The Graduate Tax Program Presents:

15TH ANNUAL TAX LAWYERING WORKSHOP:
Truth and Transparency in Tax Law

<table>
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<tr>
<th>Date</th>
<th>Thursday, May 3, 2018</th>
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<tr>
<td>Time</td>
<td>8:30 a.m.–3:00 p.m.</td>
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<td>(Breakfast and lunch served.)</td>
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<tr>
<td>Location</td>
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<td>185 West Broadway</td>
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<td>New York, NY 10013</td>
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<td>RSVP</td>
<td><a href="http://www.nyls.edu/taxRSVP">www.nyls.edu/taxRSVP</a></td>
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<tr>
<td>CLE</td>
<td>5.5 credits in Ethics</td>
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<td>(NY transitional and nontransitional)</td>
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<tr>
<td>Contact</td>
<td><a href="mailto:ashley.oliver@nyls.edu">ashley.oliver@nyls.edu</a></td>
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<td>212.431.2147</td>
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<th>KEYNOTE</th>
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<tr>
<td>Tax Opinions on the Edge</td>
</tr>
<tr>
<td>Megan L. Brackney, Partner, Kostelanetz &amp; Fink, LLP</td>
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<table>
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<th>TOPICS</th>
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<tr>
<td>Truth and the Tax Lawyer: Criminal Sanctions Enforcing the Duty of Honesty in Federal Tax Practice</td>
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<td>Lawrence S. Feld, Adjunct Professor of Law, New York Law School (NYLS) and Member, Law Office of Lawrence S. Feld</td>
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<tr>
<td>Taking Positions Contrary to Regulations: Update on Deference and Disclosure</td>
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<tr>
<td>Alan I. Appel ’76, Distinguished Practitioner; Professor of Law; Director, International Tax Program; Director, Center for International Law; and Co-Director, Center for Business and Financial Law, NYLS</td>
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<tr>
<td>Ann F. Thomas, Otto L. Walter Distinguished Professor of Tax Law and Director, Graduate Tax Program, NYLS</td>
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<tr>
<td>Zhanna A. Ziering ’06, Member, Caplin &amp; Drysdale</td>
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<tr>
<td>ACTEC’s New Model Management Letters: Promoting Competent and Ethical Representation of Clients</td>
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<tr>
<td>Elizabeth Candido Petite ’10, LL.M. ’11, Associate, Lindabury, McCormick, Estabrook &amp; Cooper, P.C.</td>
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<tr>
<td>William P. LaPiana, Associate Dean, Academic Affairs and Student Engagement; Rita and Joseph Solomon Professor of Wills, Trusts, and Estates; and Director, Estate Planning Studies, NYLS</td>
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THE GRADUATE TAX PROGRAM AT NEW YORK LAW SCHOOL

15TH ANNUAL TAX LAWYERING WORKSHOP
(TAX 403)

THURSDAY, MAY 3, 2018
NEW YORK LAW SCHOOL
185 WEST BROADWAY
8:30 AM TO 3:00 PM
ROOM W300

TOPICS FOR 2018

TRUTH AND TRANSPARENCY IN TAX PRACTICE

______________________________

BREAKFAST AND REGISTRATION
8:30 a.m. to 9:00 a.m.

WELCOME
9:00 a.m. to 9:15 a.m.

______________________________

FIRST SESSION
KEYNOTE ADDRESS

9:15 a.m. to 10:30 a.m. - 1.5 Ethics CLE Credits

Tax Opinions on the Edge
Megan L. Brackney, Esq., Partner, Kostelanetz & Fink, LLP

10:30 a.m. to 10:45 a.m. - coffee break

______________________________

SECOND SESSION
WORKSHOP CLASS

10:45 a.m. to 12:00 p.m. = 1.5 Ethics CLE Credits

Truth and the Tax Lawyer: Criminal Sanctions Enforcing the Duty of Honesty in Federal Tax Practice
Lawrence S. Feld, Esq., Law Office of Lawrence S. Feld
Adjunct Professor, New York Law School
12:00 p.m. to 12:30 p.m. - informal lunch

THIRD SESSION

12:30 p.m. to 1:30 p.m. - 1 Ethics CLE Credit

Taking Positions Contrary to Regulations: Update on Deference and Disclosure
Ann F. Thomas, Otto L. Walter Distinguished Professor of Tax Law, Director, Graduate Tax Program, New York Law School

Zhanna A. Ziering, Esq., 2006, Member, Caplin & Drysdale

Comments:
Professor Alan I. Appel, Distinguished Practitioner Professor of Law; Director of International Tax Studies; Director, Center for International Law; and co-Director of Center for Business and Financial Law, New York Law School

1:30 p.m. to 1:45 p.m. - coffee break

FOURTH SESSION

1:45 p.m. to 3:00 p.m. - 1.5 Ethics CLE Credits

ACTEC’s New Model Engagement Letters – Promoting Competent and Ethical Representation of Clients

Elizabeth Candido Petite, Esq., 2010 and LL.M. in Taxation 2011, Associate, Lindabury, McCormick, Estabrook & Cooper, P.C.

William P. LaPiana, Associate Dean for Academic Affairs and Student Engagement; Rita and Joseph Solomon Professor of Wills, Trusts and Estates; and Director of Estate Planning Studies, New York Law School
CLE credits
New York Law School has been certified by the New York State Continuing Legal Education Board as an Accredited Provider of CLE programs. This program is transitional and has been approved for newly admitted attorneys within the first two years of admission to the Bar as well as for experienced attorneys. The entire Workshop is approved for five and one-half (5.5) CLE credit hours in ethics. Program materials will be available in advance through the Graduate Tax Program office; limited copies will be available at registration.

A continental breakfast and informal lunch will be provided. There will be no charge to attend this CLE program but registration in advance is required.
THE GRADUATE TAX PROGRAM AT NEW YORK LAW SCHOOL

ANNUAL TAX LAWYERING WORKSHOP 2018
(TAX 403)

THURSDAY, MAY 3, 2018
NEW YORK LAW SCHOOL
185 WEST BROADWAY
9:00 AM TO 3:00 PM
ROOM W300

CLE MATERIALS FOR KEYNOTE ADDRESS

9:15 to 10:30 am (1.5 Ethics CLE Credit)
Tax Opinions on the Edge
Megan Brackney, Esq., Kostelanetz & Fink, LLP

Materials: “Standards for Tax Advice and Related Civil and Criminal Penalties”
Standards for Tax Advice and Related Civil and Criminal Penalties

Presented by:

Megan L. Brackney
Kostelanetz & Fink LLP

New York Law School Tax Lawyering Program
May 3, 2018
Duties to the Tax System and to the Taxpayer

“Our self-assessment tax system can function effectively only if taxpayers file tax returns that are true, correct, and complete. A tax return is prepared based on a taxpayer’s representation of facts, and the taxpayer has the final responsibility for positions taken on the return. . . .”

“In addition to a duty to the taxpayer, a member has a duty to the tax system. However, it is well established that the taxpayer has no obligation to pay more taxes than are legally owed, and a member has a duty to the taxpayer to assist in achieving that result.”

-AICPA Statements on Standards for Tax Services, Statement No. 1, Tax Return Positions, Explanation
Tax Planning is Legitimate

“Over and over again, courts have said that there is nothing sinister in so arranging one’s affairs as to keep taxes as low as possible. Everybody does so, rich or poor, and all do right, for nobody owes any public duty to pay more than the law demands: taxes are enforced exactions, not voluntary contributions. To demand more in the name of morals is mere cant.”

*Commissioner v. Newman*, 159 F2d 848, 850-51 (2nd Cir. 1947) (Learned Hand dissenting)
Standards of Conduct

For Practitioners

• ABA Ethical Opinions
• AICPA Statements on Standards for Tax Services
• Circular 230
• Civil Penalty Standards
• Criminal Penalty Standards

For Taxpayers

• Civil Penalty Standards
• Criminal Penalty Standards
AICPA Statements on Standards for Tax Services

SSTS No. 1: Tax Return Positions
SSTS No. 2: Answers to Questions on Returns
SSTS No. 3: Certain Procedural Aspects
SSTS No. 4: Use of Estimates
SSTS No. 5: Departure from a Position Previously Concluded
SSTS No. 6: Knowledge of Error
SSTS No. 7: Form and Content of Advice to Taxpayers
## Circular 230

<table>
<thead>
<tr>
<th>Section</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>10.2</td>
<td>Definitions</td>
</tr>
<tr>
<td>10.20</td>
<td>Information to be furnished</td>
</tr>
<tr>
<td>10.21</td>
<td>Knowledge of a client’s omission</td>
</tr>
<tr>
<td>10.22</td>
<td>Diligence as to accuracy</td>
</tr>
<tr>
<td>10.29</td>
<td>Conflicting interests</td>
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<tr>
<td>10.34</td>
<td>Standards with respect to tax returns and other documents</td>
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<td>10.35</td>
<td>Competence</td>
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<tr>
<td>10.37</td>
<td>Requirements for written advice</td>
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<tr>
<td>10.51</td>
<td>Incompetence and disreputable conduct</td>
</tr>
</tbody>
</table>
Civil Penalties Applicable to Tax Advisors

IRC 6694: Understatement of taxpayer’s liability by tax return preparer
IRC 6695: Other penalties for return preparers
IRC 6695A: Penalties for incorrect appraisals
IRC 6700: Promoting abusive tax shelters, etc.
IRC 6701: Penalty for aiding and abetting understatement of tax liability
IRC 6707/6708: Failure to report or maintain list of reportable transactions
IRC 6713: Disclosure or use of information by preparers of returns
Who is a Tax Return Preparer?

