the [OTHER’S/OTHERS’] legal counsel), then you agree to reimburse us for the reasonable costs of preparing those copies and delivering them.

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

- 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.

[*Note*: This provision for advance waiver of conflicts may not be enforceable in all jurisdictions.

Consent to the Terms of the Engagement

Each of you must consider all of the factors discussed in this letter and consent to the form of the representation. 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. 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.

We are enclosing an extra copy of this letter to be signed and returned to us consenting to the terms and 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,

[*NAME OF ATTORNEY IN CHARGE*]

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 Both the Entity and the Organizers Jointly)***
(Sample in Word)

[Date]

[Addressees]

Subject: Organization of [NEW ENTITY]

Dear [Client(s)]:

The purpose of this letter is to confirm the terms of our firm's engagement to perform legal services in connection with the organization of [NEW ENTITY] and to represent [NEW ENTITY] and its organizers collectively.

We appreciate your confidence and trust in engaging us as your lawyers. I will be primarily responsible for this representation, but other lawyers or paralegals will assist me.

Summary of Services to be Performed

We will provide those legal services that are necessary and appropriate in connection with the formation of [NEW ENTITY] as a [CORPORATION/PARTNERSHIP/LIMITED LIABILITY COMPANY/ETC.] under the laws of the State of [NAME OF STATE], including providing advice and counsel regarding the choice of business entity, the ownership and management structure of the company, the funding and financing of the company and its operations, 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.

[Optional]: 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 Clients

Our clients 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 represent the [NUMBER] of you jointly, and we will not undertake to represent any of you individually or 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 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 may 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 [NEW ENTITY] and all of you as organizers collectively in connection with the organization of [NEW ENTITY], but not each individual separately. 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 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 [OWNERS/MEMBERS/GOVERNING CONSTITUENTS], even though we will not represent any of you individually, we are obligated to disclose to each of you any information any one 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 or maintained as confidential information 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 divided 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 situations and interests are unique. However, because our clients are [NEW ENTITY] and all of you as organizers collectively (and not any of you individually), we cannot advise any of you individually as to whether or not a proposal suggested by one of you might be adverse to your own personal interests.

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

In our joint representation of [NEW ENTITY] and the organizers we will represent all of you collectively and [NEW ENTITY] as an entity simultaneously, as though all of you and the entity were a single client. We will not be an advocate for any one of you individually, but will serve only to assist all of you collectively 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 ongoing 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 any of the others information any one of you makes known to us, outside of 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 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, as described above, if each of you were to retain a separate attorney, each of you would have an advocate for your individual interests and would receive independent advice. Each of you would meet individually with your attorney, and the information given to you by your attorney would be confidential and could not be disclosed by the attorney to anyone else without your consent. Individual representation would ensure the preservation of each of your confidential communications and would eliminate any potential conflicts of interest between you and your attorney; however, individual 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 could result in a duplication of expenses versus having one attorney collectively.

Conclusion of the Engagement

None of you individually [*optional if an organizer was previously represented*: 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]. Each of you so agrees whether or not you are represented individually by separate counsel.

Whether or not any of you is represented by separate counsel,

[*Only if an organizer was previously represented*: 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] and the organizers further in connection with its organization and would communicate to all of you the reason for our withdrawal.]

[*Only if an organizer previously represented by firm*: If an actual conflict of interest arises between [NEW ENTITY] or its organizers and [CLIENT-ORGANIZER] that, in our judgment, makes it impossible for us to continue ethically to represent [NEW ENTITY] or all or any of you, we will continue to represent [CLIENT-ORGANIZER] and withdraw as counsel for [NEW ENTITY] and its organizers collectively.]

When the organization of [NEW ENTITY] has been completed, our representation of [NEW ENTITY] and all of you collectively as organizers will be concluded, unless arrangements for a continuing representation are made. We would be glad 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 as organizers 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.

In addition to the above provisions regarding conclusion of engagement:

- a) [NEW ENTITY] or its organizers may terminate this engagement at any time by notice in writing to us. If we receive notice of termination from [NEW ENTITY] or its organizers, we will promptly cease providing any service to [NEW ENTITY] or its organizers, subject to court approval as may be necessary. [NEW ENTITY] and/or its organizers will remain responsible for paying for our services rendered up to the time we receive such notice and for additional reasonable services that we provide after that in connection with the transfer of responsibility for the matters to other counsel or to obtain court approval of our withdrawal.
- b) The firm may terminate this engagement by giving [NEW ENTITY] and its organizers

written notice. If we send [NEW ENTITY] and its organizers notice of termination, [NEW ENTITY] and/or its organizers will be responsible for paying for our services rendered up to the time we terminate our engagement, and for reasonable services that we provide to transfer responsibility for the matter to your new counsel.

Fees and Billing

[DESCRIBE ARRANGEMENTS PERTAINING TO FEES, COSTS, RETAINERS, BILLING, ETC.]

Attorney-Client Communications

Generally, communications made via fax, e-mail, computer transmission, or cellular phone are not completely secure from inadvertent disclosure to others. Unless you tell us otherwise, you acknowledge that by furnishing us with an e-mail address or cell phone or fax number, you authorize us to communicate with you using these modes of communication notwithstanding the inherent confidentiality risks.

With few exceptions under the law, communications among us are protected by the attorney-client privilege. However, if someone else whom we do not represent (such as a family member of yours or financial planner) is included in a meeting or phone call or is copied on correspondence, then the attorney-client privilege may be lost as to things disclosed in that meeting or correspondence. Similarly, if you choose to communicate with us or authorize us to communicate with you using an e-mail address or fax machine to which others have access, the attorney-client privilege may be lost as well. As a result, you or the third party may be forced to disclose the content of that communication in a Court of law or otherwise in the context of litigation. Please keep this in mind when asking us to share information with third parties or when you share information with (or grant access to) others who are not part of our attorney-client relationship.

No Guarantee of Favorable Outcome

Although we will endeavor to achieve your mutual goals as organizers of the [NEW ENTITY], we cannot guarantee a favorable outcome. This is because favorable outcomes depend on a variety of factors (such as [PROVIDE EXAMPLES OF FACTORS]). We will make certain recommendations that will be up to you to implement (for example, [RECOMMENDATIONS CLIENT IS TO IMPLEMENT]). Once we make recommendations, you understand and agree that we will have no responsibility to make sure that you follow our advice.

[Optional: Firm's Policies on File Storage and Safekeeping of Original Documents. Make sure the definition of "client files" is consistent with local rules.]

Our Policies Concerning Client Files and Original Documents

You agree that we have the right to destroy the client file we create for you [*NUMBER*] years after we cease to actively represent you (*i.e.*, after we last perform legal services for you). Your “client file” consists of all paper and electronic copies of your signed business documents, drafts of any business documents prepared for you which have not yet been signed, documents sent to us by you or third parties (such as recorded deeds, tax documents, and business and property agreements), correspondence and other written communications between us and others that pertain to you and/or [*NEW ENTITY*]. You agree that all other materials pertinent to the organization of [*NEW ENTITY*] (such as our notes and internal memoranda) are proprietary to us and not part of your client file.

Before destroying your client file, we will attempt to contact you to make arrangements for its delivery to you. If we are unable to contact you at the most recent address contained in our file, subject to applicable law, we may destroy your file without further notice. It will be your responsibility to notify us of any change in your address and other contact information.

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);
- (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.

[*Note*: This provision for advance waiver of conflicts may not be enforceable in all jurisdictions.

Consent to the Terms of the Engagement

Before we can begin our representation of [NEW ENTITY] and its organizers jointly, each of you must consider all of the factors discussed in this letter and consent to the form and terms 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 or if you have any questions regarding this letter, please let us know.

We are enclosing an extra copy of this letter to be signed and returned to us consenting to the terms and 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.

I appreciate the opportunity to work with you on the organization of [NEW ENTITY], and I welcome and look forward to the opportunity to serve you.

Sincerely,

[NAME OF ATTORNEY IN CHARGE]

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)

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.

In the letter the fiduciary acting under the will is referred to as the executor. You will need to change the letter if your jurisdiction refers instead to the personal representative.

References to the ACTEC Commentaries (Fifth Edition 2016):

Each page number below refers to the first page of the ACTEC *Commentaries* for the subject in question.

- Lawyer Serving as Fiduciary and Counsel to Fiduciary, p. 40
- Basis of Fees for Trusts and Estates Services, p. 66
- Prospective Waivers (of Conflicts), p. 105
- Selection of Fiduciaries, p. 106
- Appointment of Scrivener as Fiduciary, p. 106
- Prohibited Transactions, p. 128
- Exculpatory Clauses, p. 129

Supplemental Checklist for the Estate Planning Lawyer Serving as a Fiduciary

(Refer also to the General Checklist on pages 4 through 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 fiduciaries? If so, what is the policy (encourage, discourage, prohibit)?
- b) Does the lawyer have adequate trained 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 representatives? trustees? guardians or conservators? attorneys-in-fact?
- d) Are restrictions imposed by state law on a lawyer's service as a fiduciary?
- e) Are restrictions imposed by state law on dual compensation to the lawyer for acting as both lawyer and fiduciary?

2. DEFINE THE CONTENTS OF THE LETTER

What should the engagement letter include when the client requests the estate planning lawyer to 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
- d) Drafting suggestions/forms for consideration in the context of this letter.

The following paragraph may be added to a trust to address the dual compensation issue [note that this provision may be prohibited in some states]:

- A. [NAME OF LAWYER], or any firm of which s/he is a member, may be engaged by the trustee to render legal services on behalf of any trust hereunder, even though [NAME OF LAWYER], as trustee hereunder, shall make or participate in the decision so to engage [HER/HIMSELF] or a firm of which [S/HE] is a member. [NAME OF LAWYER], or any firm so engaged, shall be entitled to receive fair, usual, and customary compensation as provided in the engagement letter above for those legal services. [NAME OF LAWYER] shall be entitled to receive that compensation or [HIS/HER] distributive share of the compensation received by that firm, without diminution of the compensation to which [S/HE] is entitled for services as trustee hereunder.

This broad exculpatory clause may be added to a trust (modify if trust is written in the third person):

- B. No trustee shall be liable for such trustee's own acts or omissions except for those involving gross negligence or willful misconduct [*note: or any other acts that your jurisdiction deems inappropriate*]. To the extent that such requirements can legally be waived, no trustee hereunder shall ever be required to give bond or security as trustee, or to qualify before, be appointed to, or account to any court, or to obtain the order or approval of any court before exercising any power or discretion granted in this trust. The trustee's exercise or nonexercise of powers and discretions in good faith shall be conclusive on all persons. No trustee shall have any liability for exercising or failing to exercise any of the powers or discretions granted in this trust, provided such trustee exercises reasonable care, diligence, and prudence. I intend my trustee's decisions concerning discretionary distributions under this trust to be made in that trustee's sole discretion and without interference by any beneficiary. I authorize my trustee to suspend any distributions to a beneficiary who attempts to force distributions either by repeated petitions (written or oral) or by legal action of any kind. Unless a court determines that the trustee has acted in bad faith or with gross negligence in making any decisions under this trust, no reimbursement for costs or expenses of bringing any trust construction suit or any other suit questioning the authority of the trustee shall be made from any trust hereunder.

This paragraph may be added to a trust to allow the trustee to shorten the period of time a beneficiary may object to an accounting:

- C. The trustee shall render an account of the trustee's receipts and disbursements and a statement of assets at least annually to each adult beneficiary then entitled to receive payments from the trust. An account is binding on each beneficiary who receives it and on all persons claiming by or through the beneficiary, and the trustee is released as to all matters stated in the account or shown by it, unless the beneficiary commences a judicial

proceeding to assert a claim within six (6) months after the mailing or other delivery of the account. For all purposes of this instrument, any accounting given to and approved by a beneficiary for whom a trust share is named (whether such approval is express, or by virtue of the failure of any such beneficiary to make objection within the six month period provided for above) is binding not only on such beneficiary but on all other beneficiaries (whether present or future, contingent or vested) that may have an interest in such trust share.

*Form of a Letter Regarding the
Appointment of the Lawyer as a Fiduciary
([Sample in Word](#))*

[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 OF YOUR WILL / SUCCESSOR TRUSTEE OF THE [NAME] TRUST]. At the present time, I am able and willing to undertake this responsibility when the need for my services arises. 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].

OPTIONS

Responsibilities of the 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.

Responsibilities of the 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.

[Use with Either of the Above]

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 that lawyer acts both as the [EXECUTOR/TRUSTEE] and as the 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 arise as well that cannot 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].

Dual Compensation

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 the firm's practice to charge [describe basis for fees as lawyer]. In addition to these fees, the 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.

[OPTION]

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 my 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/TRUST] from liability for actions not involving [GROSS NEGLIGENCE OR WILLFUL MISCONDUCT]¹ For example, a [WILL/TRUST] may provide that the [EXECUTOR/TRUSTEE] is not to be charged with losses resulting from his or her action or inaction in the exercise of reasonable care, diligence, and prudence.

Whether or not I am nominated, I normally include language that relieves the fiduciary from the obligation to post bond and that exonerates the fiduciary from liability for decisions made in the exercise of reasonable care, skill, diligence and prudence. Such provisions protect the fiduciary who disappoints the expectations of a beneficiary and relieves the [ESTATE/TRUST] of additional costs.

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.

[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

¹ Consult local law for the actions that cannot be exculpated, as standards vary from jurisdiction to jurisdiction.

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.]

[FOR BOTH ALTERNATIVES]

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 (usually beneficiaries) the right to remove [AN EXECUTOR/A TRUSTEE], with or without cause, and to appoint a successor.

[OPTION 1] You have instructed me to include such a provision in your [WILL/TRUST]. OR [OPTION 2] 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 that an exoneration clause may not protect the scrivener fiduciary against liability under local law.]