IRC 7701(a)(36) and Treas. Reg. 301.7701-15(b)(2)

• The term “tax return preparer” means any person who prepares for compensation, or employs one or more people to prepare for compensation, any return of tax

• The regulations provide that someone who just gives written or oral advice on a tax issue can be a preparer if
  • The advice pertains to a “substantial portion” of a return;
  • The advice is given with respect to events which have occurred at the time the advice is rendered;
  • The advice is directly relevant to a determination of the existence, characterization or amount of an entry on a return; and
  • unless the time spent on the advice given after the events have occurred is less than 5 percent of the total time incurred by the person with respect to the position.
Who is a “tax return preparer” and Why does it matter?

- **Section 6694** subjects tax return preparers to penalties if positions taken on returns they prepared do not meet minimum standards.

- A “**tax return preparer**” is “any person who prepares for compensation, or who employs one or more persons to prepare for compensation, any return of tax imposed by this title [i.e., the Internal Revenue Code] or any claim for refund of tax imposed by this title…. [T]he preparation of a substantial portion of a return or claim for refund shall be treated as if it were the preparation of such return or claim for refund.” **Code § 7701(a)(36).**

- “**Person**” includes entities (such as Dechert, EY, and Berwind Corporation) as well as individuals; those entities, as well as their employees, can be “tax return preparers”.

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Difference Between a “Planner” and a “Preparer”

• A “Planner” renders advice about structuring a transaction before the transaction has occurred.

• A “Preparer” renders advice about reporting a transaction on a tax return after the transaction has occurred.

  • Time spent on advice that is given after events have occurred that represents less than 5 percent of the aggregate time spent giving advice on the position at issue is disregarded. Treas. Reg. 301.7701-15(b)(2).
“Signing” vs. “Nonsigning” Tax Return Preparer

• **“Signing tax return preparer”**: the individual tax return preparer who has primary responsibility for the overall substantive accuracy of the preparation of a return or refund claim.

• **“Nonsigning tax return preparer”**: any tax return preparer other than the signing tax return preparer, who prepares “all or a substantial portion” of a return or claim for refund with respect to events that have occurred at the time the advice is rendered (see previous slide).
  - Outside advisers often will be “nonsigning return preparers”.
  - If an individual provides tax advice on transactions or events and positions relating thereto, and less than 5% of the time is incurred after the relevant events have occurred, that individual is not treated as a tax return preparer with respect to that position.
  - Deal counsel can still be a “nonsigning return preparer” if advice continues after the transaction closes.
    - Determination is on an individual-by-individual basis, so even if a firm’s overall time is predominantly pre-closing, tax advisers’ time must be separately tested.
Who is not a “Tax Return Preparer”? 

• An individual providing only typing, reproduction, or other mechanical assistance in the preparation of a return or claim for refund.

• An individual preparing a return or claim for refund of a taxpayer, by whom the individual is regularly and continuously employed or compensated, or an officer, a general partner, member, shareholder, or employee of a taxpayer.
Summary - Recommending Return Positions

IRC 6694, 31 CFR 10.34(1), SSTS No. 1

Position must not be “unreasonable”:  

1. The position was not supported by substantial authority; 
2. There was not a reasonable belief that the position would more likely than not be sustained on its merits; and 
3. The position was not adequately disclosed.
Section 6694 imposes penalties on tax return preparer with regard to an unreasonable position taken on a tax return if:

1. The preparer actually prepared any return or claim for refund on which the position was taken; and
2. The preparer knew or reasonably should have known of the position.

A position is unreasonable if it is associated with a tax shelter (under Code § 6662(d)(2)(C)(ii)) or a reportable transaction (to which Code § 6662A applies):

• Exceptions apply if it is reasonable to believe that the position would more likely than not succeed on its merits.

If the position is not associated with a tax shelter or a reportable transaction:

1. The position was not separately disclosed on Form 8275 or 8275-R and there was no “substantial authority” for the position; or
2. The tax return position was separately disclosed and there was not a “reasonable basis” for taking the position.
Amount of penalty: Greater of $1000 ($5000 in the case of willful or reckless conduct) or 50% of income derived by the tax preparer from preparation of the applicable return.

Preparer may avoid penalty by showing that there was reasonable cause for the understatement and that the preparer acted in good faith.

Penalty rules effective for tax years ending after October 3, 2008:

- New Regulations were effective for all returns and refund claims filed after 12/31/2008.
- First Berwind Group returns to which these new penalty rules apply is FYE12/31/2008.
- For prior period rules, see presentation materials from Dechert/EY joint presentation 11/28/2008.

See Code § 6694(a)
Section 6694: Return Preparer Penalties (continued)

- Penalties can be separately imposed on the individual giving advice and the firm (or company) giving advice.

- Individual penalties based on the amount of the individual’s salary attributable to work done on the applicable return, if the individual is employed by an entity that was hired to prepare the return.

- Entity penalties based on fees received to prepare the return.
  - Unified management fee would be allocated to return preparation and to other activities; only share allocated to preparation of applicable return would be basis for penalty.

- If penalties were imposed on both an entity and one or more employees of that entity for the same return, the aggregate penalties would be capped at 50% of the fees paid to the entity for work on the return.
  - If penalties are assessed against individual preparers, they reduce the amount of penalties that may be assessed against their employer.

See Treas. Reg. § 1.6694-1
10.34 Standards with Respect to Tax Returns and Documents

1. A practitioner may not willfully, recklessly, or through gross incompetence —

   i. Sign a tax return or claim for refund that the practitioner knows or reasonably should know contains a position that —

      a) Lacks a reasonable basis

      b) Is an unreasonable position as described in IRC 6694(a)(2)

      c) Is a willful attempt by the practitioner to understate the liability for tax or a reckless or intentional disregard of rules or regulations by the practitioner as described in IRC 6694(b)(2)
2. A practitioner may not advise a client to submit a document, affidavit or other paper to the Internal Revenue Service —

i. The purpose of which is to delay or impede the administration of the Federal tax laws;

ii. That is frivolous; or

iii. That contains or omits information in a manner that demonstrates an intentional disregard of a rule or regulation unless the practitioner also advises the client to submit a document that evidences a good faith challenge to the rule or regulation.
5. If the applicable taxing authority has no written standards with respect to recommending a tax return position or preparing or signing a tax return, or if its standards are lower than the standards set forth in this paragraph, the following standards will apply:

a) A member should not recommend a tax return position or prepare or sign a tax return taking a position unless the member has a good-faith belief that the position has at least a realistic possibility of being sustained administratively or judicially on its merits if challenged.
Notwithstanding paragraph 5(a), a member may *recommend a tax return position* if the member:

i. concludes that there is a reasonable basis for the position and

ii. advises the taxpayer to appropriately disclose that position.

Notwithstanding paragraph 5(a), a member may *prepare or sign a tax return* that reflects a position if:

i. the member concludes there is a reasonable basis for the position, and

ii. the position is appropriately disclosed
Substantial Authority

Defined in Treas. Reg. 1.6662-4(d)

Objective standard involving application of the law to the relevant facts.

The standard is lower than the more likely than not standard but higher than the reasonable basis standard.

- A return position that is arguable but fairly unlikely to prevail in court satisfies the reasonable basis standard but not the substantial authority standard.
There is substantial authority only if the weight of authority supporting the tax treatment is substantial in relation to the weight of authority supporting a contrary treatment.

The weight according an authority depends on its relevance and persuasiveness and the type of document providing the authority.

Only the authorities listed in Treas. Reg. 1.6662-4(d)(3)(iii) may be considered:

- Includes things such as the Internal Revenue Code, temporary and final regulations, revenue rulings and procedures, treaties, cases, congressional intent as reflected in congressional history, private letter rulings, technical advice memos, action on decisions and general counsel memos, IRS notices, announcement and press releases.

- Conclusions reached in treatises, legal periodicals and legal opinions rendered by tax professionals are not authority, but the authorities underlying such expressions of opinion may give rise to substantial authority.
Reasonable Basis is defined in Treas. Reg. 1.6662-3(b)(3)

• Reasonable basis is a relatively high standard of tax reporting that is significantly higher than not frivolous or not patently improper. The reasonable basis standard is not satisfied by a return position that is merely arguable or that is merely a colorable claim.

• If a return position is reasonably based on one or more of the authorities used for the substantial authority standard, then the position has a reasonable basis.
Adequate Disclosure is defined in Treas. Reg. 1.6662-4(f) and Cir. 230, sec. 10.34(c).

- Form 8275 or 8275-R
- Special rules via Rev. Proc. 2016-13
- Schedule UTP
Adequate Disclosure

1. Provide the taxpayer with a return that included the disclosure; OR

2. Advise the taxpayer of the penalty standards applicable to the taxpayer under § 6662, and contemporaneously document the advice.

## Disclosure Statement

(Do not use this form to disclose items in positions that are contrary to Treasury regulations. Instead, use Form 8275-R, Reporting Discretionary Statement.)

Information about Form 8275 and its separate instructions is at <www.irs.gov/form8275>.

Attach to your tax return.

### Part I General Information (see instructions)

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<th>Item or Group of Items</th>
<th>DJ Detailed Description of Item</th>
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### Part II Detailed Explanation (see instructions)

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### Part III Information About Pass-Through Entity. To be completed by partners, shareholders, beneficiaries, or residual interest holders.

Complete this part only if you are making adequate disclosure for a pass-through item.

Notes: A pass-through entity is a partnership, S corporation, estate, trust, regulated investment company (RIC), real estate investment trust (REIT), or real estate mortgage investment conduit (REMIC).

1. Name, address, and ZIP code of pass-through entity
2. Identifying number of pass-through entity
3. Tax year of pass-through entity
4. Internal Revenue Service Center where the pass-through entity filed its return

For Paperwork Reduction Act Notice, see separate instructions.
Penalties/Circ. 230 sanctions will not be imposed if, considering all of the facts and circumstances, the understatement was due to reasonable cause and the preparer acted in good faith.
What about Tax Shelters?

- Any partnership, entity, investment, plan or arrangement, if a significant purpose of such partnership, entity, investment, plan or arrangement was the avoidance or evasion of tax.

- For individuals, understatement is reduced only if
  - Substantial authority plus reasonable belief/more likely than not
  - Disclosure has no effect

- For corporations, the understatement cannot be reduced
  - It does not matter how much authority
  - Disclosure has no effect
10.34(d) Relying on Information Furnished by Clients

A practitioner advising a client to take a position on a tax return, document, affidavit or other paper submitted to the Internal Revenue Service, or preparing or signing a tax return as a preparer, generally may rely in good faith without verification upon information furnished by the client.

The practitioner may not, however, ignore the implications of information furnished to, or actually known by, the practitioner, and must make reasonable inquiries if the information as furnished appears to be incorrect, inconsistent with an important fact or another factual assumption, or incomplete.
10.34(c) Advising Clients on Potential Penalties

1. A practitioner must inform a client of any penalties that are reasonably likely to apply to the client with respect to —
   i. A position taken on a tax return if —
      A. The practitioner advised the client with respect to the position; or
      B. The practitioner prepared or signed the tax return; and
   ii. Any document, affidavit or other paper submitted to the IRS.

2. The practitioner also must inform the client of any opportunity to avoid any such penalties by disclosure, if relevant, and of the requirements for adequate disclosure.

3. This paragraph (c) applies even if the practitioner is not subject to a penalty under the Internal Revenue Code with respect to the position or with respect to the document, affidavit or other paper submitted.
Likelihood of Audit - Can it Be Considered?

Written Advice

“The Practitioner must not, in evaluating a Federal tax matter, take into account the possibility that a tax return will not be audited or that a matter will not be raised on audit.”

Circular 230 § 10.37(a)(2)

Oral Advice

“Treasury and the IRS agree that audit risk should not be considered by practitioners in the course of advising a client on a Federal tax matter, regardless of the form in which the advice is given.”

Regulations Governing Practice Before the Internal Revenue Service, 79 FR 33685-01.
Likelihood of Audit - Can it Be Considered?

SSTS No. 1(7)

• A member should not recommend a tax return position or prepare or sign a tax return reflecting a position that the member knows:

a) exploits the audit selection process of a taxing authority, or

b) serves as a mere arguing position advanced solely to obtain leverage in a negotiation with a taxing authority.
OPR’s Position

Former head of OPR, Karen Hawkins:

“You don't get to take into account whether the client is going to get caught. . . . That's violating every ethical principle I can think of. You shouldn't engage with the client on that issue.”

Can You Advise a Client Not to File a Return (that is legally required)?

• Failure to file is a misdemeanor.  

I.R.C. § 7203.

• Failure to file also can be tax evasion if there has been an affirmative act showing intent to evade.  

I.R.C. § 7201.

• You could be accused of aiding, abetting, counseling or commanding a criminal violation under 18 U.S.C. 2 or other offenses.

• Fifth Amendment return may be the best option.

• Remember Rule 1.

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Fifth Amendment Returns

• What is a 5th Amendment Return?


• Under what circumstances would you recommend that a client file a 5th Amendment return?

• What about the frivolous filing penalty – does it apply to 5th amendment returns? Should it?
Example of 6694(b) Penalties

In *John Q. Rodgers v. United States*, 2017 WL 5197397 (C.D. Cal. Nov. 8, 2017), the IRS imposed 14 separate $5,000 penalties after trial showing that returns prepared by Rodgers included the following errors (among others):

1. Not applying mortgage-interest limitation for loans over $1 million;
2. Claiming deductions for home offices for which taxpayer did not actually incur or which were clearly personal;
3. Not applying passive activity loss limitations;
4. Court emphasized that Rodgers was knowledgeable about client’s business, and knew that there had been several iterations of the profit and loss statements that had negative balances indicating that income and expenses were not properly characterized, but did not make reasonable inquiries about this;
5. Did not follow up on request for client to fill in tax organizer;
6. Standard practice was to have returns reviewed by another preparer, but did not do so with this client.
Example of 6694(b) Conduct (basis for injunction against preparer)


• Stinson took “unreasonable” or “reckless” positions by reporting personal expenses as business expenses, or commuting miles as deductible business miles.

• Stinson not only claimed non-deductible expenses as deductible ones, but the amounts claimed were largely inflated.

• Stinson’s conduct was repeated, continuous, and willful, occurring over multiple years and multiple clients: “The pattern of improper claims on tax returns prepared at Stinson's stores goes far beyond mere mistakes—the ‘mistakes’ were ‘unvaryingly in the taxpayers' favor’ and the exact same abusive claims were repeated among taxpayer customers.”
Potential Sanctions for Violation of Circular 230

Disbarred from practice before the IRS

An individual who is disbarred is not eligible to practice before the IRS as defined at 31 C.F.R. § 10.2(a)(4) for a minimum period of five (5) years.

Suspended from practice before the IRS

An individual who is suspended is not eligible to practice before the IRS as defined at 31 C.F.R. § 10.2(a)(4) during the term of the suspension.

Censured in practice before the IRS

Censure is a public reprimand. Unlike disbarment or suspension, censure does not affect an individual's eligibility to practice before the IRS, but OPR may subject the individual's future practice rights to conditions designed to promote high standards of conduct.

ANNOUNCEMENT OF DISCIPLINARY SANCTIONS FROM THE OFFICE OF PROFESSIONAL RESPONSIBILITY, Announcement 2017-09.
Potential Sanctions for Violation of Circular 230 (cont.)

**Monetary penalty**

A monetary penalty may be imposed on an individual who engages in conduct subject to sanction, or on an employer, firm, or entity if the individual was acting on its behalf and it knew, or reasonably should have known, of the individual's conduct.

**Disqualification of appraiser**

An appraiser who is disqualified is barred from presenting evidence or testimony in any administrative proceeding before the Department of the Treasury or the IRS.

**Ineligible for limited practice**

An unenrolled/unlicensed return preparer who fails to comply with the requirements in Revenue Procedure 81-38 or to comply with Circular 230 as required by Revenue Procedure 2014-42 may be determined ineligible to engage in limited practice as a representative of any taxpayer. Under the regulations, individuals subject to Circular 230 may not assist, or accept assistance from, individuals who are suspended or disbarred with respect to matters constituting practice (i.e., representation) before the IRS, and they may not aid or abet suspended or disbarred individuals to practice before the IRS.