Nominating the Lawyer as [EXECUTOR/TRUSTEE]

If, after considering 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 REQUESTED TO ACT AS FIDUCIARY]

Confirmation of Nomination

We have voluntarily nominated [LAWYER] as [EXECUTOR/TRUSTEE] in our [WILLS/TRUST]. [HE/SHE] is also the lawyer who prepared the [WILLS/TRUST] 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 may arise as a result of [HIS/HER] serving as [EXECUTOR/TRUSTEE], as described above.

We understand our estate plan will include provisions authorizing the compensation of the attorney not only as attorney but as [EXECUTOR/TRUSTEE].

We direct that our [WILLS/TRUSTS] (check the appropriate box for each statement):

[] 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.

[] Include [] Not include language allowing the [BENEFICIARIES/CO-EXECUTORS/CO-TRUSTEES] to remove the lawyer as [EXECUTOR/TRUSTEE] and to appoint someone else to serve in the lawyer's place.

Dated: _____

Client 1

Client 2

CHAPTER 5. REPRESENTATION OF EXECUTORS AND TRUSTEES IN ADMINISTRATION MATTERS

Introduction

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

The representation of guardians and conservators is discussed in Chapter 6.

This section comprises two checklists and specific language for two corresponding engagement letters. The first set pertains to representation of an executor (or other designation such as personal representative), and the second set pertains to the representation of a trustee. Note that in some states there is court supervision of a trust (especially a testamentary trust), so that the estate administration letter and its references to the court should also be consulted.

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

References to the ACTEC Commentaries (Fifth Edition 2016):

Each page number below refers to the first page of the ACTEC *Commentaries* for the subject in question.

General Principles (re Scope of Representation), p. 36

Multiple Fiduciaries, p. 36

Communication with Beneficiaries of Fiduciary Estate, p. 36

Lawyer May Not Make False or Misleading Statements, p. 38

Disclosure of Acts or Omissions by Fiduciary Client, p. 38

Representation of Client in Fiduciary, Not Individual, Capacity, p. 39

General and Individual Representation Distinguished, p. 39

Lawyer Should Not Attempt to Diminish Duties of Lawyer to Beneficiaries Without Notice to Them, p. 39

Duties to Beneficiaries, p. 39

Planning the Administration of a Fiduciary Estate, p. 57

Advising Fiduciary Regarding Administration, p. 62

Termination of Representation, p. 63

Basis of Fees for Trusts and Estates Services, p. 66

Implied Authorization to Disclose, p. 79

Disclosures by Lawyer for Fiduciary, p. 81

Disclosure of Fiduciary's Commission of, or Intent to Commit, a Fraud or Crime, p. 81

Conflicts of Interest May Preclude Multiple Representation, p. 104

Designation of Scrivener as Attorney for Fiduciary, p. 107

Representation of Fiduciary in Representative and Individual Capacities, p. 107

Prohibited Transactions, p. 128
Organization as Client, p. 156
Truthfulness in Statements to Others, p. 190
Dealing with Unrepresented Person, p. 192

***Supplemental Checklist for the Representation of Executors (or Other
Personal/Representatives) in an Estate Administration***

(Refer also to the General Checklist on pages 4 through 8.)

1. SERVICES TO BE PERFORMED FOR PROBATE ADMINISTRATION

What services will the attorney perform in connection with the probate administration? Some of the services the attorney may wish to list for the client include the following. If there is a corporate or other professional fiduciary, the lawyer may simply indicate availability to perform such services as the executor or other personal representative may require from time to time. The duties may include:

- a) Prepare and complete all notices of appointment of the client as the executor or other personal representative and other notices with respect to creditors as are required by applicable State law and the rules of the probate court.
- b) Assist the client 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, that may also be transferred or paid to the estate as a result of the decedent's death.
- c) Help the client 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 the client regarding other action that must be taken by the client to secure, reinvest, or protect the assets and provide for the discharge of liabilities.
- d) Prepare and complete interim accounts and reports to the Probate Court and the beneficiaries as may be required during the course of administration of the estate.
- e) Decide whether the lawyer or accountant will prepare tax returns required to be filed for the decedent or the estate or whether the responsibility for the preparation of those tax returns will be shared. These tax returns may include federal estate tax and generation-skipping transfer tax returns, any state inheritance tax return, any local or state property tax returns or reports, the basis reporting Form 8971, as well as federal and state fiduciary income tax returns, and a final income tax return for the decedent.
- f) Review and consider with the client 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 distribution of assets in a way that is beneficial to the estate and 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 to pay any tax obligations, along with installment payments 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. As part of the plan of distribution, particular attention must be paid to the disposition of tax-favored retirement accounts (IRAs, etc.),

as strict deadlines apply.

- i) Prepare all reports, notices, consents, receipts, and accountings for closing the estate and discharging the client as [executor/personal representative].
- j) Counsel and advise on any related questions or matters arising out of the administration of the estate.

2. COMMUNICATIONS WITH BENEFICIARIES

- a) Particular care must be taken with communications with the beneficiaries of the estate. Typically, the attorney represents the fiduciary of the estate (executor, personal representative, or administrator). However, beneficiaries often contact the attorney with questions or demands. Moreover, even if the attorney does not represent the beneficiaries, the attorney may nevertheless owe duties to those beneficiaries – at least to advise them of the course of administration, status of the matter, when they can expect distributions, and to seek their own tax advice regarding the distributions. What, if anything, do the laws of your jurisdiction say about the attorney’s duties to beneficiaries?
- b) Which questions from beneficiaries should be directed to the fiduciary to answer? Which should the lawyer handle?
- c) Should the lawyer send a letter to the beneficiaries informing them of the opening of the administration (this may be required by local probate rules) and explaining that the law firm does not represent any of the beneficiaries, that the firm’s services are being rendered to the estate and the client is the fiduciary?
- d) Does the lawyer wish to raise in the engagement letter the specter of a misbehaving executor and the lawyer’s rights either to make a noisy withdrawal and/or to give notice to the court and the beneficiaries?
- e) Note that the lawyer may need to enlist the cooperation of beneficiaries to file complete tax returns and reports.

3. CO-FIDUCIARIES

In the case of the estate where the administration is court-supervised, the lawyer should be able to represent the co-fiduciaries jointly, absent indications that differences exist between or among the co-fiduciaries. If multiple fiduciaries are acting, the attorney should make it clear from the outset what will happen if a dispute develops between or among them. The lawyer may wish to continue to represent one of them, or to have them both or all of them seek new counsel. The letter includes alternative provisions to consider in defining the lawyer’s role when there are multiple fiduciaries. Note that this letter is directed to fiduciaries who are formally appointed by the court. If someone not formally appointed is nevertheless performing duties, you will need to change the letter to indicate that is the situation.

Form of an Engagement Letter for Estate Administration
([Sample in Word](#))

(Date)

Name and address

Dear [NAME OF PERSONAL REPRESENTATIVE/EXECUTOR]:

The purpose of this letter is to confirm our representation of you in connection with the petition or application to the court for you to act as [*PERSONAL REPRESENTATIVE/EXECUTOR*] of the [*DECEDENT'S*] Estate (and in that capacity if and when you are appointed) and to set forth the terms of our engagement. We appreciate your confidence and trust in engaging this firm as your lawyers. I will be primarily responsible for this representation, but other lawyers or paralegals will assist me.

Summary of Services to be Performed For You as [PERSONAL REPRESENTATIVE/EXECUTOR]

We will provide those services that are necessary and appropriate to petition or apply to the court to appoint you and, if you are appointed, to administer the estate under [*NAME OF STATE*] law, beginning with the [*PETITION/APPLICATION*] for probate and your appointment as [*PERSONAL REPRESENTATIVE/EXECUTOR*], and ending with any documents required to be filed with the court to close the estate. The normal services include the following

[DESCRIBE NORMAL SERVICES, INCLUDING RESPONSIBILITY FOR NON-PROBATE ASSETS, CLIENT RESPONSIBILITIES, RESPONSIBILITIES FOR PREPARING INVENTORY AND ACCOUNTINGS, COMMUNICATION WITH BENEFICIARIES, PREPARATION OF TAX RETURNS, ETC. CHECKLIST CONTAINS SOME SUGGESTIONS.]

If Additional Services are Necessary

If there are other legal services that you wish us to perform for you as the representative of the estate, we should first consult one another and supplement this letter agreement before undertaking those tasks. If [*DECEDENT*] left a revocable trust, and you would like us to assist you with its administration or termination, we will provide a separate engagement letter regarding legal services for trust administration.¹

¹ The engagement letters may, of course, be combined.

Identification of the Client

Please understand that we represent you only in your fiduciary capacity as [*PERSONAL REPRESENTATIVE/EXECUTOR*]. We do not represent individual beneficiaries of the estate, even though we will from time to time provide them with information about your administration of the estate. In appropriate circumstances, we may advise beneficiaries to obtain independent counsel, as we do not represent them.

[*OPTIONAL PROVISIONS where the executor is also a beneficiary:*]

Because you are a beneficiary of the estate, we cannot advocate for you to maximize your share. If there is a dispute with another beneficiary about your entitlements, we cannot represent you individually in that dispute, and you will have to seek your own independent counsel.

OPTION 1:

Apart from any legal requirement to notify the beneficiaries that the Will has been admitted to probate and the estate administration started, we consider it good practice to do so and to give each beneficiary a copy of the Will. When we do, we will make it clear that you, alone, as [*PERSONAL REPRESENTATIVE/EXECUTOR*], are our client. We usually keep the beneficiaries advised as the administration of the estate progresses, for example by furnishing copies of the inventory of estate assets as soon as you complete it (with our assistance as needed). We consider it the better practice that these letters come from you, but we will give you the form of letters that we suggest be sent and will assist you in complying with your duties to keep the beneficiaries informed.

OPTION 2:

As a part of our representation, we recommend complete and free disclosure to the estate's beneficiaries of all information relating to the estate administration that we may receive from you in your capacity as [*PERSONAL REPRESENTATIVE/EXECUTOR*], unless you advise us there are good reasons not to make a disclosure.

[NOTE: In many jurisdictions the attorney-client communications privilege might preclude this type of disclosure without the personal representative's informed waiver. Refer to the law of the jurisdiction where the estate proceeding is pending.]

[*OPTION for use when more than one personal representative will be clients*]

Waiver of Potential Conflicts of Interest

It is common for [*PERSONAL REPRESENTATIVES/EXECUTORS*] to employ the same law firm to assist them in administering an estate, as you have requested us to do. Please understand that, because we will represent you jointly, we must communicate with [*BOTH/ALL*] of you and receive instructions from [*BOTH/ALL*] of you. Accordingly, by agreeing to this form of representation,

each of you authorizes us to disclose to the [OTHER/OTHERS] information that one of you shares with us or that we acquire from another source that is pertinent to the administration of the estate.

We will not take any action or refrain from taking an action that affects the estate without the [OTHER'S/OTHERS'] knowledge and consent. Of course, anything one of you discusses with us is confidential, and will not be disclosed to third parties except as limited by the discussion above.

If a conflict arises between you during the course of the estate's administration or if you have a difference of opinion on any matter concerning the estate, we can point out the pros and cons of your respective positions. However, we cannot advocate one of your positions over the other. [*Note that in some jurisdictions, it may be necessary to provide examples of potential conflicts.*] By signing this letter, you waive any conflict of interest which may arise by virtue of the fact that we represent [BOTH/ALL] of you together.

[*Option 1: If an actual conflict arises, lawyer withdraws from representation of all Executors*] If an actual conflict of interest arises [BETWEEN/AMONG] you that, in our judgment, makes it impossible for us to live up to our ethical obligations to [BOTH/ALL] of you, we will withdraw as your joint attorneys and advise each of you to seek other legal counsel.

[*Option 2: If an actual conflict arises, lawyer will continue to represent one Executor but not the others*] If an actual conflict of interest arises [BETWEEN/AMONG] you that, in our judgment, makes it impossible for us to comply with our ethical obligations to [BOTH/ALL] of you, we will continue to represent [NAME OF PERSON LAWYER WILL CONTINUE TO REPRESENT], to the extent we may appropriately do so, and withdraw as legal counsel for the [OTHER/OTHERS] of you. Your signature below constitutes your consent to our continued future representation of [NAME OF PERSON LAWYER WILL CONTINUE TO REPRESENT] and each of you agrees not to seek to disqualify us from representing [HIM/HER] in the future. Notwithstanding this agreement, we may be required to withdraw or be disqualified from representing [NAME OF PERSON FIRM WISHES TO CONTINUE TO REPRESENT] after an actual conflict arises.

Attorney-Client Communications.

Any relationship between a lawyer and client is subject to Rules of Professional Conduct. In estates, ethical rules applicable to conflicts of interests and confidentiality are of special concern because of the close relationship of the parties. We cannot overemphasize the need for complete and full disclosure to us at all times of all your acts and doings in order to avoid potential problems that may arise. [*Cite examples such as executor's fees, personal property distributions or early/unequal distributions to one or more beneficiaries, beneficiary living in the decedent's house, etc.*]

The attorney-client privilege generally applies to communications between us. The privilege encompasses more than confidentiality. It is also an evidence rule in the context of litigation that

prevents third parties from gaining access to our communications with you. However, there are exceptions to the attorney-client privilege. If a beneficiary, accountant, or financial planner is included in a meeting or phone call, or is copied on correspondence or email, then the attorney-client privilege may be lost as to matters disclosed in that meeting or correspondence. As a result, the beneficiary or other third party may be forced to disclose the information in a court of law or otherwise in the context of litigation, or may use such information to his or her advantage.

Please keep this in mind when asking us to share information with third parties or when you share information with others who are not part of our attorney-client relationship.

[OPTIONAL PROVISION if you are in a jurisdiction where the “office” of the fiduciary holds the attorney- client privilege and successor fiduciaries succeed to the privilege:]

Please also keep in mind that [NAME OF STATE] courts have determined that the “holder” of the attorney-client privilege is the “office” of the [EXECUTOR/PERSONAL REPRESENTATIVE]. This means if a successor to you is appointed and assumes your fiduciary responsibilities, that person will also succeed to the attorney-client privilege that exists between us. In other words, your successor would be entitled to require you or to require us to disclose to the successor all of the attorney-client communications between us. You can avoid this only by paying a different lawyer with your own personal funds for separate legal advice. As long as we are being paid from the estate, this caveat to the privileged nature of our communications exists.