ANNOUNCEMENT OF DISCIPLINARY SANCTIONS FROM THE OFFICE OF PROFESSIONAL RESPONSIBILITY, Announcement 2017-09.
CPA Disbarred for Failure to Exercise Due Diligence and Compliance Problems

- CPA failed to exercise due diligence in preparing tax returns for a corporation and its husband and wife shareholders and to determine the correctness of representations made to the IRS.
- Defense was that he relied on information from the taxpayers, but ALJ found that “it was inconceivable that [“the individual taxpayers”] could pay their living expenses based on the income reported on their returns.
- CPA also failed to advise clients of potential penalties and opportunities to avoid such penalties by disclosure.

IR-2010-82
CPA Suspended for 12 months For Preparing False Tax Returns

• The CPA assisted clients by claiming false business expenses.

• For no legitimate purpose, CPA advised clients to forward funds from their businesses to two corporations that the CPA controlled. The corporations then rebated the funds to his clients.

• The CPA prepared the clients’ books and business tax returns expensing and deducing the entire amounts that were paid to the corporations.
Civil Penalties vs. Criminal Penalties

Avoidance of taxes is not a criminal offense. Any attempt to reduce, avoid, or alleviate taxes by legitimate means is permissible. The distinction between avoidance and evasion is fine, yet definite. One who avoids tax does not conceal or misrepresent. He/she shapes events to reduce or eliminate tax liability and, upon the happening of the events, makes a complete disclosure. Evasion on the other hand, involves deceit, subterfuge, camouflage, concealment, some attempt to color or obscure events, or makes things seem other than they are.

- Avoidance Distinguished from Evasion, IRM 9.1.3.3.2.1
Criminal Penalties

Main criminal charges against Tax Professionals:

- IRC § 7201: Evasion
- IRC § 7206: Fraud and false statements
- IRC § 7207: Fraudulent returns, statements, or other documents (misdemeanor)
- 18 U.S.C. § 371: Conspiracy to Defraud the IRS
- IRC § 7212: Attempt to interfere with administration of internal revenue laws
Willfulness is the Key

• For purposes of criminal penalties, willfulness is defined as the “intentional violation of a known legal duty.” E.g., United State v. Pomponio, 429 U.S. 10 (1976).

• Willfulness can be proven by showing that the defendant was “willfully blind” or “consciously avoided” learning that his or her or conduct was unlawful. E.g., United States v. MacKenzie, 777 F.2d 811 (2nd Cir. 1985).

• The test for willfulness is subjective, rather than objective, and a defendant who honestly believed that his or her conduct was lawful is not guilty, no matter how unreasonable the belief may be. E.g., Cheek v. United States, 498 U.S. 192 (1991).
Circumstantial Evidence of Willfulness

• a/k/a “Badges of fraud”
  • Repeated failure to report income or pay tax
    • Serial “mistakes”
  • Attempts to confuse, conceal or “overly advocate”
    • False invoices or other documents
    • Destruction of records
    • Failure to produce damaging documents or information
    • Overly complex structures or arrangement with no legitimate business purpose
    • Off-books bank accounts
    • Use of pseudonyms or fake names
    • Lying or excessive delaying during an audit

• Admissions
  • Double set of books
  • Incriminating e-mails, notes or statements to witnesses
Circumstantial Evidence of Willfulness in Foreign Asset Cases

• a/k/a “Badges of Fraud”
  • Use of a bank secrecy jurisdiction
  • Motivation was to hide from spouse or partner
  • Failure to pay tax on the corpus
  • Failure to pay tax on the income
  • Numbered account or pseudonym
  • Entities or structures
  • Hold mail
  • Move the account
  • Use of cash or debit card
  • Use of other non-reportable assets
  • Failure to tell accountant or other advisor
  • Failure to check the box
Willful Blindness

• Deliberate ignorance and positive knowledge are equally culpable if the person us aware of the “high probability of the existence of the fact in question.”

• United States v. Stadtmauer, 620 F.3d 238 (3d Cir. 2010) - The Court held that the government need not present direct evidence of conscious avoidance to justify a willful blindness instruction. Although the defendant spent very little time reviewing the tax returns prepared by the accountants, there was sufficient evidence to justify the willful blindness charge because the defendant was intimately involved with the operations of the partnerships and was aware of how the partnerships characterized capital expenditures, charitable contributions, gift and entertainment expenses, and “non-property” expenses in the general ledger and financial statements.

• United States v. Williams, 489 Fed. Appx. 655 (4th Cir. 2012) - Taxpayer checked “no” on his tax return as to whether he had an interest in a foreign bank account even though he did have such an interest. Williams argued that he never looked at the language of the return and made sure the accountant’s numbers on the tax return were correct. The court held that a person who signs a tax return has constructive knowledge of its contents and Williams’s signature was prima facie evidence that he knew the contents of the return.
Who Can be Included in a Potential Conspiracy?

• Participating in a phone call or sending an e-mail that is in furtherance of a plan to impair or impede the IRS

• Providing comments on an opinion letter that later turns out to contain false representations?

• Distributing documents during a meeting with a client and then taking them back so that the IRS won’t get the documents if they issue a summons to the client?

• Making arguments about “business purpose” or some other fact during an audit if it later turns out that the fact was not true?
Tax Evasion

- Attorney failed to report approximately $3 million in income to the IRS on his personal tax returns, and his CPA assisted him. The attorney diverted fees for tax shelter promotion to an entity that he co-owned with his CPA who assisted him in concealing from the IRS and prepared returns that did not report it. In addition, the CPA knew that the lawyer was using a home as a residence for which the CPA claimed false deductions as a rental property.

- Attorney sentenced to 24 months in prison; CPA sentenced to 9 months in prison.

Aiding or assisting in the filing of false returns

CPA convicted of one count of aiding or assisting in the filing of false returns under 26 U.S.C. § 7206(2).

The CPA:

1. provided accounting, tax, and consulting services to individuals and entities that, collectively, developed, owned, and operated privately-held restaurants and bars;

2. knew that certain individuals used corporate funds to pay personal expenses, including car lease payments, car insurance premiums, country club dues, lawn service, and home repairs and maintenance; and

3. prepared the corporate tax returns and deducted these personal expenses;

Tax loss was approximately $191,000.

The CPA was sentenced to a year and a day in prison.

Aiding or assisting in the filing of false returns

• CPA convicted of one count of aiding or assisting in the filing of false returns under 26 U.S.C. § 7206(2)

• CPA had prepared returns that did not report $407,000 in fees paid to client, but instead reclassified them as loans

• In order to get reduced sentence, CPA testified against client at client’s trial.

• Sentenced to one year of probation.

Preparing Fraudulent Tax Returns

Tax return preparer in Manhattan prepared more than 1,000 fraudulent tax returns for his clients, who significantly underpaid their taxes, received refunds to which they were not entitled, or both. In many cases, the defendant counseled his clients to create corporations or partnerships if they were not established already and, in some instances, the defendant created entities for his clients even when there was no evidence of existing or actual business. Using closely held corporations and partnerships, the defendant transferred income from his clients’ personal tax returns and negated the income by inflating deductions and expenses, which registered as large losses on the tax returns and fraudulently lowered his clients’ incomes and tax liability. The defendant caused more than $10 million in estimated tax fraud over a five-year period.

Attempt to interfere with administration of internal revenue laws

- Former IRS Revenue Officer had tax consulting business. Although the defendant filed tax returns every year, he has not paid taxes since at least 1998. He used his knowledge and experience as a revenue officer to evade paying his own taxes. He hid hundreds of thousands of dollars that he earned from his consulting business in bank accounts that he created in the names of his children and used money orders and cashier’s checks to pay his personal expenses. In response to IRS collection efforts, he submitted a false collection form on which he claimed to have only one bank account and concealed the existence of his nominee accounts. He filed, in bad faith, a cash offer in compromise to settle his tax debt, a request to discharge the levies on the nominee accounts and an application to subordinate his federal tax lien.

- The defendant also corruptly endeavored to impede the internal revenue laws by using his stepson’s identity, without his knowledge, to apply for a Preparer Tax Identification Number that he used to file over 900 tax returns for clients, as well as his own tax returns.

- Sentenced to 43 months for tax evasion and corruptly endeavoring to impede the due administration of the internal revenue laws.

Tips for Ensuring Compliance with Circular 230 and Other Standards

• Require all partners, employees to annually certify having read Circular 230 and NAEE Code of Ethics and Rules of Professional Conducts;

• Require all partners, employees to attend continuation education programs on ethics in tax;

• Robust process for return review;

• Have ethics/risk management focus at firm; everyone should know who the “go to person” is for questions;

• Cultivate firm culture that ethics are important and that the client is not always right;

• Require annual certification that partners are in compliance with own tax obligations.
Thank you!