[ADDITIONAL OR ALTERNATIVE OPTIONAL PROVISION regarding the fiduciary exception to the attorney-client privilege which allows beneficiaries access to privileged information.]

Under the laws of [NAME OF STATE], the *fiduciary exception* to the attorney-client privilege may apply to our communications. The fiduciary exception allows beneficiaries and their attorneys, in certain situations, access to our communications regarding the administration of the estate. For example, if litigation occurs in this case or you have a dispute with the beneficiaries, the court may require us to disclose to the beneficiaries certain information that otherwise would be privileged. It is important that you be aware of the fiduciary exception and its possible ramifications during this administration.

Generally, communications made via fax, e-mail, computer transmission or cellular phone are not as secure from inadvertent disclosure to others. Unless you tell us otherwise, you acknowledge that by furnishing us with an e-mail address or cell phone or fax number, you authorize us to communicate with you using these modes of communication notwithstanding the inherent confidentiality risks. By giving us an email address to use to communicate with you, you are indicating to us that your email is secure, that you do not use your employer’s server to receive communications from us (as doing so would violate the confidentiality of our communications), and that we have your permission to use the address which you are satisfied is confidential.

Exception to Rule of Confidentiality.

[*OPTIONAL PROVISION, notice to the beneficiaries of the fiduciary's inappropriate action or inaction:*] As a condition of this representation, we require that, notwithstanding normal rules of confidentiality, you authorize us to notify the probate court 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, even to the court. Refer to the law of the jurisdiction where the estate proceeding is pending.]

No Guarantee of Favorable Outcome

Although [*DECEDENT'S*] estate plan may have been designed to achieve certain goals, such as tax savings, we cannot guarantee that the Will you offer for probate will be admitted to probate, that you will be appointed as Executor, or that third parties will not attack the Will or transfers made under it. A party with legal standing can object to your appointment, or to the Will's admission to probate, or may offer another Will for admission to probate. You agree that if the court does not admit the Will to probate, or you are not appointed, or if disputes arise and our fees are disallowed by the court, you nevertheless will be personally responsible for payment of our fees and costs, rather than the estate. [*Consult local rules. In some jurisdictions the lawyer may not be able to accept fees that are disallowed by the court.*]

Fees and Billing

[DESCRIBE ARRANGEMENTS PERTAINING TO FEES, COSTS, RETAINERS, BILLING, ETC.]

[*OPTIONAL PROVISION for use if the firm conducting the probate administration drafted the estate planning documents and if the jurisdiction allows drafting attorneys to be paid their hourly rates for testimony in a Will or Trust contest.*]

You agree that if a member of or person rendering services to our firm is deposed, called to testify or required to respond to discovery in the context of legal proceedings concerning any aspect of Decedent's estate plan, we will be compensated for that person's services at his or her hourly rate to clients at the time of the deposition, other testimony or other discovery. You also agree that we will be entitled to full reimbursement for costs incurred in connection with the production of documents in response to subpoenas and demands for the production of documents issued in any legal proceedings.

Optional: If persons outside your firm might be hired, for example in connection with an estate tax return:

Sometimes it is necessary to hire other persons to provide services for you, such as accounting or appraisal firms. Their work may be protected from disclosure to third parties to a greater extent if we (rather than you) request their services, and so we may hire them. However, you (or the estate) will be responsible for paying their fees and expenses, whether paid directly to them or by reimbursing us.

Our Policies Concerning Client Files

You agree that we have the right to destroy the client file we create for you [*NUMBER*] years after we cease to actively represent you (*i.e.*, after we last perform legal services for you). Your “client file” consists of all paper and electronic copies of the probate file (which is also generally available from the court), documents sent to us by you or third parties (such as deeds, beneficiary designations and statements from financial institutions), correspondence and other written communications between us and others that pertain to the estate. You agree that all other pertinent materials (such as our notes and internal memoranda) are proprietary to us and not part of your client file.

Before destroying your client file, we will attempt to contact you to make arrangements to deliver the file contents to you. If we are unable to contact you at the most recent address contained in our file, then, subject to applicable law, we may destroy your file without further notice. It will be your responsibility to notify us of any change in your address and other contact information.

[OPTION for use when more than one personal representative will be clients]

Following the conclusion or termination of our representation of you, if one or [*BOTH/ALL*] of you request your client file or any original documents in our possession and you are unable to agree on which of you is entitled to the file, we may petition the court to make that determination, and you agree to be responsible for the costs of our doing that. If you agree that your file or any original documents will be sent to one of you (or that party’s legal counsel) and copies will be sent to the [*OTHER/OTHERS*] (or the [*OTHER’S/OTHERS’*] legal counsel), then you agree to reimburse us for the reasonable costs of preparing those copies and delivering them.

Termination of Engagement

You may terminate this engagement at any time by notice in writing to us. If we receive notice of termination from you, we will promptly cease providing any service to you, subject to court approval of our withdrawal as may be necessary. You will be responsible for paying for our services rendered up to the time we receive such notice and for additional reasonable services that we provide after that in connection with the transfer of responsibility for the matters to other counsel.

We may terminate this engagement by giving you written notice. If we send you notice of termination, you will be responsible for paying for our services rendered up to the time we terminate our engagement, and for reasonable services that we provide to transfer responsibility for the matter to your new counsel. However, whether you terminate or we terminate the representation, if we represent you in court proceedings and prior court approval is needed in order for us to cease rendering legal services, we will continue to render legal services to you until such time as the court determines that we may cease rendering services.

Conclusion of Representation

After the probate administration is closed and you are discharged as the [*PERSONAL REPRESENTATIVE/EXECUTOR*], our engagement will be concluded. Of course, we will be happy to provide additional or continuing services. Unless we mutually agree in writing to those services, however, we will have no further responsibility to you or to the estate with respect to future or ongoing legal issues, nor will we have a duty to notify you of changes in the laws.

If you have any questions about anything discussed in this letter, please let us know. In addition, you should feel free to consult with another lawyer about the effect of signing this letter.

If you approve this arrangement, please sign the approval copy of this letter and return it in the envelope provided.

We welcome and look forward to serving you.

Yours very truly,

[*NAME OF ATTORNEY IN CHARGE*]

[*I/WE*] have reviewed, understand, and agree to the provisions set out in the representation letter referred to above, including those provisions dealing with [*CONFLICT DISCLOSURE AND*] confidentiality of communications. [*I/WE*] further agree to the provisions in this letter regarding disclosures to the court or others as under the circumstances herein. [*I/WE*] further acknowledge receiving and reviewing the informational material provided with this letter, including your fee and billing information. At this time, [*I/WE*] wish to use your services to go forward with the petition to the court and, if [*I AM/WE ARE*] appointed as [*EXECUTOR(S)/PERSONAL REPRESENTATIVE(S)*], with the estate administration.

Dated: _____

(Client 1)

(Client 2)

***Supplemental Checklist for the Representation of Trustees in a Trust
Administration***

(Refer also to the General Checklist on pages 4 through 8.)

1. SERVICES TO BE PERFORMED FOR TRUST ADMINISTRATION

What services will the attorney perform in connection with the trust administration? The lawyer may wish to list some of the services the lawyer will perform. 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. The duties may include:

- a) Prepare and complete a trust certification, acceptance of office, and other documentation for third parties to explain that the client is the Trustee or Co-Trustee (following the death of the Trustor or Settlor). That documentation should assist the Trustee in collecting the assets of the trust or changing the identity of the Trustee on existing trust accounts.
- b) If required by local law, prepare and serve a notification to the persons entitled to it (e.g., heirs and beneficiaries) to notify them of the Trustor's or Settlor's death, their entitlement to the trust terms and/or the statute of limitations for filing a trust contest.
- c) Assist the client in determining if a probate (or another court proceeding to transfer title of assets held in the name of a deceased Trustor or Settlor) will be required.
- d) Assist the client in preparing a complete inventory of the trust assets, and additional assets that may be passing outside of the trust (such as life insurance, retirement benefits, and other assets), that may also be transferred or paid to the trust as a result of the death of the Settlor or Trustor.
- e) Help the client make a thorough search for all debts, obligations, and contingent liabilities of the decedent in order to determine the financial condition of the trust estate and advise the client regarding other action that must be taken by the client to secure, reinvest, or protect the assets and provide for the discharge of liabilities.
- f) Prepare and complete such interim accounts and reports to the beneficiaries as may be necessary or advisable during the course of administration of the trust estate.
- g) Decide whether the lawyer or accountant will prepare tax returns required to be filed for the Trustor, Settlor or trust or whether the responsibility for the preparation of those tax returns will be shared. These tax returns include federal estate tax and generation-skipping transfer tax returns, any state inheritance tax return, any local or state property tax returns or reports, the basis reporting Form 8971, as well as federal and state fiduciary income tax

returns, and a final income tax return for the deceased Trustor or Settlor.

- h) Review and consider with the client any post-death planning, such as alternative asset valuation options, use of disclaimers, funding of gifts and subtrusts as provided for in the trust, timing the distribution of assets in a way that is beneficial to the trust and beneficiaries, and election of income tax benefits for the trust and beneficiaries.
- i) Plan for the payment of all death taxes and the source of funds to be used in payment of any tax obligations, along with installment payments of taxes, if available.
- j) Prepare a plan of distribution of assets held in the trust, either outright or to separate continuing trusts for the beneficiaries. As part of the plan of distribution, particular attention must be paid to the disposition of tax-favored retirement accounts (IRAs, etc.), as strict deadlines apply.
- k) Prepare all reports, consents, receipts, and accountings for closing the master trust and releasing the client as Trustee.
- l) Counsel and advise on any related questions or matters arising out of the administration of the trust.

2. COMMUNICATIONS WITH BENEFICIARIES

- a) Particular care must be taken with communications with the trust beneficiaries. Typically, the attorney represents the trustee only. However, beneficiaries often contact the attorney with questions or demands. Moreover, even if the attorney does not represent the beneficiaries, the attorney may nevertheless owe duties to those beneficiaries – at least to advise them of the course of trust administration, status of the matter, when they can expect distributions, and to seek their own tax advice regarding the distributions. What, if anything, do the laws of your jurisdiction say about the attorney’s duties to beneficiaries?
- b) Which questions from beneficiaries should be directed to the trustee to answer? Which should the attorney handle?
- c) Should the lawyer send a letter to the beneficiaries informing them of the trust administration, and explaining that the law firm does not represent any of the beneficiaries, that the firm’s services are being rendered to the trust and that the client is the Trustee?
- d) Does the lawyer wish to raise the specter of a misbehaving trustee and the attorney’s rights either to make a noisy withdrawal and/or to give notice to the court and the beneficiaries?
- e) Note that the lawyer may need the cooperation of the beneficiaries in filing complete

tax returns and reports.

- f) Trusts are private documents, but some disclosure of trust terms may be necessary or advisable. Consider if the beneficiary who is receiving only a specific gift should be given the entire trust or only the portion(s) pertaining to that beneficiary. Some jurisdictions require a specific legal notice to be served on heirs and beneficiaries following the death of a Trustor or Settlor.

3. CO-FIDUCIARIES

In the case of a trust (if unanimous action is required to bind the trust), the lawyer should be able to represent the co-trustees, absent indications that differences exist between or among them. If multiple trustees are acting, the attorney should make it clear from the outset what will happen if a dispute develops between or among them. The lawyer may wish to continue to represent one of them, or to have them both or all of them seek new counsel. Alternative provisions to consider in defining the lawyer's role when there are multiple fiduciaries are included in the letter. If someone who is not a trustee or who is a special or independent trustee is performing certain duties, the lawyer will need to change the letter to indicate that.

Form of an Engagement Letter for Trust Administration
([Sample in Word](#))

(Date)

Trustee name and address

Dear [NAME OF TRUSTEE]:

The purpose of this letter is to confirm our representation of you as Trustee of the trust created by [DECEDENT], and to set forth the terms of our engagement.

We appreciate your confidence and trust in engaging this firm as your lawyers. I will be primarily responsible for this representation, but other lawyers or paralegals will assist me.

Summary of Services to be Performed For You as Trustee

We will provide those services that are necessary and appropriate to administer the trust under [NAME OF STATE] law. The normal services include the following:

[DESCRIBE NORMAL SERVICES, INCLUDING RESPONSIBILITY FOR NON-TRUST
ASSETS, CLIENT RESPONSIBILITIES, RESPONSIBILITIES FOR PREPARING
INVENTORY AND ACCOUNTINGS, COMMUNICATION WITH BENEFICIARIES,
PREPARATION OF TAX RETURNS, ETC.
CHECKLIST CONTAINS SOME SUGGESTIONS.]

[OPTIONAL:]

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

If Additional Services are Necessary

If there are other legal services that you wish us to perform for you as Trustee, we should first consult one another and supplement this letter agreement before undertaking those tasks. If a probate of [DECEDENT]'s estate becomes necessary and you would like us to assist you with it, we will provide a separate engagement letter regarding legal services for the probate administration.

Identification of the Client

Please understand that we represent you only in your fiduciary capacity as Trustee. We do not represent individual trust beneficiaries, even though we will from time to time provide them with

information about your administration of the trust. In appropriate circumstances, we may advise beneficiaries to obtain independent counsel, as we do not represent them.

[OPTIONAL PROVISION where the trustee is also a beneficiary:]

Because you are a beneficiary of the trust, we cannot advocate for you to maximize your share. If there is a dispute with another beneficiary about your entitlements, we cannot represent you individually in that dispute, and you will have to seek your own independent counsel.

OPTION 1:

Apart from any legal requirement to notify the beneficiaries that the trust is being administered and give them basic information about the course of that administration, we consider it good practice to do so. That being said, the trust is a private document and you need to consider which beneficiaries are entitled to a copy of the trust and which should be given only limited information (usually, these are beneficiaries who do not share in the remainder or residue of the trust). If we do contact the beneficiaries, we will make it clear that you, alone, as Trustee, are our client. We usually keep the beneficiaries advised as the trust administration progresses, for example by furnishing copies of the inventory of trust assets as soon as you complete it (with our assistance as needed). We consider it the better practice that these letters come from you as Trustee, but we will give you the form of letters that we suggest be sent and will assist you in complying with your duties to keep the beneficiaries informed.

OPTION 2:

As a part of our representation, we recommend complete and free disclosure to the trust's beneficiaries of all information relating to the trust administration that we may receive from you in your capacity as Trustee, unless you advise us there are good reasons not to make a disclosure.

[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 where the trust is being administered.]

[OPTION for use when you are representing more than one trustee.]

Waiver of Potential Conflicts of Interest.

It is common for co-Trustees to employ the same law firm to assist them in administering a trust, as you have requested us to do. Please understand that, because we will represent you jointly, we must communicate with *[BOTH/ALL]* of you and receive instructions from *[BOTH/ALL]* of you. Accordingly, by agreeing to this form of representation, each of you authorizes us to disclose to the *[OTHER/OTHERS]* information that one of you shares with us or that we acquire from another source that is pertinent to the administration of the trust.

We will not take any action or refrain from taking an action that affects the trust without the [OTHER'S/OTHERS'] knowledge and consent. Of course, anything one of you discusses with us is confidential, and will not be disclosed to third parties except as limited by the discussion above.

If a conflict arises between you during the course of the trust administration or if you have a difference of opinion on any matter concerning the trust, we can point out the pros and cons of your respective positions. However, we cannot advocate one of your positions over the [OTHER/OTHERS]. [Note that in some jurisdictions, it may be necessary to provide examples of potential conflicts.] By signing this letter, you waive any conflict of interest which may arise by virtue of the fact that we represent [BOTH/ALL] of you together.

[Option 1: If an actual conflict arises, lawyer withdraws from representation of all trustees]

If an actual conflict of interest arises [BETWEEN/AMONG] you that, in our judgment, makes it impossible for us to live up to our ethical obligations to [BOTH/ALL] of you, we will withdraw as your joint attorneys and advise each of you to seek other legal counsel.

[Option 2: If an actual conflict arises, lawyer will continue to represent one trustee but not the others]

If an actual conflict of interest arises [BETWEEN/AMONG] you that, in our judgment, makes it impossible for us to live up to our ethical obligations to [BOTH/ALL] of you, we will continue to represent [NAME OF PERSON LAWYER WILL CONTINUE TO REPRESENT], to the extent we may appropriately do so, and withdraw as legal counsel for the [OTHER/OTHERS] of you. Your signature below constitutes your consent to our continued future representation of [NAME OF PERSON LAWYER WILL CONTINUE TO REPRESENT] and each of you agrees not to seek to disqualify us from representing [HIM/HER] in the future. Notwithstanding this agreement, we may be required to withdraw or be disqualified from representing [NAME OF PERSON FIRM WISHES TO CONTINUE TO REPRESENT] after an actual conflict arises.

Attorney-Client Communications.

Any relationship between a lawyer and client is subject to Rules of Professional Conduct. In trusts, ethical rules applicable to conflicts of interests and confidentiality are of special concern because of the close relationship of the parties. We cannot overemphasize the need for complete and full disclosure to us at all times of all your acts and doings in order to avoid potential problems that may arise. [CITE EXAMPLES SUCH AS TRUSTEE'S FEES, PERSONAL PROPERTY DISTRIBUTIONS OR EARLY/UNEQUAL DISTRIBUTIONS TO ONE OR MORE BENEFICIARIES, BENEFICIARY LIVING IN THE DECEDENT'S HOUSE WHICH IS TITLED IN THE TRUST, ETC.]

The attorney-client privilege generally applies to communications between us. The privilege encompasses more than confidentiality. It is also an evidence rule in the context of litigation that

prevents third parties from gaining access to our communications with you. However, there are exceptions to the attorney-client privilege. If a beneficiary, accountant, or financial planner is included in a meeting or phone call, or is copied on correspondence or email, then the attorney-client privilege may be lost as to matters disclosed in that meeting or correspondence. As a result, the beneficiary or other third party may be forced to disclose the information in a court of law or otherwise in the context of litigation, or may use that information to his or her advantage. Please keep this in mind when asking us to share information with third parties or when you share information with others who are not part of our attorney-client relationship. That is why, as indicated above, we prefer that communications with beneficiaries originate with you.

[OPTIONAL PROVISION if you are in a jurisdiction where the “office” of the fiduciary holds the attorney-client privilege and successor fiduciaries succeed to the privilege:]

Please also keep in mind that [NAME OF STATE] courts have determined that the “holder” of the attorney-client privilege is the “office” of the Trustee. This means if a successor to you is appointed and assumes your fiduciary responsibilities, that person will also succeed to the attorney-client privilege that exists between us. In other words, your successor would be entitled to require you or to require us to disclose to the successor all of the attorney-client communications between us. You can avoid this only by paying a different lawyer with your own personal funds for separate legal advice. As long as we are being paid from the trust, this caveat to the privileged nature of our communications exists.

[ADDITIONAL OR ALTERNATIVE OPTIONAL PROVISION regarding the fiduciary exception to the attorney-client privilege which allows beneficiaries access to privileged information.]

Under the laws of [NAME OF STATE], the *fiduciary exception* to the attorney-client privilege may apply to our communications. The fiduciary exception allows beneficiaries and their attorneys, in certain situations, access to our communications regarding the administration of the trust. For example, if litigation occurs in this case or you have a dispute with the beneficiaries, the court may require us to disclose to the beneficiaries certain information that otherwise would be privileged. It is important that you be aware of the fiduciary exception and its possible ramifications during this administration.

Generally, communications made via fax, e-mail, computer transmission or cellular phone are not as secure from inadvertent disclosure to others. Unless you tell us otherwise, you acknowledge that by furnishing us with an e-mail address or cell phone or fax number, you authorize us to communicate with you using these modes of communication notwithstanding the inherent confidentiality risks. By giving us an email address to use to communicate with you, you are indicating to us that your email is secure, that you do not use your employer’s server to receive communications from us (as doing so would violate the confidentiality of our communications), and that we have your permission to use the address which you are satisfied is confidential.

Exception to Confidentiality.

[*OPTIONAL PROVISION, notice to the beneficiaries of the fiduciary's inappropriate action or inaction:*]

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 duties as Trustee.

[NOTE: In many jurisdictions the attorney-client communications privilege might preclude this type of disclosure. Reference should be made to the law of the jurisdiction where the trust is being administered.]

No Guarantee of Favorable Outcome

Although [*DECEDENT*]'s trust may have been designed to achieve certain goals, such as tax savings, we cannot guarantee that third parties will not attack the trust or transfers made under it. A party with legal standing – such as a trust beneficiary – can object to your actions as Trustee. If any objections are successful and a court determines that the trust cannot pay our fees, you agree you nevertheless will be personally responsible for payment of our fees and costs, rather than the trust. [Consult local rules. In some jurisdictions, the lawyer may not be able to accept fees that are disallowed by the court.]

Fees and Billing

[DESCRIBE ARRANGEMENTS PERTAINING TO FEES, COSTS, RETAINERS, BILLING, ETC.]

[*OPTIONAL PROVISION for use if the firm conducting the trust administration drafted the estate planning documents and if the jurisdiction allows drafting attorneys to be paid their hourly rates for testimony in a Will or Trust contest.*]

You agree that if a member of or person rendering services to our firm is deposed, called to testify or required to respond to discovery in the context of legal proceedings concerning any aspect of [Decedent]'s estate plan, we will be compensated for that person's services at his or her hourly rate to clients at the time of the deposition, other testimony or other discovery. You also agree that we will be entitled to full reimbursement for costs incurred in connection with the production of documents in response to subpoenas and demands for the production of documents issued in any such legal proceedings.

[*Optional: If persons outside your firm might be hired, for example in connection with an estate tax return:*]

Sometimes it is necessary to hire other persons to provide services for you, such as accounting or appraisal firms. Their work may be protected from disclosure to third parties to a greater extent if we (rather than you) request their services, and so we may hire them. However, you and the trust will be responsible for paying their fees and expenses, whether paid directly to them or to us in reimbursement.

Our Policies Concerning Client Files

You agree that we have the right to destroy the client file we create for you [*NUMBER*] years after we cease to actively represent you (*i.e.*, after we last perform legal services for you). Your “client file” consists of all paper and electronic copies of the trust administration file, documents sent to us by you or third parties (such as deeds, beneficiary designations and statements from financial institutions), correspondence and other written communications between us and others that pertain to the trust. You agree that all other pertinent materials (such as our notes and internal memoranda) are proprietary to us and not part of your client file.

Before destroying your client file, we will attempt to contact you to make arrangements to deliver the file contents to you. If we are unable to contact you at the most recent address contained in our file, then, subject to applicable law, we may destroy your file without further notice. It will be your responsibility to notify us of any change in your address and other contact information.

[OPTION for use when more than one trustee will be clients]

Following the conclusion or termination of our representation of you, if one or [*BOTH/ALL*] of you request your client file or any original documents in our possession and you are unable to agree on which of you is entitled to the file, we may petition the court with jurisdiction over the trust to make that determination, and you agree to be responsible for the costs of our doing that. If you agree that your file or any such original documents will be sent to one of you (or that party’s legal counsel) and copies will be sent to the [*OTHER/OTHERS*] (or the [*OTHER’S/OTHERS’*] legal counsel), then you agree to reimburse us for the reasonable costs of preparing those copies and delivering them.

Termination of Engagement

You may terminate this engagement at any time by notice in writing to us. If we receive notice of termination from you, we will promptly cease providing any service to you as Trustee. You will be responsible for paying for our services rendered up to the time we receive such notice and for additional reasonable services that we provide after that in connection with the transfer of responsibility for the trust administration to other counsel.

We may terminate this engagement by giving you written notice. If we send you notice of termination, you will be responsible for paying for our services rendered up to the time we terminate our engagement, and for reasonable services that we provide to transfer responsibility

for the matter to your new counsel. However, whether you terminate or we terminate the representation, if we represent you in court proceedings and prior court approval is needed in order for us to cease rendering legal services, we will continue to render legal services to you until such time as the court determines that we may cease rendering services.

Conclusion of Representation

After the [trust is terminated (except for the distribution of assets held in reserve/separate trusts created under [DECEDENT]'s trust have been funded)], our engagement will be concluded. Of course, we will be happy to provide additional or continuing services. Unless arrangements are made for such services and agreed upon in writing, however, we will have no further responsibility to you or to the trust with any future or ongoing legal issues nor will we have a duty to notify you of changes in the laws.

If you have any questions about anything discussed in this letter, please let us know. In addition, you should feel free to consult with another lawyer about the effect of signing this letter.

If you approve this arrangement, please sign the approval copy of this letter and return it in the envelope provided.

We welcome and look forward to serving you.

Yours very truly,

[NAME OF ATTORNEY IN CHARGE]

[I/WE] have reviewed, understand, and agree to the provisions set out in the representation letter referred to above, including those provisions dealing with [CONFLICT DISCLOSURE AND] confidentiality of communications. [I/WE] further agree to the provisions in this letter regarding disclosures to the beneficiaries or their legal representatives under the circumstances described herein. Further, [I/WE] acknowledge receiving and reviewing the informational material provided with this letter, including your fee and billing information. At this time, [I/WE] wish to use your services to go forward with the trust administration.

Dated: _____

(Client 1)

(Client 2)

CHAPTER 6. REPRESENTATION OF GUARDIANS/CONSERVATORS

Introduction

This form illustrates specific issues that should be considered and addressed when the lawyer is about to undertake general representation of a person petitioning for guardianship or conservatorship. Issues to be addressed in the letter may differ depending on whether the alleged disabled person is a minor or adult. The letter is better suited for use when the petition concerns a disabled adult, as there are usually many more statutory limitations on who may act as guardian for a minor and what may be done with the minor's estate.

The chapter (and the letter) use the term guardian. If your state uses the term conservator, you will have to change the letter.

The nature of the alleged disability affects the representation. So does the remaining capacity (if any) of the alleged disabled person, who is, of course, entitled to notice and entitled to object to the proceedings or to request the court to appoint someone other than the petitioner as guardian. Moreover, state laws often set forth further detailed requirements for representation of this class of fiduciaries. For example, in a guardianship for a minor, the parents usually have preference in acting as guardian of the person. However, in some states only a corporate fiduciary may act as guardian of the estate, unless the parents are willing to put funds in a blocked bank account and to seek court permission before making any expenditures.

Potential outcomes of the guardianship matter should be addressed; and the attorney may wish to consult the litigation letters included in this Guide for additional or alternative language on this subject.

This section comprises a checklist and specific language for the engagement letter to open the guardianship. You may wish to consider sending another letter regarding the ongoing administration of the guardianship, or you may wish to combine them. This letter is not designed for every situation in which lawyers represent guardians and should be modified as appropriate to conform with state laws, rules of practice, and particular circumstances.

References to the ACTEC Commentaries (Fifth Edition 2016):

Each page number below refers to the first page of the ACTEC *Commentaries* for the subject in question.

General Principles (re Scope of Representation), p. 36

Multiple Fiduciaries, p. 36

Lawyer May Not Make False or Misleading Statements, p. 38

Disclosure of Acts or Omissions by Fiduciary Client, p. 38
General and Individual Representation Distinguished, p. 39
Planning the Administration of a Fiduciary Estate, p. 57
Advising Fiduciary Regarding Administration, p. 62
Termination of Representation, p. 63
Basis of Fees for Trusts and Estates Services, p. 66
Implied Authorization to Disclose, p. 79
Disclosures by Lawyer for Fiduciary, p. 81
Disclosure of Fiduciary's Commission of, or Intent to Commit, a Fraud or Crime, p. 81
Conflicts of Interest May Preclude Multiple Representation, p. 104
Prohibited Transactions, p. 128
Implied Authority to Disclose and Act, p. 160
Lawyer Representing Client with Diminished Capacity May Consult with Client's Family
Members and Others as Appropriate, p. 161
Reporting Elder Abuse, p. 161
Lawyer Retained by Fiduciary for Person with Diminished Capacity, p. 162
Wishes of Person with Diminished Capacity Who Is Under Guardianship or
Conservatorship
When the Fiduciary is the Client, p. 163
May Lawyer Represent Guardian or Conservator of Current or Former Client? p. 163
Truthfulness in Statements to Others, p. 190
Dealing with Unrepresented Person, p. 192

Supplemental Checklist for the Representation of Guardians/Conservators

(Refer also to the General Checklist on pages 4 through 8.)