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CLE MATERIALS FOR SECOND SESSION

10:45 a.m. to 12:00 p.m. (1.5 Ethics CLE Credit)

Truth and the Tax Lawyer: Criminal Sanctions Enforcing the Duty of Honesty in Federal Tax Practice
Lawrence S. Feld, Esq., Law Office of Lawrence S. Feld; Adjunct Professor, NYLS

Materials:
1. I.R.C. § 7206 & § 7212
2. Marinello v. United States
Internal Revenue Code of 1986 as amended

§ 7206 Fraud and false statements.

Any person who-

(1) Declaration under penalties of perjury.

Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or

(2) Aid or assistance.

Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document; or ...

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 3 years, or both, together with the costs of prosecution.

§ 7212 Attempts to interfere with administration of Internal Revenue laws.

(a) Corrupt or forcible interference.

Whoever corruptly or by force or threats of force (including any threatening letter or communication) endeavors to intimidate or impede any officer or employee of the United States acting in an official capacity under this title, or in any other way corruptly or by force or threats of force (including any threatening letter or communication) obstructs or impedes, or
endeavors to obstruct or impede, the due administration of this title, shall, upon conviction thereof, be fined not more than $5,000, or imprisoned not more than 3 years, or both, except that if the offense is committed only by threats of force, the person convicted thereof shall be fined not more than $3,000, or imprisoned not more than 1 year, or both. The term "threats of force", as used in this subsection, means threats of bodily harm to the officer or employee of the United States or to a member of his family.
Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

SYLLABUS

MARINELLO v. UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 16–1144. Argued December 6, 2017—Decided March 21, 2018

Between 2004 and 2009, the Internal Revenue Service (IRS) intermittently investigated petitioner Marinello’s tax activities. In 2012, the Government indicted Marinello for violating, among other criminal tax statutes, a provision in 26 U. S. C. §7212(a) known as the Omnibus Clause, which forbids “corruptly or by force or threats of force . . . obstruct[ing] or impede[ing], or endeavor[ing] to obstruct or impede, the due administration of [the Internal Revenue Code].” The judge instructed the jury that, to convict Marinello of an Omnibus Clause violation, it must find that he “corruptly” engaged in at least one of eight specified activities, but the jury was not told that it needed to find that Marinello knew he was under investigation and intended corruptly to interfere with that investigation. Marinello was convicted. The Second Circuit affirmed, rejecting his claim that an Omnibus Clause violation requires the Government to show the defendant tried to interfere with a pending IRS proceeding, such as a particular investigation.

Held. To convict a defendant under the Omnibus Clause, the Government must prove the defendant was aware of a pending tax-related proceeding, such as a particular investigation or audit, or could reasonably foresee that such a proceeding would commence. Pp. 3–11.

(a) In United States v. Aguilar, 515 U. S. 593, this Court interpreted a similarly worded criminal statute—which made it a felony “corruptly or by threats or force . . . [to] influence[e], obstruct[e], or impede[e], or endeavor[e] to influence, obstruct, or impede, the due administration of justice,” 18 U. S. C. §1503(a). There, the Court required the Government to show there was a “nexus” between the defendant’s obstructive conduct and a particular judicial proceeding. The Court said that the defendant’s “act must have a relationship in
time, causation, or logic with the judicial proceedings.” 515 U. S., at 599. In reaching this conclusion, the Court emphasized that it has “traditionally exercised restraint in assessing the reach of a federal criminal statute, both out of deference to the prerogatives of Congress and out of concern that ‘a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.’” Id., at 600. That reasoning applies here with similar strength. The verbs “obstruct” and “impede” require an object. The taxpayer must hinder a particular person or thing. The object in §7212(a) is the “due administration of [the Tax Code].” That phrase is best viewed, like the “due administration of justice” in Aguilar, as referring to discrete targeted administrative acts rather than every conceivable task involved in the Tax Code’s administration. Statutory context confirms this reading. The Omnibus Clause appears in the middle of a sentence that refers to efforts to “intimidate or impede any officer or employee of the United States acting in an official capacity.” §7212(a). The first part of the sentence also refers to “force or threats of force,” which the statute elsewhere defines as “threats of bodily harm to the officer or employee of the United States or to a member of his family.” Ibid. And §7212(b) refers to the “forcibl[e] rescu[e]” of “any property after it shall have been seized under” the Internal Revenue Code. Subsections (a) and (b) thus refer to corrupt or forceful actions taken against individual identifiable persons or property. In context, the Omnibus Clause logically serves as a “catchall” for the obstructive conduct the subsection sets forth, not for every violation that interferes with routine administrative procedures such as the processing of tax returns, receipt of tax payments, or issuance of tax refunds. The statute’s legislative history does not suggest otherwise. The broader context of the full Internal Revenue Code also counsels against a broad reading. Interpreting the Omnibus Clause to apply to all Code administration could transform the Code’s numerous misdemeanor provisions into felonies, making them redundant or perhaps the subject matter of plea bargaining. It could also result in a similar lack of fair warning and related kinds of unfairness that led this Court to “exercise” interpretive “restraint” in Aguilar. See 515 U. S., at 600. The Government claims that the “corrupt state of mind” requirement will cure any overbreadth problem, but it is difficult to imagine a scenario when that requirement will make a practical difference in the context of federal tax prosecutions. And to rely on prosecutorial discretion to narrow the otherwise wide-ranging scope of a criminal statute’s general language places too much power in the prosecutor’s hands. Pp. 3–9.

(b) Following the same approach taken in similar cases, the Government here must show that there is a “nexus” between the defend-
Syllabus

The defendant’s conduct and a particular administrative proceeding, such as an investigation, an audit, or other targeted administrative action. See Aguilar, supra, at 599. The term “particular administrative proceeding” does not mean every act carried out by IRS employees in the course of their administration of the Tax Code. Just because a taxpayer knows that the IRS will review her tax return annually does not transform every Tax Code violation into an obstruction charge. In addition to satisfying the nexus requirement, the Government must show that the proceeding was pending at the time the defendant engaged in the obstructive conduct or, at the least, was then reasonably foreseeable by the defendant. See Arthur Andersen LLP v. United States, 544 U. S. 696, 703, 707–708. Pp. 9–11.

839 F. 3d 209, reversed and remanded.

A clause in §7212(a) of the Internal Revenue Code makes it a felony “corruptly or by force” to “endeavor[e] to obstruct or impede[e] the due administration of this title.” 26 U. S. C. §7212(a). The question here concerns the breadth of that statutory phrase. Does it cover virtually all governmental efforts to collect taxes? Or does it have a narrower scope? In our view, “due administration of [the Tax Code]” does not cover routine administrative procedures that are near-universally applied to all taxpayers, such as the ordinary processing of income tax returns. Rather, the clause as a whole refers to specific interference with targeted governmental tax-related proceedings, such as a particular investigation or audit.

I

The Internal Revenue Code provision at issue, §7212(a), has two substantive clauses. The first clause, which we shall call the “Officer Clause,” forbids “corruptly or by force or threats of force (including any threatening letter or communication) endeavor[ing] to intimidate or impede any officer or employee of the
Opinion of the Court

United States acting in an official capacity under [the Internal Revenue Code].” Ibid. (emphasis added).

The second clause, which we shall call the “Omnibus Clause,” forbids

“corruptly or by force or threats of force (including any threatening letter or communication) obstruct[ing] or impede[ing], or endeavor[ing] to obstruct or impede, the due administration of [the Internal Revenue Code].” Ibid. (emphasis added).

As we said at the outset, we here consider the scope of the Omnibus Clause. (We have placed the full text of §7212 in the Appendix, infra.)

Between 2004 and 2009, the Internal Revenue Service (IRS) opened, then closed, then reopened an investigation into the tax activities of Carlo Marinello, the petitioner here. In 2012 the Government indicted Marinello, charging him with violations of several criminal tax statutes including the Omnibus Clause. In respect to the Omnibus Clause the Government claimed that Marinello had engaged in at least one of eight different specified activities, including “failing to maintain corporate books and records,” “failing to provide” his tax accountant “with complete and accurate” tax “information,” “destroying . . . business records,” “hiding income,” and “paying employees . . . with cash.” 839 F. 3d 209, 213 (CA2 2016).

Before the jury retired to consider the charges, the judge instructed it that, to convict Marinello of violating the Omnibus Clause, it must find unanimously that he engaged in at least one of the eight practices just mentioned, that the jurors need not agree on which one, and that he did so “corruptly,” meaning “with the intent to secure an unlawful advantage or benefit, either for [himself] or for another.” App. in No. 15–2224 (CA2), p. 432. The judge, however, did not instruct the jury that it must find that Marinello knew he was under investigation and intended
corruptly to interfere with that investigation. The jury subsequently convicted Marinello on all counts.

Marinello appealed to the Court of Appeals for the Second Circuit. He argued, among other things, that a violation of the Omnibus Clause requires the Government to show that the defendant had tried to interfere with a “pending IRS proceeding,” such as a particular investigation. Brief for Appellant in No. 15–2224, pp. 23–25. The appeals court disagreed. It held that a defendant need not possess “‘an awareness of a particular [IRS] action or investigation.’” 839 F. 3d, at 221 (quoting United States v. Wood, 384 Fed. Appx. 698, 704 (CA2 2010); alteration in original). The full Court of Appeals rejected Marinello’s petition for rehearing, two judges dissenting. 855 F. 3d 455 (CA2 2017).

Marinello then petitioned for certiorari, asking us to decide whether the Omnibus Clause requires the Government to prove the defendant was aware of “a pending IRS action or proceeding, such as an investigation or audit,” when he “engaged in the purportedly obstructive conduct.” Pet. for Cert. i. In light of a division of opinion among the Circuits on this point, we granted the petition. Compare United States v. Kassouf, 144 F. 3d 952 (CA6 1998) (requiring showing of a pending proceeding), with 839 F. 3d, at 221 (disagreeing with Kassouf).

II

In United States v. Aguilar, 515 U. S. 593 (1995), we interpreted a similarly worded criminal statute. That statute made it a felony “corruptly or by threats or force, or by any threatening letter or communication, [to] influenc[e], obstruc[t], or imped[e], or endeav[o]r to influence, obstruct, or impede, the due administration of justice.” 18 U. S. C. §1503(a). The statute concerned not (as here) “the due administration of” the Internal Revenue Code but rather “the due administration of justice.” (We have
placed the full text of §1503 in the Appendix, infra.)

In interpreting that statute we pointed to earlier cases in which courts had held that the Government must prove “an intent to influence judicial or grand jury proceedings.” *Aguilar,* supra, at 599 (citing *United States v. Brown,* 688 F. 2d 596, 598 (CA9 1982)). We noted that some courts had imposed a “‘nexus’ requirement”: that the defendant’s “act must have a relationship in time, causation, or logic with the judicial proceedings.” *Aguilar,* supra, at 599 (citing *United States v. Wood,* 6 F. 3d 692, 696 (CA10 1993), and *United States v. Walasek,* 527 F. 2d 676, 679, and n. 12 (CA3 1975)). And we adopted the same requirement.

We set forth two important reasons for doing so. We wrote that we “have traditionally exercised restraint in assessing the reach of a federal criminal statute, both out of deference to the prerogatives of Congress and out of concern that ‘a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.’” *Aguilar,* supra, at 600 (quoting *McBoyle v. United States,* 283 U. S. 25, 27 (1931); citation omitted). Both reasons apply here with similar strength.

As to Congress’ intent, the literal language of the statute is neutral. The statutory words “obstruct or impede” are broad. They can refer to anything that “block[s],” “make[s] difficult,” or “hinder[s].” Black’s Law Dictionary 1246 (10th ed. 2014) (obstruct); Webster’s New International Dictionary (Webster’s) 1248 (2d ed. 1954) (impede); id., at 1682 (obstruct); accord, 5 Oxford English Dictionary 80 (1933) (impede); 7 id., at 36 (obstruct). But the verbs “obstruct” and “impede” suggest an object—the taxpayer must hinder a particular person or thing. Here, the object is the “due administration of this title.” The word “administration” can be read literally to refer to every “[a]ct or process of administering” including every act of “manag-
ing” or “conduct[ing]” any “office,” or “performing the executive duties of” any “institution, business, or the like.” Webster’s 34. But the whole phrase—the due administration of the Tax Code—is best viewed, like the due administration of justice, as referring to only some of those acts or to some separable parts of an institution or business. Cf. Aguilar, supra, at 600–601 (concluding false statements made to an investigating agent, rather than a grand jury, do not support a conviction for obstruction of justice).

Here statutory context confirms that the text refers to specific, targeted acts of administration. The Omnibus Clause appears in the middle of a statutory sentence that refers specifically to efforts to “intimidate or impede any officer or employee of the United States acting in an official capacity.” 26 U. S. C. §7212(a) (emphasis added). The first part of the sentence also refers to “force or threats of force,” which the statute elsewhere defines as “threats of bodily harm to the officer or employee of the United States or to a member of his family.” Ibid. (emphasis added). The following subsection refers to the “forcibl[e] rescu[e]” of “any property after it shall have been seized under” the Internal Revenue Code. §7212(b) (emphasis added). Subsections (a) and (b) thus refer to corrupt or forceful actions taken against individual identifiable persons or property. And, in that context the Omnibus Clause logically serves as a “catchall” in respect to the obstructive conduct the subsection sets forth, not as a “catchall” for every violation that interferes with what the Government describes as the “continuous, ubiquitous, and universally known” administration of the Internal Revenue Code. Brief in Opposition 9.

Those who find legislative history helpful can find confirmation of the more limited scope of the Omnibus Clause in the House and Senate Reports written when Congress first enacted the Omnibus Clause. See H. R. Rep. No.
Opinion of the Court

1337, 83d Cong., 2d Sess. (1954); S. Rep. No. 1622, 83d Cong., 2d Sess. (1954). According to the House Report, §7212 “provides for the punishment of threats or threatening acts against agents of the Internal Revenue Service, or any other officer or employee of the United States, or members of the families of such persons, on account of the performance by such agents or officers or employees of their official duties” and “will also punish the corrupt solicitation of an internal revenue employee.” H. R. Rep. No. 1337, at A426 (emphasis added). The Senate Report also refers to the section as aimed at targeting officers and employees. It says that §7212 “covers all cases where the officer is intimidated or injured; that is, where corruptly, by force or threat of force, directly or by communication, an attempt is made to impede the administration of the internal-revenue laws.” S. Rep. No. 1622, at 147 (emphasis added). We have found nothing in the statute’s history suggesting that Congress intended the Omnibus Clause as a catchall applicable to the entire Code including the routine processing of tax returns, receipt of tax payments, and issuance of tax refunds.

Viewing the Omnibus Clause in the broader statutory context of the full Internal Revenue Code also counsels against adopting the Government’s broad reading. That is because the Code creates numerous misdemeanors, ranging from willful failure to furnish a required statement to employees, §7204, to failure to keep required records, §7203, to misrepresenting the number of exemptions to which an employee is entitled on IRS Form W–4, §7205, to failure to pay any tax owed, however small the amount, §7203. To interpret the Omnibus Clause as applying to all Code administration would potentially transform many, if not all, of these misdemeanor provisions into felonies, making the specific provisions redundant, or perhaps the subject matter of plea bargaining. Some overlap in criminal provisions is, of course, inevitable. See, e.g., Sansone
Opinion of the Court

v. United States, 380 U. S. 343, 349 (1965) (affirming conviction for tax evasion despite overlap with other provisions). Indeed, as the dissent notes, post, at 8 (opinion of THOMAS, J.), Marinello’s preferred reading of §7212 potentially overlaps with another provision of federal law that criminalizes the obstruction of the “due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States,” 18 U. S. C. §1505. But we have not found any case from this Court interpreting a statutory provision that would create overlap and redundancy to the degree that would result from the Government’s broad reading of §7212—particularly when it would “‘render superfluous other provisions in the same enactment.’” Freytag v. Commissioner, 501 U. S. 868, 877 (1991) (quoting Pennsylvania Dept. of Public Welfare v. Davenport, 495 U. S. 552, 562 (1990); see also Yates v. United States, 574 U. S. ___, ___ (2015) (plurality opinion) (slip op., at 13).

A broad interpretation would also risk the lack of fair warning and related kinds of unfairness that led this Court in Aguilar to “exercise” interpretive “restraint.” See 515 U. S., at 600; see also Yates, supra, at ___–___ (slip op., at 18–19); Arthur Andersen LLP v. United States, 544 U. S. 696, 703–704 (2005). Interpreted broadly, the provision could apply to a person who pays a babysitter $41 per week in cash without withholding taxes, see 26 CFR §31.3102–1(a)(2017); IRS, Publication 926, pp. 5–6 (2018), leaves a large cash tip in a restaurant, fails to keep donation receipts from every charity to which he or she contributes, or fails to provide every record to an accountant. Such an individual may sometimes believe that, in doing so, he is running the risk of having violated an IRS rule, but we sincerely doubt he would believe he is facing a potential felony prosecution for tax obstruction. Had Congress intended that outcome, it would have spoken with more clarity than it did in §7212(a).
The Government argues that the need to show the defendant’s obstructive conduct was done “corruptly” will cure any overbreadth problem. But we do not see how. The Government asserts that “corruptly” means acting with “the specific intent to obtain an unlawful advantage” for the defendant or another. See Tr. of Oral Arg. 37; accord, 839 F. 3d, at 218. Yet, practically speaking, we struggle to imagine a scenario where a taxpayer would “willfully” violate the Tax Code (the mens rea requirement of various tax crimes, including misdemeanors, see, e.g., 26 U. S. C. §§7203, 7204, 7207) without intending someone to obtain an unlawful advantage. See Cheek v. United States, 498 U. S. 192, 201 (1991) (“Willfulness . . . requires the Government to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty”) A taxpayer may know with a fair degree of certainty that her babysitter will not declare a cash payment as income—and, if so, a jury could readily find that the taxpayer acted to obtain an unlawful benefit for another. For the same reason, we find unconvincing the dissent’s argument that the distinction between “willfully” and “corruptly”—at least as defined by the Government—reflects any meaningful difference in culpability. See post, at 6–7.