1. OPENING THE GUARDIANSHIP

- a) Did you or do you represent the alleged disabled person already such that you may not be able to open a guardianship alleging they now lack capacity? While you may be the family attorney and familiar with their affairs both personal and financial, you may simply already be conflicted out of being able to go forward. Some jurisdictions permit the lawyer whose client is allegedly disabled to seek the appointment of a guardian or conservator, while others do not. What does your local law provide?
- b) What services will the attorney perform in connection with the guardianship? Will a preliminary or temporary guardianship be sought so that multiple court appearances will be necessary? Must the disabled person appear? Who will represent the disabled person? If a temporary guardianship is sought, should you ask for a guardian ad litem to be appointed at that time and for summons to issue immediately?
- c) How likely is the matter to be contested, either by the alleged disabled adult or by another family member? Be sure you know if the disabled person has nominated a guardian or if another person is entitled to preference in acting that is equal or superior to that of your prospective clients. The answers to these questions influence the matters to be discussed in the engagement letter.
- d) Consider listing the required court-filings involved. The Court documents are likely to include Petitions for Temporary and Permanent Guardianship (prepared by the firm), a Physician's Report (which the attorney will review, perhaps assist authorized medical personnel in preparing and perhaps summarize for the court), the Summons, Petition for the guardian ad litem to be appointed or to be waived, the Bond and the attendant Orders. A waiver of a guardian ad litem is more common when the matter is not contested and the impairment is not being questioned by anyone. Of course, your jurisdiction may have different or additional requirements.
- e) Issues of attorney-client privilege are trickier in the guardianship context, and the court will usually give short shrift to attempts to keep family members or the court in the dark about what is going on. Also note that additional issues regarding confidentiality and conflicts may arise if there are multiple fiduciaries or petitioners. Both of these issues must be discussed in the letter.
- f) Attorneys' fees are always subject to court scrutiny and should not be paid without court approval.
- g) Where you are representing the petitioner or guardian, that person 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. 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.

2. ONGOING ADMINISTRATION OF THE GUARDIANSHIP

- a) If the guardianship is opened, make sure your client is aware of his or her ongoing responsibilities to report to the court. Be sure your client is aware of this. Annual reports of the well-being of the disabled person, both personally and financially, can be burdensome and expensive to prepare. You may wish to address those in this initial letter or to send another letter once the guardianship is opened. The lawyer may choose to or may be required to have an engagement letter with the 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. Review the estate administration letter to consider what to include. If there is a corporate or other professional fiduciary, the lawyer may simply indicate availability to perform those services the guardian may require from time to time.
- b) The lawyer should be able to represent co-guardians jointly, absent indications that differences exist between or among them. If multiple persons are petitioning or are acting, the attorney should make it clear from the outset what will happen if a dispute develops between or among them, *i.e.*, the attorney will go to court to seek instructions and will simply present the alternative views of the guardians with a request that the judge decide.
- c) You may represent different persons, one of whom is the guardian of the person and the other of whom the guardian of the estate. But consider the wisdom of representing both of them. Disputes about expenditures for the ward's benefit or paying the expenses or fees of a guardian can and often do arise when the guardian of the person and the guardian of the estate are not the same person.
- d) Some jurisdictions may permit a court-approved change to the ward's estate plan. In this situation, the lawyer should exercise great care in determining who is the lawyer's client and the lawyer should explain the representation to the court. It may be that the ward's guardian ad litem or other attorney should prepare that estate plan.

Form of an Engagement Letter for Guardianship Petition
(Sample in Word)

(Date)

Petitioner's name and address

Dear [NAME OF PETITIONER]:

The purpose of this letter is to confirm our representation in connection with a petition to the court for you to act as Guardian of the Person and Estate [or Guardian of the Person or Guardian of the Estate] (and in that capacity if and when you are appointed) and to set forth the terms of our engagement. We appreciate your confidence and trust in engaging this firm as your lawyers. I will be primarily responsible for this representation, but other lawyers or paralegals will assist me.

Summary of Services to be Performed For You as Personal Representative.

We will provide those services that are necessary and appropriate to petition for a guardianship of the Person and of the Estate [or Guardian of the Person or Guardian of the Estate] of your [RELATIONSHIP AND NAME OF DISABLED PERSON] and, if you are appointed, to assist you in filing documents required to be filed with the court and making court appearances. The normal services necessary to open the estate include the following:

[DESCRIBE NORMAL SERVICES, INCLUDING PETITIONS FOR A TEMPORARY AND
PERMANENT GUARDIANSHIP, OBTAINING A DOCTOR'S REPORT, CLIENT
RESPONSIBILITIES, RESPONSIBILITIES IF SUCCESSFUL TO PREPARE AN
INVENTORY AND ANNUAL ACCOUNTINGS, COMMUNICATION WITH OTHERS IF
REQUIRED, ETC.]

If Additional Services are Necessary

If there are other legal services that you wish us to perform for you in your capacity as the Guardian, we should first consult one another and supplement this letter agreement before undertaking those tasks.

Identification of the Client

Please understand that we represent you only as Petitioner and, if you are appointed by the court, then only in your fiduciary capacity as Guardian. We do not represent the alleged disabled person or any other interested parties. However, we are required by statute to provide such interested parties with information both about the petition, and, if you are appointed, about your administration of the estate and/or decisions regarding the care of your [RELATIONSHIP AND

NAME OF DISABLED PERSON].

[*OPTION for use when more than one person will be clients*]

Waiver of Potential Conflicts of Interest

It is common for Guardians to employ the same law firm to assist them in administering a [*MINOR'S*] [*DISABLED ADULT'S*] estate, as you have requested us to do. Please understand that, because we will represent [*BOTH/ALL*] of you, we must communicate with and receive instructions from [*BOTH/ALL*] of you. Accordingly, by agreeing to this form of representation, each of you authorizes us to disclose to the [*OTHER/OTHERS*] information that one of you shares with us or that we acquire from another source that is pertinent to the guardianship.

We will not take any action or refrain from taking an action that affects the guardianship without the [*OTHER'S/OTHERS'*] knowledge and consent. Of course, anything you (or one of you) discusses with us is confidential, and will not be disclosed to third parties, except as limited by the discussion above.

If a conflict arises between you during the course of the guardianship or if you have a difference of opinion on any matter concerning the guardianship, we can point out the pros and cons of your respective positions. However, we cannot advocate one of your positions over the other. [*Note that in some jurisdictions, it may be necessary to provide examples of potential conflicts.*] By signing this letter, you waive any conflict of interest which may arise by virtue of the fact that we represent [*BOTH/ALL*] of you together.

[*Option 1: If an actual conflict arises, lawyer withdraws from representation of all Guardians*]

If an actual conflict of interest arises [*BETWEEN/AMONG*] you that, in our judgment, makes it impossible for us to live up to our ethical obligations to [*BOTH/ALL*] of you, we will withdraw as your joint attorneys and advise each of you to seek other legal counsel.

[*Option 2: If an actual conflict arises, lawyer will continue to represent one Guardian but not the others*]

If an actual conflict of interest arises [*BETWEEN/AMONG*] you that, in our judgment, makes it impossible for us to live up to our ethical obligations to [*BOTH/ALL*] of you, we will continue to represent [*NAME OF PERSON LAWYER WILL CONTINUE TO REPRESENT*], to the extent we may appropriately do so, and withdraw as legal counsel for the [*OTHER/OTHERS*] of you. Your signature below constitutes your consent to our continued future representation of [*NAME OF PERSON LAWYER WILL CONTINUE TO REPRESENT*] and each of you agrees not to seek to disqualify us from representing [*HIM/HER*] in the future. Notwithstanding this agreement, we may be required to withdraw or be disqualified from representing [*NAME OF PERSON FIRM WISHES TO CONTINUE TO REPRESENT*] after an actual conflict arises.

Attorney-Client Communications.

Any relationship between a lawyer and client is subject to Rules of Professional Conduct. In guardianships, ethical rules applicable to conflicts of interests and confidentiality are of special concern because of the close relationship of the parties and the concerns of the court. We cannot overemphasize the need for complete and full disclosure to us at all times of all your acts and doings in order to avoid potential problems that may arise. [*Cite examples such as fees and expenses, proposed expenditures for the disabled person, personal property dispositions, placement in a nursing home, etc.*]

The attorney-client privilege generally applies to communications between us. The privilege encompasses more than confidentiality. It is also an evidence rule in the context of litigation that prevents third parties from gaining access to our communications with you. However, there are exceptions to the attorney-client privilege. If an accountant or financial planner is included in a meeting or phone call, or is copied on correspondence or email, then the attorney-client privilege may be lost as to matters disclosed in that meeting or correspondence. As a result, the third party may be forced to disclose the information in a court of law or otherwise in the context of litigation, or may use such information to his or her advantage. Please keep this in mind when asking us to share information with third parties or when you share information with others who are not part of our attorney-client relationship.

[*OPTIONAL PROVISION if you are in a jurisdiction where the “office” of the fiduciary holds the attorney-client privilege and successor fiduciaries succeed to the privilege:*]

Please also keep in mind that [NAME OF STATE] courts have determined that the “holder” of the attorney-client privilege is the “office” of the Guardian. This means if a successor to you is appointed and assumes your fiduciary responsibilities, that person will also succeed to the attorney-client privilege that exists between us. In other words, your successor would be entitled to require you or to require us to disclose to the successor all of the attorney-client communications between us. You can avoid this only by paying a different lawyer with your own personal funds for separate legal advice. As long as we are being paid from the guardianship estate, this caveat to the privileged nature of our communications exists.

Generally, communications made via fax, e-mail, computer transmission or cellular phone are not as secure from inadvertent disclosure to others. Unless you tell us otherwise, you acknowledge that by furnishing us with an e-mail address or cell phone or fax number, you authorize us to communicate with you using these modes of communication notwithstanding the inherent confidentiality risks. By giving us an email address to use to communicate with you, you are indicating to us that your email is secure, that you do not use your employer’s server to receive communications from us (as doing so would violate the confidentiality of our communications), and that we have your permission to use the address which you are satisfied is confidential.

[OPTIONAL PROVISION- notice to court of Guardian's inappropriate action or inaction]

Exception to Rule of Confidentiality.

Above all, please understand that the court is entitled to be kept informed and that you will have duty to seek permission and approval of your actions, rather than simply spending money or making changes to the disabled person's living arrangements. The ultimate decision about the appropriateness of any expenditure or any personal arrangements for your *[RELATIONSHIP AND NAME OF DISABLED PERSON]*, resides in the court and you are simply in a position of advocating for *[HIM/HER]*.

Therefore, as a condition of this representation, we require that, notwithstanding normal rules of confidentiality, you authorize us to notify the guardianship court and any representative of *[NAME OF DISABLED PERSON]* of any actions or omissions on your part that have a material effect on this guardianship or the ward including acts or omissions that may constitute negligence, bad faith, or breach of your fiduciary duties.

No Guarantee of Favorable Outcome

Because *[NAME OF STATE]* laws provide for family members to receive notice of this matter and such notice may cause them to oppose the Petition or submit their own Petition, we cannot guarantee that you will be appointed as the Guardian. Moreover, the laws do not favor taking away the rights of disabled persons, so it will be up to the court to decide if the guardianship is needed and, if so, whether the guardianship will be plenary (total) or limited (with limited rights kept by the disabled person to be delineated by the judge). Your *[RELATIONSHIP AND NAME OF DISABLED PERSON]* will be represented by an attorney appointed by the court. *[HE/SHE]* or another party with legal standing can object to your appointment.

Fees and Billing.

[DESCRIBE ARRANGEMENTS PERTAINING TO FEES, COSTS, RETAINERS, BILLING, ETC.]

[THE FOLLOWING MAY BE USEFUL, BUT REMEMBER THE REQUIREMENTS OF YOUR JURISDICTION.]

In addition to our firm's legal fees, and the costs we incur, the court will appoint an attorney to represent the protected person before it makes any determination about the need for a guardianship. That attorney's fees are almost always based upon the time expended. Different attorneys vary not only in their hourly rates, but their approaches as well. We have no control over who the court will appoint to represent the protected person. Assuming our petition is successful and you are appointed as the Guardian, then our law firm's fees, as well as the court-appointed attorney's fees, will be paid from the assets of the person in need of protection, and you will not be individually responsible for paying our fees, or the fees of the court-appointed attorney.

If the Court does not appoint you as Guardian (for example, because someone object to the guardianship or your appointment or if you decide to withdraw your petition to be appointed), you will be individually responsible for the payment of our fees and you may also be individually responsible for payment of the fees incurred by the court-appointed attorney, depending on the court's decision.

Optional: If persons outside your firm might be hired:

Sometimes it is necessary to hire other persons to provide services for you, such as accounting or appraisal firms. Their work may be protected from disclosure to third parties to a greater extent 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 Policies Concerning Client Files

You agree that we have the right to destroy the client file we create for you [*NUMBER*] years after we cease to actively represent you (*i.e.*, after we last perform legal services for you). Your "client file" consists of all paper and electronic copies of the guardianship file (which is also generally available from the court), documents sent to us by you or third parties (such as deeds and statements from financial institutions), correspondence and other written communications between us and others that pertain to the estate. You agree that all other pertinent materials (such as our notes and internal memoranda) are proprietary to us and not part of your client file.