Neither can we rely upon prosecutorial discretion to narrow the statute’s scope. True, the Government used the Omnibus Clause only sparingly during the first few decades after its enactment. But it used the clause more often after the early 1990’s. Brief for Petitioner 9. And, at oral argument the Government told us that, where more punitive and less punitive criminal provisions both apply to a defendant’s conduct, the Government will charge a violation of the more punitive provision as long as it can readily prove that violation at trial. Tr. of Oral Arg. 46–47, 55–57; see Office of the Attorney General, Department Charging and Sentencing Policy (May 10,
Regardless, to rely upon prosecutorial discretion to narrow the otherwise wide-ranging scope of a criminal statute’s highly abstract general statutory language places great power in the hands of the prosecutor. Doing so risks allowing “policemen, prosecutors, and juries to pursue their personal predilections,” Smith v. Goguen, 415 U. S. 566, 575 (1974), which could result in the nonuniform execution of that power across time and geographic location. And insofar as the public fears arbitrary prosecution, it risks undermining necessary confidence in the criminal justice system. That is one reason why we have said that we “cannot construe a criminal statute on the assumption that the Government will ‘use it responsibly.’” McDonnell v. United States, 579 U. S. ___, ___ (2016) (slip op., at 23) (quoting United States v. Stevens, 559 U. S. 460, 480 (2010)). And it is why “[w]e have traditionally exercised restraint in assessing the reach of a federal criminal statute.” Aguilar, supra, at 600.

III

In sum, we follow the approach we have taken in similar cases in interpreting §7212(a)’s Omnibus Clause. To be sure, the language and history of the provision at issue here differ somewhat from that of other obstruction provisions we have considered in the past. See Aguilar, supra (interpreting a statute prohibiting the obstruction of “the due administration of justice”); Arthur Andersen, supra (interpreting a statute prohibiting the destruction of an object with intent to impair its integrity or availability for use in an official proceeding); Yates, supra (interpreting a statute prohibiting the destruction, concealment, or covering up of any “record, document, or tangible object with the intent to” obstruct the “investigation or proper administration of any matter within the jurisdiction of any
department or agency of the United States”). The Government and the dissent urge us to ignore these precedents because of those differences. The dissent points out, for example, that the predecessor to the obstruction statute we interpreted in *Aguilar*, 18 U.S.C. §1503, prohibited influencing, intimidating, or impeding “any witness or officer in any court of the United States” or endeavoring “to obstruct or impede[e] the due administration of justice therein.” *Pettibone v. United States*, 148 U.S. 197, 202 (1893) (citing Rev. Stat. §5399; emphasis added); see *post*, at 9. But Congress subsequently deleted the word “therein,” leaving only a broadly worded prohibition against obstruction of “the due administration of justice.” Act of June 25, 1948, §1503, 62 Stat. 769–770. Congress then used that same amended formulation when it enacted §7212, prohibiting the “obstruction of the due administration” of the Tax Code. Internal Revenue Code of 1954, 68A Stat. 855. Given this similarity, it is helpful to consider how we have interpreted §1503 and other obstruction statutes in considering §7212. The language of some and the underlying principles of all these cases are similar. We consequently find these precedents—though not controlling—highly instructive for use as a guide toward a proper resolution of the issue now before us. See *Smith v. City of Jackson*, 544 U.S. 228, 233 (2005).

We conclude that, to secure a conviction under the Omnibus Clause, the Government must show (among other things) that there is a “nexus” between the defendant’s conduct and a particular administrative proceeding, such as an investigation, an audit, or other targeted administrative action. That nexus requires a “relationship in time, causation, or logic with the [administrative] proceeding.” *Aguilar*, 515 U.S., at 599 (citing *Wood*, 6 F. 3d, at 696). By “particular administrative proceeding” we do not mean every act carried out by IRS employees in the course of their “continuous, ubiquitous, and universally
known” administration of the Tax Code. Brief in Opposition 9. While we need not here exhaustively itemize the types of administrative conduct that fall within the scope of the statute, that conduct does not include routine, day-to-day work carried out in the ordinary course by the IRS, such as the review of tax returns. The Government contends the processing of tax returns is part of the administration of the Internal Revenue Code and any corrupt effort to interfere with that task can therefore serve as the basis of an obstruction conviction. But the same could have been said of the defendant’s effort to mislead the investigating agent in Aguilar. The agent’s investigation was, at least in some broad sense, a part of the administration of justice. But we nevertheless held the defendant’s conduct did not support an obstruction charge. 515 U. S., at 600. In light of our decision in Aguilar, we find it appropriate to construe §7212’s Omnibus Clause more narrowly than the Government proposes. Just because a taxpayer knows that the IRS will review her tax return every year does not transform every violation of the Tax Code into an obstruction charge.

In addition to satisfying this nexus requirement, the Government must show that the proceeding was pending at the time the defendant engaged in the obstructive conduct or, at the least, was then reasonably foreseeable by the defendant. See Arthur Andersen, 544 U. S., at 703, 707–708 (requiring the Government to prove a proceeding was foreseeable in order to convict a defendant for persuading others to shred documents to prevent their “use in an official proceeding”). It is not enough for the Government to claim that the defendant knew the IRS may catch on to his unlawful scheme eventually. To use a maritime analogy, the proceeding must at least be in the offing.

For these reasons, the Second Circuit’s judgment is reversed, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*
26 U. S. C. §7212: “Attempts to interfere with administration of internal revenue laws

“(a) Corrupt or forcible interference
“Whoever corruptly or by force or threats of force (including any threatening letter or communication) endeavors to intimidate or impede any officer or employee of the United States acting in an official capacity under this title, or in any other way corruptly or by force or threats of force (including any threatening letter or communication) obstructs or impedes, or endeavors to obstruct or impede, the due administration of this title, shall, upon conviction thereof, be fined not more than $5,000, or imprisoned not more than 3 years, or both, except that if the offense is committed only by threats of force, the person convicted thereof shall be fined not more than $3,000, or imprisoned not more than 1 year, or both. The term ‘threats of force’, as used in this subsection, means threats of bodily harm to the officer or employee of the United States or to a member of his family.

“(b) Forcible rescue of seized property
“Any person who forcibly rescues or causes to be rescued any property after it shall have been seized under this title, or shall attempt or endeavor so to do, shall, excepting in cases otherwise provided for, for every such offense, be fined not more than $500, or not more than double the value of the property so rescued, whichever is the greater, or be imprisoned not more than 2 years.”

18 U. S. C. §1503: “Influencing or injuring officer or juror generally

“(a) Whoever corruptly, or by threats or force, or by any
threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate judge or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate judge, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished as provided in subsection (b). If the offense under this section occurs in connection with a trial of a criminal case, and the act in violation of this section involves the threat of physical force or physical force, the maximum term of imprisonment which may be imposed for the offense shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

“(b) The punishment for an offense under this section is—

“(1) in the case of a killing, the punishment provided in sections 1111 and 1112;

“(2) in the case of an attempted killing, or a case in which the offense was committed against a petit juror and in which a class A or B felony was charged, imprisonment for not more than 20 years, a fine under this title, or both; and

“(3) in any other case, imprisonment for not more than 10 years, a fine under this title, or both.”
JUSTICE THOMAS, with whom JUSTICE ALITO joins, dissenting.

The Omnibus Clause of 26 U. S. C. §7212(a) of the Internal Revenue Code (Tax Code) makes it a felony to “corruptly . . . endeav[or] to obstruct or impede[e] the due administration of this title.” “[T]his title” refers to Title 26, which contains the entire Tax Code and authorizes the Internal Revenue Service (IRS) to calculate, assess, and collect taxes. I would hold that the Omnibus Clause does what it says: forbid corrupt efforts to impede the IRS from performing any of these activities. The Court, however, reads “this title” to mean “a particular [IRS] proceeding.” Ante, at 10. And that proceeding must be either “pending” or “in the offing.” Ante, at 11. The Court may well prefer a statute written that way, but that is not what Congress enacted. I respectfully dissent.