Before destroying your client file, we will attempt to contact you to make arrangements to deliver the file contents to you. If we are unable to contact you at the most recent address contained in our file, then, subject to applicable law, we may destroy your file without further notice. It will be your responsibility to notify us of any change in your address and other contact information.

[Option where co-guardians are acting]

Following the conclusion or termination of our representation of you, if one or both of you request your client file or any original documents in our possession and you are unable to agree on which of you is entitled to the file, we may petition the court to make that determination, and you agree to be responsible for the costs of our doing that. If you agree that your file or any such original documents will be sent to one of you (or that party's legal counsel) and copies will be sent to the [*OTHER/OTHERS*] (or the [*OTHER'S/OTHERS*'] legal counsel), then you agree to reimburse us for the reasonable costs of preparing those copies and delivering them.

Termination of Engagement

You may terminate this engagement at any time by notice in writing to us. If we receive notice of termination from you, we will promptly cease providing any service to you, subject to court approval of our withdrawal as may be necessary. You will be responsible for paying for our services rendered up to the time we receive such notice and for additional reasonable services that we provide after that in connection with the transfer of responsibility for the matters to other counsel.

We may terminate this engagement by giving you written notice. If we send you notice of termination, you will be responsible for paying for our services rendered up to the time we terminate our engagement, and for reasonable services that we provide to transfer responsibility for the matter to your new counsel. However, whether you terminate or we terminate the representation, if we represent you in court proceedings and prior court approval is needed in order for us to cease rendering legal services, we will continue to render legal services to you until such time as the court determines that we may cease rendering services.

Conclusion of Representation

After the guardianship is closed and you are discharged as the Guardian, our engagement will be concluded. We will be happy to provide additional or continuing services. But unless arrangements are made for such services and agreed upon in writing, we will have no further responsibility to you or to the estate with any future or ongoing legal issues nor will we have a duty to notify you of changes in the laws.

If you have any questions about anything discussed in this letter, please let us know. In addition, you should feel free to consult with another lawyer about the effect of signing this letter.

If you approve this arrangement, please sign the approval copy of this letter and return it in the envelope provided.

We welcome and look forward to serving you.

Yours very truly,

[*NAME OF ATTORNEY IN CHARGE*]

[I/WE] have reviewed, understand, and agree to the provisions set out in the representation letter referred to above, including those provisions dealing with [*CONFLICT DISCLOSURE AND*] confidentiality of communications. [I/WE] further agree to the provisions in this letter regarding disclosures to the court or others as under the circumstances herein. Further [I/WE] acknowledge receiving and reviewing the informational material provided with this letter, including your fee

and billing information. At this time, [I/WE] wish to use your services to go forward with the guardianship petition and if [I AM/WE ARE] appointed as Guardian[s], with the guardianship.

Dated: _____

(Client 1)

(Client 2)

CHAPTER 7. PROBATE LITIGATION

Introduction

These forms illustrate specific issues that should be addressed when the lawyer is about to undertake the representation of a beneficiary or fiduciary in probate litigation. The first letter is for use when one or more beneficiaries will be represented. The second is for use when a fiduciary (e.g., an executor, administrator, or trustee) will be represented in connection with litigation involving an estate or trust).

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

References to the ACTEC Commentaries (Fifth Edition 2016):

Each page number below refers to the first page of the *ACTEC Commentaries* for the subject in question.

- General Principles (re Scope of Representation), p. 36
- Representation of Client in Fiduciary, Not Individual, Capacity, p. 39
- General and Individual Representation Distinguished, p. 39
- Advising Fiduciary Regarding Administration, p. 62
- Termination of Representation, p. 63
- Basis of Fees for Trusts and Estates Services, p. 66
- Representation of Fiduciary in Representative and Individual Capacities, p. 107
- Special Rules in Litigation and Other Court Proceedings, p. 175

Supplemental Checklist for Probate Litigation

(Refer also to the General Checklist on pages 4 through 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) The lawyer must consider carefully the fundamental differences between representing a beneficiary and representing a fiduciary in probate litigation and make 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.
- c) When beneficiaries are represented, what do the clients expect the "style" of the representation to be (e.g., desire to try to preserve family relationships to the extent possible versus a desire to wage all-out war, "no matter the cost")?
- d) If one or more fiduciaries are represented do they realize that they (a) cannot wage an all-out war against the beneficiaries, (b) have to be fair and impartial to all beneficiaries, and (c) may still have to defend the Will or Trust?
- e) If appropriate, describe conflicts of interest that may 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 that person's individual or representative capacity?
- b) Is the client a beneficiary (but not a fiduciary) of an estate or trust in the matter?
- c) If the client is a fiduciary and a beneficiary and the lawyer determines that he or she is able (under applicable law and rules of practice) to represent the client in both capacities explain the consequences of the dual representation.
- d) If and when an actual conflict arises, it is imperative that another letter be sent to the clients informing them that an actual conflict has arisen and who will be represented going forward. See Chapter 9.

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 the Representation of One or More
Beneficiaries in Litigation Matters***
(Sample in Word)

[Date]

[Name(s) and Address(es)]

Subject: Representation of Beneficiary in Litigation Matter

Dear [Client(s)]:

Thank you for asking that our firm, [NAME OF FIRM], represent you as a beneficiary in connection with [*DESCRIBE LITIGATION*] (the “Litigation”) involving the [*IDENTIFY ESTATE, TRUST, ETC.*]. This will confirm the terms of our agreement to represent you in that capacity. The legal services to be rendered consist of the following: [*DESCRIBE SERVICES TO BE RENDERED*]. Should we agree to represent you in another matter involving the [*ESTATE, TRUST, ETC.*], the terms of this letter agreement shall govern such additional or future representation unless we enter into a different written agreement with respect to that matter.

Fees for Legal Services. We will bill you for our legal services and costs in the following manner: [*DESCRIBE ARRANGEMENTS PERTAINING TO FEES, COSTS, RETAINERS, BILLING, ETC.*]

[IF REPRESENTING MORE THAN ONE CLIENT IN THE MATTER]

Waiver of Potential Conflicts of Interest. Our joint representation of [*NAMES OF CLIENTS*] (the “Clients”) in the Litigation is undertaken on the understanding that neither [*NONE*] of the Clients now perceives any actual conflict of interest in such joint representation. However, since you may not always perceive matters in the same way and because your interests may vary, it is possible that a conflict of interest now exists or may arise. Examples of such potential conflicts of interest include, but are not limited to, the following:

- 1) One or more of the Clients may differ on litigation strategy.
- 2) One or more of the Clients could, at some point, seek contribution or indemnity from one of the other Clients for any claims arising out of the Litigation. We will not advise or represent any of the Clients in connection with any claim for contribution or indemnity that Client may have against any of the other Clients.
- 3) One or more of the Clients could be the subject of claims, or may wish to assert claims, arising out of the subject matter of the Litigation, including claims against one another. Of course we could not represent [*EITHER/ANY*] of you in that regard.

The law is complex, especially as applied to actual facts and circumstances, and the factual circumstances also may be complicated. Therefore, as a practical matter it is not possible to anticipate and describe, or to advise each of you about, all potential conflicts of interest between or among you, about the pros and cons of any particular item from the point of view of each of you, or of the adverse effects of those conflicts upon our representation of any one or more of you. *[NOTE THAT IN SOME JURISDICTIONS IT MAY BE NECESSARY TO PROVIDE EXAMPLES OF POTENTIAL CONFLICTS.]* Although joint representation may result in tactical advantage, convenience, efficiency or reduced legal expense, joint representation also has the following disadvantages that you must acknowledge and accept as a condition of our engagement:

- 1) Joint representation may result in less aggressive assertion or protection of one Client's individual or separate interests than if we were to represent only that Client; we will provide a united front and not necessarily make every argument that we would make if we represented only one Client.
- 2) Joint representation has the further disadvantage that no attorney-client privilege would apply to communications between or among the Clients or with us in any dispute between or among the Clients or by any of the Clients with us. In other words, we cannot keep confidential from one of the Clients any communication with another one of the Clients in the course of the joint representation, and we could be compelled to testify concerning any such communication if a dispute *[BETWEEN/AMONG]* the Clients develops. The Clients should also know that communications which occur during the course of the joint representation will lose their privileged character if they should be offered in a future proceeding between one Client and another.
- 3) When we communicate with the Clients, whether in the course of the Litigation in order to obtain instruction, to report or otherwise, or for the purpose of discussing the pros and cons of any particular item or issue, we shall be entitled to rely on communications with fewer than all of the Clients. For this reason and possibly others, joint representation may have the disadvantage of communication that is less complete or effective than if we represented only one Client.
- 4) The Clients should not assume that we will advise each Client of the substance of every communication received by us from any one of the Clients.

If you sign this letter, you waive the potential conflict of interest arising from such joint representation and acknowledge that, if any actual dispute arises between or among the Clients concerning the subject of the joint representation, absent further consent from each of the Clients, we may be required to withdraw as counsel to one or more or all of the Clients. If we withdraw, a Client who then is required to or does engage independent counsel may incur legal costs (e.g., for new counsel to become familiar with the matter) that would be avoided by separate representation

throughout the matter. We will notify you in such an event that we intend either to withdraw completely from the representation of any Client in the Litigation or continue as counsel for one or more of the Clients.

At present, we would seek to continue to represent one or more of the Clients to the extent we determine that we could appropriately do so, notwithstanding any adversity between their interests and the interests of the Clients. Accordingly, your signature below constitutes your consent to our present and continued future representation of the Clients, and each Client agrees not to assert any conflict of interest or seek to disqualify us from representing one or more of the Clients now or in the future, despite any adversity between the interests of the Clients that may arise. Nonetheless, notwithstanding your consent hereto, depending on the circumstances at the time, we may be required to withdraw or we may be disqualified from representing any of the Clients in the event of a dispute between or among the Clients.

Each of you should feel free to consult independent counsel at any time concerning matters which are the subject of the joint representation, including whether or not to sign this engagement letter by which you will be providing this waiver and consent.

Attorney-Client Communications. When we communicate between lawyer and client in a manner intended to be confidential as between us, our legal advice to you is protected from disclosure to third parties by the attorney-client privilege. Generally, communications made via fax, computer transmission or cellular phone are not as secure from inadvertent disclosure to others as other forms of communication. You acknowledge that by furnishing us with an e-mail address or cell phone or fax number, you authorize us to communicate with you using this mode of communication notwithstanding the inherent confidentiality risks.

Please keep in mind that if someone else whom we do not represent (such as a family member of yours or financial planner) is included in a meeting or phone call or is copied on correspondence, then the attorney-client privilege may be lost as to things disclosed in that meeting or correspondence. Similarly, if you choose to communicate with us or authorize us to communicate with you using an e-mail address or fax machine to which others have access, the attorney-client privilege may be lost as well. As a result, you or the third party may be forced to disclose the content of that communication in a Court of law or otherwise in the context of litigation. Please keep this in mind when asking us to share information with third parties or when you share information with (or grant access to) others who are not part of the attorney-client relationship.

Our Policies Concerning Client Files. You agree that we have the right to destroy the client file we create for you [NUMBER] years after we cease to represent you (i.e., after we last perform legal services for you). Your “client file” consists of all papers and documents and electronic files and versions of papers and documents, including without limitation, all pleadings, agreements, correspondence, emails, unsigned drafts of any documents, and documents sent to us by you or

third parties (such as documents we may receive in discovery). You agree that all other pertinent materials (such as our notes and internal memoranda) are proprietary to us and not part of your client file. You understand and acknowledge that if you have not requested the client file in writing prior to the expiration of the time period set forth above, we have the right to destroy the client file without advance or further notice to you.

[IF REPRESENTING MORE THAN ONE CLIENT IN THIS MATTER.] Following the conclusion (or termination) of our representation of you, if one or both of you request your client file or any original documents in our possession and you are unable to agree on which of you is entitled to these things, we may petition the Court to make that determination. If you agree that your client file or any such original documents will be sent to one of you (or that party's legal counsel) and copies will be sent to the [OTHER/OTHERS] (or the [OTHER'S/OTHERS'] legal counsel), then you agree to reimburse us for the reasonable costs of preparing those copies and delivering them.

No Warranties. As you know, litigation is by its nature unpredictable. It is not possible to warrant a successful result or represent that a particular result can be obtained within a given time framework. We appreciate your awareness of and patience with the pitfalls of

litigation. You acknowledge that we have not made any representations, promises, warranties or guarantees to you, express or implied, regarding the outcome of your matter.

Conclusion of Representation. After the [SUBJECT MATTER OF THE ENGAGEMENT] has been completed, the engagement of this firm will be concluded unless arrangements for a continuing representation are made. We will be happy to provide additional or continuing services. But unless arrangements are made for such services and agreed upon in writing, we will have no further responsibility to any of you in connection with any future or ongoing legal issues nor will we have a duty to notify you of changes in the laws. Should we mutually agree to continue to represent you on other matters, the terms of this Agreement shall apply to all such matters unless we obtain a new engagement agreement with you for that purpose.

[OPTION for Voluntary Termination]

You may terminate our representation of you at any time by providing us with written notice of the termination. Upon our receipt of this notice, we will promptly cease providing services to you. Similarly, we may terminate our representation of you at any time by providing you with written notices of the termination. Upon your receipt of this notice, we will promptly cease providing services. However, whether you terminate or we terminate the representation, if we represent you in Court proceedings and prior Court approval is needed in order for us to cease rendering legal services, we will continue to render legal services to you until such time as the Court determines that we may cease rendering services. You will pay for our services rendered to you and costs incurred on your behalf until the cessation of legal services and for any services we must render

and costs we must incur thereafter to transfer responsibility for legal affairs we handle to your new counsel.

If you consent to our representation on these terms, please sign and return the enclosed copy of this letter. If you have any questions about this letter, please let me know. Feel free to consult another lawyer about this letter before signing it.

Sincerely,

[*NAME OF ATTORNEY IN CHARGE*]

CONSENT

[*I HAVE/EACH OF US HAS*] read the foregoing letter and understand[s] its contents. [*I/WE*] consent to [*NAME OF FIRM*]'s representation of [*ME/BOTH OF US*] on the terms and conditions set forth in it.

Signed: _____, 20____
_____ (Client 1)

Signed: _____, 20____
_____ (Client 2)

***Form of an Engagement Letter for the Representation of One or More
Fiduciaries in Litigation Matters***

(Sample in Word)

[Date]

[Name(s) and Address(es)]

Subject: Representation of Fiduciary in Litigation Matter

Dear [Client(s)]:

Thank you for asking that our firm, [*NAME OF FIRM*], represent you in your fiduciary capacity as [*TYPE OF FIDUCIARY*] in connection with [*DESCRIBE LITIGATION*] (the “Litigation”) involving the [*IDENTIFY ESTATE, TRUST, ETC.*]. This will confirm the terms of our agreement to represent you in that capacity. The legal services to be rendered consist of the following: [*DESCRIBE SERVICES TO BE RENDERED*]. Should we agree to represent you in another matter in your capacity as [*TYPE OF FIDUCIARY*] involving [*IDENTIFY ESTATE, TRUST, ETC.*], the terms of this letter agreement shall govern such additional or future representation unless we enter into a different written agreement with respect to that matter.

Fees for Legal Services. We will bill you, in your capacity as [*TYPE OF FIDUCIARY*], for our legal services and costs in the following manner: [*DESCRIBE ARRANGEMENTS PERTAINING TO FEES, COSTS, RETAINERS, BILLING, ETC. BE CLEAR WHO, E.G., THE TRUST OR ESTATE OR THE CLIENT PERSONALLY, WILL BE RESPONSIBLE FOR THE FEES. IF THERE IS A LEGAL IMPEDIMENT TO THE CLIENT PAYING FEES WITHOUT PRIOR COURT APPROVAL, BE SURE TO INDICATE THAT IN THE ENGAGEMENT AGREEMENT. IT IS ADVISABLE TO SEND INFORMATIONAL “BILLS” TO THE CLIENT TO KEEP THE CLIENT APPRISED OF THE FEES INCURRED, EVEN IF THE CLIENT MAY NOT PAY THE BILLS UNTIL A COURT ORDER PERMITS IT.*].

[IF REPRESENTING MORE THAN ONE FIDUCIARY IN THE MATTER]

Waiver of Potential Conflicts of Interest. Our joint representation of [*NAMES OF CLIENTS*] (“the Clients”) in the Litigation is undertaken on the understanding that neither [*NONE*] of the Clients now perceives any actual conflict of interest in such joint representation. However, since you may not always perceive matters in the same way and because your interests may vary, it is possible that a conflict of interest now exists or may arise. Examples of such potential conflicts of interest include, but are not limited to, the following:

- 1) One or more of the Clients may differ on litigation strategy.
- 2) One or more of the Clients could, at some point, seek contribution or indemnity from one

of the other Clients for any claims arising out of the Litigation. We will not advise or represent any of the Clients in connection with any claim for contribution or indemnity that Client may have against any of the other Clients.

- 3) One or more of the Clients could be the subject of claims, or may wish to assert claims, arising out of the subject matter of the Litigation, including claims against one another. Of course we could not represent [*EITHER/ANY*] of you in that regard.

The law is complex, especially as applied to actual facts and circumstances, and the factual circumstances also may be complicated. Therefore, as a practical matter it is not possible to anticipate and describe, or to advise each of you about, all potential conflicts of interest between or among you, about the pros and cons of any particular item from the point of view of each of you, or of the adverse effects of those conflicts upon our representation of any one or more of you. [*Note that in some jurisdictions it may be necessary to provide examples of potential conflicts.*] Although joint representation may result in tactical advantage, convenience, efficiency or reduced legal expense, joint representation also has the following disadvantages that you must acknowledge and accept as a condition of our engagement:

- 1) Joint representation may result in less aggressive assertion or protection of one Client's individual or separate interests than if we were to represent only that Client; we will provide a united front and not necessarily make every argument that we would make if we represented only one Client.
- 2) Joint representation has the further disadvantage that no attorney-client privilege would apply to communications between or among the Clients or with us in any dispute between or among the Clients or by any of the Clients with us. In other words, we cannot keep confidential from one of the Clients any communication with another one of the Clients in the course of the joint representation, and we could be compelled to testify concerning any such communication if a dispute [*BETWEEN/AMONG*] the Clients develops. The Clients should also know that communications which occur during the course of the joint representation will lose their privileged character if they should be offered in a future proceeding between one Client and another.
- 3) When we communicate with the Clients, whether in the course of the Litigation in order to obtain instruction, to report or otherwise, or for the purpose of discussing the pros and cons of any particular item or issue, we shall be entitled to rely on communication with fewer than all of the Clients. For this reason and possibly others, joint representation may have the disadvantage of communication that is less complete or effective than if we represented only one Client.

- 4) The Clients should not assume that we will advise each Client of the substance of every communication received by us from any one of the Clients.

If you sign this letter, you waive the potential conflict of interest arising from such joint representation and acknowledge that, if any actual dispute arises between or among the Clients concerning the subject of the joint representation, absent further consent from each of the Clients, we may be required to withdraw as counsel to one or more or all of the Clients. If we withdraw, a Client who then is required to or does engage independent counsel may incur legal costs (e.g., for new counsel to become familiar with the matter) that would be avoided by separate representation throughout the matter. We will notify you in such an event that we intend either to withdraw completely from the representation of any Client in the Litigation or continue as counsel for one or more of the Clients.

At present, we would seek to continue to represent one or more of the Clients to the extent we determine that we could appropriately do so, notwithstanding any adversity between their interests and the interests of the Clients. Accordingly, your signature below constitutes your consent to our present and continued future representation of the Clients, and each Client agrees not to assert any conflict of interest or seek to disqualify us from representing one or more of the Clients now or in the future, despite any adversity between the interests of the Clients that may arise. Nonetheless, notwithstanding your consent hereto, depending on the circumstances at the time, we may be required to withdraw or we may be disqualified from representing any of the Clients in the event of a dispute between or among the Clients.

Each of you should feel free to consult independent counsel at any time concerning matters which are the subject of the joint representation, including whether or not to sign this engagement letter by which you will be providing this waiver and consent.

Attorney-Client Communications. When we communicate between lawyer and client in a manner intended to be confidential as between us, our legal advice to you is protected from disclosure to third parties by the attorney-client privilege. Generally, communications made via fax, computer transmission or cellular phone are not as secure from inadvertent disclosure to others as other forms of communication. You acknowledge that by furnishing us with an e-mail address or cell phone or fax number, you authorize us to communicate with you using this mode of communication notwithstanding the inherent confidentiality risks.

Please keep in mind that if someone else whom we do not represent (such as a family member of yours or financial planner) is included in a meeting or phone call or is copied on correspondence, then the attorney-client privilege may be lost as to things disclosed in that meeting or correspondence. Similarly, if you choose to communicate with us or authorize us to communicate with you using an e-mail address or fax machine to which others have access, the attorney-client privilege may be lost as well. As a result, you or the third party may be forced to disclose the

content of that communication in a Court of law or otherwise in the context of litigation. Please keep this in mind when asking us to share information with third parties or when you share information with (or grant access to) others who are not part of the attorney-client relationship.

[IF YOU ARE IN A JURISDICTION IN WHICH THE “OFFICE” OF THE FIDUCIARY IS THE HOLDER OF THE ATTORNEY-CLIENT PRIVILEGE:] Please also keep in mind that the courts of this State hold that the “holder” of the attorney-client privilege is the “office” of the *[TRUST/ESTATE/ETC.]* This means that if you are succeeded by a new or different fiduciary, that person will also succeed to the attorney-client privilege that exists between us. In other words, your successor would be entitled to require you or us to disclose to the successor all of the attorney-client communications between us. You can avoid this only by paying a different lawyer with your own personal funds for separate legal advice. As long as we are being paid from the *[TRUST/ESTATE/ETC.]*, this caveat to the protection of our communications exists.

Our Policies Concerning Client Files. You agree that we have the right to destroy the client file we create for you *[NUMBER]* years after we cease to represent you (i.e., after we last perform legal services for you). Your “client file” consists of all papers and documents and electronic files and versions of papers and documents, including without limitation, all pleadings, agreements, correspondence, emails, unsigned drafts of any documents, and documents sent to us by you or third parties (such as documents we may receive in discovery). You agree that all other pertinent materials (such as our notes and internal memoranda) are proprietary to us and not part of your client file. You understand and acknowledge that if you have not requested the client file in writing prior to the expiration of the time period set forth above, we have the right to destroy the client file without advance or further notice to you.

[IF REPRESENTING MORE THAN ONE CLIENT IN THIS MATTER.] Following the conclusion (or termination) of our representation of you, if one or both of you request your client file or any original documents in our possession and you are unable to agree on which of you is entitled to these things, we may petition the Court to make that determination. If you agree that your client file or any such original documents will be sent to one of you (or that party’s legal counsel) and copies will be sent to the *[OTHER/OTHERS]* (or the *[OTHER’S/OTHERS’]* legal counsel), then you agree to reimburse us for the reasonable costs of preparing those copies and delivering them.

No Warranties. As you know, litigation is by its nature unpredictable. It is not possible to warrant a successful result or represent that a particular result can be obtained within a given time framework. We appreciate your awareness of and patience with the pitfalls of litigation. You acknowledge that we have not made any representations, promises, warranties or guarantees to you, express or implied, regarding the outcome of your matter.

Conclusion of Representation. After the *[SUBJECT MATTER OF THE ENGAGEMENT]* has been

completed, the engagement of this firm will be concluded unless arrangements for a continuing representation are made. We will be happy to provide additional or continuing services. But unless arrangements for such services 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 nor will we have a duty to notify you of changes in the laws. Should we mutually agree to continue to represent you on other matters, the terms of this Agreement shall apply to all such matters unless we obtain a new engagement agreement with you for that purpose.

[OPTION for Voluntary Termination]

You may terminate our representation of you at any time by providing us with written notice of the termination. Upon our receipt of this notice, we will promptly cease providing services to you. Similarly, we may terminate our representation of you at any time by providing you with written notices of the termination. Upon your receipt of this notice, we will promptly cease providing services. However, whether you terminate or we terminate the representation, if we represent you in Court proceedings and prior Court approval is needed in order for us to cease rendering legal services, we will continue to render legal services to you until such time as the Court determines that we may cease rendering services. You will pay for our services rendered to you and costs incurred on your behalf until the cessation of legal services and for any services we must render and costs we must incur thereafter to transfer responsibility for legal affairs we handle to your new counsel.

If you consent to our representation on these terms, please sign and return the enclosed copy of this letter. If you have any questions about this letter, please let me know. Feel free to consult another lawyer about this letter before signing it.

Sincerely,

[NAME OF ATTORNEY IN CHARGE]

CONSENT

[I HAVE/EACH OF US HAS] read the foregoing letter and understand[s] its contents. [I/WE] consent to [NAME OF FIRM]'s representation of [ME/BOTH OF US] on the terms and conditions set forth in it.

Signed: _____, 20____
_____ (Client 1)

Signed: _____, 20____
_____ (Client 2)

CHAPTER 8. DEALING WITH THE DIMINISHED CAPACITY OR DEATH OF A CLIENT NOT REPRESENTED IN A FIDUCIARY CAPACITY

Introduction

With longer life expectancies, it is increasingly common for clients to experience diminished capacity due to physical or mental disabilities. It is also possible that a client will pass away before the representation is terminated.

The optional additions to the engagement letters contained in this chapter point out the importance of planning for incapacity and death and the things the law firm is authorized to do if the client suffers from diminished capacity or dies during the course of the representation. These optional additions do *not* apply to engagement letters pertaining to the representation of fiduciaries.

References to the ACTEC Commentaries (Fifth Edition 2016):

Each page number below refers to the first page of the *ACTEC Commentaries* for the subject in question.

Facilitating Informed Judgment by Clients, p. 37

Communications During Active Phase of Representation, p. 62

Protection Against Reasonably Certain Death or Substantial Bodily Harm, p. 80

Disclosures to Client's Agent, p. 80

Client Who Apparently Has Diminished Capacity (re Duty of Confidentiality), p. 83

Client with Diminished Capacity (Cases), p. 91

Client with Diminished Capacity (re Conflict of Interest), p. 108

MRPC 1.14: Client with Diminished Capacity and Annotations, p. 159

Mandatory Withdrawal/Prohibited Representation, p. 174

Other Events of Termination, p. 176

Supplemental Checklist for Dealing with Diminished Capacity or Death

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

1. A client who has diminished capacity may or may not 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 full mental capacity for as long as that is possible.
2. Pre-need planning for diminished capacity and death should be done for all estate planning clients, including Wills, the possible use and full funding of revocable trusts, durable powers of attorney for asset management and health care powers of attorney and directives.
3. Suggest pre-need planning for clients represented in litigation matters, in connection with the formation of a legal entity or being counseled as beneficiaries in non-litigated matters.
4. A lawyer may wish to ascertain who the lawyer is permitted to represent in the event of a client's incapacity and following the client's death.

*Optional Addition to Engagement Letters Dealing with the Potential for
Diminished Capacity or Death of a Client*
(Sample in Word)

[ENTITY FORMATION AND LITIGATION ENGAGEMENTS]¹

Effect of Disability or Death

If [YOU BECOME/ ANY OF YOU BECOMES] unable to make adequately-considered decisions regarding the [organization of (NEW ENTITY)/Litigation], the ethics rules state that we may continue a normal attorney-client relationship as long as possible. By signing a durable power of attorney, you can designate one or more other persons to make decisions for you about the [organization of (NEW ENTITY)/Litigation] and to sign documents on your behalf.

If you authorize others to act for you, and if their authority is broad enough to allow them to instruct us with regard to the [organization of (NEW ENTITY)/Litigation], we can continue to render legal services on your behalf by dealing with your designated agent, and we can rely on instructions from the agent. Notwithstanding our duty of confidentiality to you, you further authorize us to communicate with the 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.

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, are entitled to act in your place and have the right to retain legal counsel of their choosing. We may, in our discretion, render legal services on behalf of your estate by dealing with those personal representatives and their legal counsel (if we do not represent them) and rely on instructions from those personal representatives or their legal counsel. In doing so we may, in our discretion, communicate with them and disclose information they need to make informed decisions on behalf of your estate.

[ESTATE PLANNING ENGAGEMENTS]

Effect of Disability or Death.

As part of our estate planning services we will discuss with you the steps you should take to protect your interests and to see to it that your wishes are carried out if your capacity to make either financial or health care decisions diminishes. 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) the use of a revocable trust where your successor Trustee

¹ May also be adapted for use when law firm represents a beneficiary in a non-litigated matter.

will take over the management of the trust assets if you become unable to manage them. One or more of those tools may eliminate the need for a guardian or conservator to be appointed in a court proceeding if you become unable to see to your own financial or personal needs. A further benefit is that this helps to keep your affairs private. You may also nominate someone to act as the guardian or conservator of you and your property in case the appointment of a guardian or conservator is ever required.

If concerns develop regarding your capacity during our representation of you, we may continue to represent you, in our discretion, and protect your interests consistent with our standards of practice and our ethical responsibilities. To the extent we can and choose to 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 wishes previously expressed to us.

If concerns develop about your capacity and those concerns are brought to our attention, by signing this engagement letter, you authorize us to do the following things notwithstanding our duty of confidentiality to you or the fact that our representation of you regarding your estate plan may in fact have concluded: (1) to communicate with your immediate family, your physicians, your accountant and your other advisors and to disclose to them such pertinent, but limited, confidential information as we may determine to be reasonably appropriate to act in your best interests and carry out your wishes previously expressed to us, (which may include information that is protected by the attorney-client privilege); (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; and (3) if necessary, to petition the court for the appointment of a fiduciary to protect you and your assets.¹² After our representation concludes, this authority continues until you notify us in writing that it is withdrawn.

By the same token, after your death the persons you have nominated to serve as the personal representatives of your estate and the successor Trustees of any revocable trust you may choose to establish are free to retain legal counsel of their choices. By signing this letter, you authorize us to represent any of those individuals in their fiduciary capacities, if they choose to retain us and we agree to represent them.

¹ Before disclosure of confidential/privileged information, the attorney should attempt to make direct contact with the client or otherwise verify the facts that give rise to the disclosure. The attorney should also consider whether renewed involvement in client affairs constitutes continued representation and the attorney's ability to undertake such representation.

² Some states do not allow a lawyer to petition the court to have a fiduciary appointed for his or her client if the client objects (e.g., California as of the publication of this edition of the Guide).

CHAPTER 9. TERMINATION OF REPRESENTATION

Introduction

This chapter illustrates issues that should be addressed when a lawyer withdraws from the representation of one or more clients. The first two letters pertain to the representation of multiple clients. In the first letter, the law firm withdraws from the representation of all clients when an actual conflict of interest arises. In the second letter, the law firm withdraws from the representation of some but not all clients when an actual conflict of interest arises. The third letter formally concludes the representation when all legal services requested have been performed (and no conflict of interest has arisen).

These forms should be adapted to fit each specific factual situation and applicable state law. There are a number of ethical issues that arise in each setting. These include pinpointing the time when an actual conflict of interest arises (and the law firm must withdraw), whether the firm may continue to represent some of the clients (if the firm so desires) and how to handle the withdrawal so that clients who are no longer represented are not unnecessarily harmed or prejudiced by the withdrawal.

References to the ACTEC Commentaries (Fifth Edition 2016):

Each page number below refers to the first page of the ACTEC *Commentaries* for the subject in question.

- General Principles (re Scope of Representation), p. 36
- Multiple Fiduciaries, p. 36
- Termination of Representation, p. 63
- Multiple Separate Clients, p. 84
- Confidences Imparted by One Joint Client, p. 84
- Disclosures to Multiple Clients, p. 102
- Consider Possible Presence and Impact of Any Conflicts of Interest, p. 103
- Representation of Fiduciary in Representative and Individual Capacities, p. 107
- Mandatory Withdrawal/Prohibited Representation, p. 174
- Permissive Withdrawal, p. 175
- Special Rules in Litigation and Other Court Proceedings, p. 175
- Duties Upon Withdrawal, p. 176

Supplemental Checklist for the Termination of Representation

(Refer also to the General Checklist on pages 4 through 8.)

1. IDENTIFY THE IMPACT OF THE WITHDRAWAL ON THE CLIENTS.

Generally, a lawyer may withdraw from a representation if the withdrawal can be effected without a material adverse effect on the client. If there is a material adverse effect on the client, applicable state law and ethics guidance should be consulted for permissible reasons for the withdrawal, such as the client (a) persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent; (b) has used the lawyer's services to perpetrate a crime or fraud, (c) insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement; or (d) fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled. The lawyer may also withdraw if the representation will result in an unforeseeable financial burden on the lawyer or the representation has been rendered unreasonably difficult by the client.

2. IDENTIFY THE INFORMATION THAT MUST BE DISCLOSED AND THAT IS PERMITTED TO BE DISCLOSED.

The lawyer should consult applicable state law and ethics guidance to determine what information must be, or is permitted to be, disclosed by the withdrawing lawyer to the court, other clients who are represented in the same matter or other parties.

3. IDENTIFY COURT REQUIREMENTS AND OBTAIN COURT APPROVAL.

The Court has the right to require a lawyer to continue in a representation. A lawyer should consult state procedural rules to make sure that the lawyer has provided the necessary information and disclosures to the Court, other clients represented in the same matter and other parties when requesting approval to withdraw or giving notice of a withdrawal.

4. DUTIES TO CLIENT UPON WITHDRAWAL.

A lawyer should consult applicable state law and ethics guidance to determine the extent of the lawyer's duties to a former client. Generally, a lawyer must take "reasonably practicable" steps to protect the client's interests. This includes giving reasonable notice to the client, allowing time for the employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fees or expenses that has not been earned or incurred.

***Form of a Letter Withdrawing from Representation of All Clients When an
Actual Conflict of Interest Arises***
(Sample in Word)

[SEND THE LETTER BY A METHOD REQUIRING A SIGNATURE TO PROVE RECEIPT]

[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 [*BOTH/ALL*] of you simultaneously in this matter in which you have a common interest. When we began this representation, we explained to [*BOTH/ALL*] of you that if, during the course of the representation, an actual (as opposed to potential) conflict of interest should arise [*BETWEEN/AMONG*] you with respect to this matter that leads us to believe that our representation of [*EITHER/ANY*] one of you would be adversely affected by our continued representation [*BOTH/ALL*] of you, we would withdraw from the representation of [*BOTH/ALL*] of you in this matter; and [*EACH/ALL*] 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 an actual conflict that prevents us from further representing or advising [*BOTH/ALL*] of you in this matter. Accordingly, we hereby withdraw immediately from our representation of [*BOTH/ALL*] of you in this matter and our engagement is terminated. It will now be necessary for each of you to obtain separate counsel.

[ALTERNATIVE 2: *Silent Withdrawal*]

We have become aware of circumstances that we believe represent an actual conflict that prevents us from further representing or advising [*BOTH/ALL*] of you in this matter. Accordingly, we hereby withdraw immediately from our representation of [*BOTH/ALL*] of you in this matter and our engagement is terminated. It will now be necessary for each of you to obtain separate counsel.

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

[ALSO CONSIDER REMINDING CLIENTS OF RECORDS RETENTION POLICY DESCRIBED IN THE ENGAGEMENT LETTER AND THE PROCEDURE FOR OBTAINING THE FILE.]

Sincerely,

[NAME OF ATTORNEY IN CHARGE]

***Form of a Letter Withdrawing from Representation of Certain Client(s) and
Continuing Representation of Other Client(s) When an Actual Conflict of
Interest Arises***
(Sample in Word)

[SEND THE LETTER BY A METHOD REQUIRING A SIGNATURE TO PROVE RECEIPT]

[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 [*BOTH/ALL*] of you in the above-described 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*] for many years. We further advised the [*NUMBER*] of you that if, during the course of the representation, an actual conflict of interest should arise [*BETWEEN/AMONG*] you with respect to this matter that leads us to believe that our representation of [*EITHER/ANY*] of you would be adversely affected by our continued representation of [*BOTH/ALL*] of you, we would withdraw from the representation of [*CLIENT 2*], but would continue to represent [*CLIENT 1*]; and [*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 an actual conflict that prevents us from further representing or advising [*BOTH/ALL*] of you in this matter. Accordingly, we hereby withdraw immediately from our representation of, and terminate our engagement with, [*CLIENT 2*] in this matter but will continue to represent [*CLIENT 1*] in this matter. It will now be necessary for [*CLIENT 2*] to obtain separate counsel.

[ALTERNATIVE 2: *Silent Withdrawal*]

We have become aware of circumstances that we believe represent an actual conflict that prevents us from representing or advising [*BOTH/ALL*] of you in this matter. Accordingly, we hereby withdraw immediately from our representation of, and terminate our engagement with, [Client 2] in this matter but will continue to represent [*CLIENT 1*] in this matter. It will now be necessary for [*CLIENT 2*] to obtain separate counsel.

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

[ALSO CONSIDER REMINDING CLIENTS OF RECORDS RETENTION POLICY DESCRIBED IN THE ENGAGEMENT LETTER AND THE PROCEDURE FOR OBTAINING THE FILE.]

Sincerely,

[*NAME OF ATTORNEY IN CHARGE*]

***Form of a Letter Concluding Representation of Client(s) Once Services
Described in Engagement Letter Have Been Performed***
(Sample in Word)

[SEND THE LETTER BY A METHOD REQUIRING A SIGNATURE TO PROVE RECEIPT]

[Date]

[Name and Address of Client]

Re: Conclusion of Engagement

Dear [Client]:

On [date of engagement letter], you engaged us to perform the following legal services: [DESCRIPTION OF SERVICES]. Those services have been performed and our representation of you is therefore concluded. Among other things, this means that although we may choose to do so from time to time, we will have no responsibility to notify you of changes in the law or to remind you of filing or other deadlines.

[OPTION TO REMIND CLIENTS OF IMPORTANT THINGS REMAINING TO BE DONE].

It will be your responsibility to see to the completion of the following important tasks: [DESCRIBE TASKS SUCH AS FUNDING TRUSTS, CHANGING OWNERSHIP OF LIFE INSURANCE POLICIES AND BENEFICIARY DESIGNATIONS, ANNUAL FILINGS OF TAX RETURNS OR LEGAL ENTITY REPORTS, THE PREPARATION OF TRUST ACCOUNTINGS, ETC.] We will not assist you with these tasks (or others) unless you request us to do so and we agree to do so in writing.

We are pleased to have been of service to you. Please contact us if we may be of service in the future so that we may discuss another engagement (after our firm clears any potential conflicts of interest).

Sincerely,

[NAME OF ATTORNEY IN CHARGE]

CHAPTER 10. OPTIONAL ENGAGEMENT LETTER PROVISIONS

Introduction

This chapter includes optional provisions for engagement letters.

These provisions should be adapted to fit each specific factual situation and applicable state law. There may be also be ethical considerations that may need to be addressed.

References to the ACTEC Commentaries (Fifth Edition 2016):

Each page number below refers to the first page of the *ACTEC Commentaries* for the subject in question.

- Fees Paid by Person Other than Client, p. 67
- Rebates, Discounts, Commissions, Referral Fees, and Fee Splitting, p. 77
- Existing Client Asks Lawyer to Prepare Will or Trust for Another Person, p. 102
- Concurrent Conflicts of Interest Generally, p. 119
- Transactions with Client or Beneficiary, p. 136
- Payment of Compensation by Person Other than Client, p. 129
- Personal Interest Exception, p. 148

***Optional Engagement Letter Provision – Third Party Payment of Fees
Form of Paragraph to Add to Engagement Letter to Client When a Third Party
is Paying the Fees and Costs***

It is our understanding that _____ will pay for the legal services performed pursuant to this engagement, including costs. Since you are our client and ultimately responsible for the payment of the legal fees and costs, we will send all billing statements to you. If you would like us to send a copy of the billing statements to _____, we will require a written direction authorizing us to do so at the end of this letter. Even though _____ will be paying for the legal services and costs associated with this engagement, _____ will not be entitled to any confidential information concerning the engagement (other than such information as may be disclosed in your billing statements if you expressly authorize us to send copies to _____), and we will not follow any direction or instruction from _____ with respect to this engagement. Anything you discuss remains subject to our duty of confidentiality to you unless you authorize us to disclose such confidential information to _____. By your signature below, you consent to this arrangement and indicate whether you wish for copies of billing statements to be sent to _____.

*Form of Confirmation Letter to a Third Party Paying the Fees and Costs of a
Client of the Firm*

It is our understanding that you will pay for the legal services performed pursuant to our engagement with _____, including costs. Since _____ is our client and ultimately responsible for the payment of the legal fees and costs, you will need to obtain a copy of our billing statements in this matter from _____, unless _____ authorizes us in writing to send a copy to you. Even though you will pay for the legal services and costs associated with this engagement, you will not be entitled to any confidential information concerning the engagement, nor will we follow any direction or instruction from you with respect to this engagement. Anything _____ discusses with us is confidential and will not be disclosed to you unless _____ authorizes such disclosure. Anything you discuss with us regarding this matter, however, is not confidential and may be shared with our client unless otherwise agreed in advance by our client. By your signature below, you confirm that you agree to be responsible for paying for the legal fees and costs of _____ in this engagement with our firm and to abide by the terms of this letter by your signature below. You also acknowledge that this arrangement whereby you agree to pay for the legal fees and costs of _____ does not create an attorney-client relationship between you and the firm.

Note: If the third party paying the client's fees is also a client of the firm, additional considerations regarding potential conflicts of interest may apply and affect the terms of the letters above.