I

Petitioner Carlo J. Marinello, II, owned and managed a company that provided courier services. Marinello, however, kept almost no records of the company’s earnings or expenditures. He shredded or discarded most business records. He paid his employees in cash and did not give them tax documents. And he took tens of thousands of dollars from the company each year to pay his personal
Unbeknownst to Marinello, the IRS began investigating him in 2004. The IRS learned that he had not filed a tax return—corporate or individual—since at least 1992. But the investigation came to a standstill because the IRS did not have enough information about Marinello’s earnings. This was not surprising given his diligent efforts to avoid creating a paper trail. After the investigation ended, Marinello consulted a lawyer and an accountant, both of whom advised him that he needed to file tax returns and keep business records. Despite these warnings, Marinello did neither for another four years.

In 2009, the IRS decided to investigate Marinello again. In an interview with an IRS agent, Marinello initially claimed he was exempt from filing tax returns because he made less than $1,000 per year. Upon further questioning, however, Marinello changed his story. He admitted that he earned more than $1,000 per year, but said he “‘never got around’” to paying taxes. 839 F. 3d 209, 212 (CA2 2016). He also admitted that he shredded documents, did not keep track of the company’s income or expenses, and used the company’s income for personal bills. His only excuse was that he “took the easy way out.” Ibid. After just a few hours of deliberation, a jury convicted Marinello of corruptly endeavoring to obstruct or impede the due administration of the Tax Code, §7212(a).

II

Section 7212(a)’s Omnibus Clause prohibits “corruptly ... obstruct[ing] or impede[ing], or endeavor[ing] to obstruct or impede, the due administration of this title.” I agree with the Court’s interpretations of “obstruct or impede” and “due administration,” which together refer to conduct that hinders the IRS’ performance of its official duties. See ante, at 4–5. I also agree that the object of these words—the thing a person is prohibited from ob-
THOMAS, J., dissenting

structing the due administration of—is “this title,” i.e., Title 26, which contains the entire Tax Code. See ante, at 4. But I part ways when the Court concludes that the whole phrase “due administration of the Tax Code” means “only some of” the Tax Code—specifically “particular [IRS] proceeding[s], such as an investigation, an audit, or other targeted administrative action.” Ante, at 5, 10. That limitation has no basis in the text. In my view, the plain text of the Omnibus Clause prohibits obstructing the due administration of the Tax Code in its entirety, not just particular IRS proceedings.

A

The words “this title” cannot be read to mean “only some of this title.” As this Court recently reiterated, phrases such as “this title” most naturally refer to the cited provision “as a whole.” Rubin v. Islamic Republic of Iran, 583 U. S. ___, ___ (2018) (slip op., at 8). Congress used “this title” throughout Title 26 to refer to the Tax Code in its entirety. See, e.g., §7201 (“[a]ny person who willfully attempts in any manner to evade or defeat any tax imposed by this title”); §7203 (“[a]ny person required under this title to pay any estimated tax or tax, or required by this title . . . to make a return, keep any records, or supply any information, who willfully fails to [do so]”). And, “[w]hen Congress wanted to refer only to a particular subsection or paragraph, it said so.” NLRB v. SW General, Inc., 580 U. S. ___, ___ (2017) (slip op., at 9); see, e.g., §7204 (criminalizing willfully failing to furnish a statement “required under section 6051”); §7207 (criminalizing willfully furnishing fraudulent or materially false information “required pursuant to section 6047(b), section 6104(d), or subsection (i) or (j) of section 527”); §7210 (criminalizing neglecting to appear or produce documents “required under section 6420(e)(2), 6421(g)(2), 6427(j)(2), 7602, 7603, and 7604(b)”). Thus, “this title” must refer to
Thomas, J., dissenting

The phrase “due administration of this title” likewise refers to the due administration of the entire Tax Code. As this Court has recognized, “administration” of the Tax Code includes four basic steps: information gathering, assessment, levy, and collection. See Direct Marketing Assn. v. Brohl, 575 U. S. ___ – ___ (2015) (slip op., at 6–7). The first “phase of tax administration procedure” is “information gathering.” Id., at ___ (slip op., at 6); see, e.g., §§6001–6096. “This step includes private reporting of information used to determine tax liability, including reports by third parties who do not owe the tax.” Id., at ___ (slip op., at 6) (citation omitted). The “next step in the process” is “assessment,” which includes “the process by which [a taxpayer’s liability] is calculated” and the “official recording of a taxpayer’s liability.” Id., at ___ (slip op., at 6); see, e.g., §§6201–6241. After information gathering and assessment come “levy” and “collection.” See id., at ___ (slip op., at 7); see, e.g., §§6301–6344. Levy refers to “a specific mode of collection under which the Secretary of the Treasury distrains and seizes a recalcitrant taxpayer’s property.” Id., at ___ (slip op., at 7). Collection refers to “the act of obtaining payment of taxes due.” Ibid.

Subtitle F of the Tax Code—titled “Procedure and Administration”—contains directives related to each of these steps. It requires taxpayers to keep certain records and file certain returns, §6001; specifies that taxpayers with qualifying incomes must file returns, §6012; and authorizes the Secretary of the Treasury to create returns for taxpayers who fail to file returns or who file fraudulent ones, §6020. It requires the Secretary to make inquiries, determinations, and assessments of tax liabilities. §6201. And it authorizes the Secretary to collect and levy taxes. §§6301, 6331. Subtitle F also gives the Secretary the power to commence proceedings to recover unpaid taxes or fees, §§7401–7410, and to conduct investigations into the
accuracy of particular returns, §§7601–7613.

Accordingly, the phrase “due administration of this title” refers to the entire process of taxation, from gathering information to assessing tax liabilities to collecting and levying taxes. It is not limited to only a few specific provisions within the Tax Code.

B

The Court rejects this straightforward reading, describing the “literal language” of the Omnibus Clause as “neutral.” Ante, at 4. It concludes that the statute prohibits only acts related to a pending or imminent proceeding. Ante, at 10–11. There is no textual or contextual support for this limitation.

The text of the Omnibus Clause is not “neutral”; it omits the limitation that the Court reads into it. The Omnibus Clause nowhere suggests that “only some of” the processes in the Tax Code are covered, ante, at 5, or that the line between covered and uncovered processes is drawn at some vague notion of “proceeding.” The Omnibus Clause does not use the word “proceeding” at all, but instead refers to the entire Tax Code, which covers much more than that. This Court cannot “lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply.” Jama v. Immigration and Customs Enforcement, 543 U. S. 335, 341 (2005).

Having failed to find its proposed limit in the text, the Court turns to context. However, its two contextual arguments fare no better.

First, the Court contends that the Omnibus Clause must be limited to pending or imminent proceedings because the other clauses of §7212 are limited to actions “taken against individual identifiable persons or property.” Ante, at 5. But specific clauses in a statute typically do not limit the scope of a general omnibus clause. See Ali v. Federal Bureau of Prisons, 552 U. S. 214, 225 (2008) (explaining
that the *ejusdem generis* canon does not apply to a “disjunctive” phrase in a statute “with one specific and one general category”). Nor do the other clauses in §7212 contain the pending-or-imminent-proceeding requirement that the Court reads into the Omnibus Clause. See §7212(a) (prohibiting efforts to “intimidate or impede any officer or employee of the United States acting in an official capacity”); §7212(b) (prohibiting “forcibly rescuing or causing to be rescued any property after it shall have been seized under this title”). They thus provide no support for the Court’s atextual limitation.

Second, the Court asserts that its reading prevents the Omnibus Clause from overlapping with certain misdemeanors in the Tax Code. *Ante*, at 6–7 (discussing §§7203, 7204, 7205). But there is no redundancy problem because these provisions have different *mens rea* requirements. The Omnibus Clause requires that an act be done “corruptly,” but the misdemeanor provisions require that an act be done “willfully.” The difference between these *mens rea* requirements is significant. While “willfully” requires proof only “that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty,” *Cheek v. United States*, 498 U. S. 192, 201 (1991), “corruptly” requires proof that the defendant “act[ed] with an intent to procure an unlawful benefit either for [himself] or for some other person,” *United States v. Floyd*, 740 F. 3d 22, 31 (CA1 2014) (collecting cases); see also Black’s Law Dictionary 414 (rev. 4th ed. 1951) (“corruptly” “generally imports a wrongful design to acquire some pecuniary or other advantage”). In other words, “corruptly” requires proof that the defendant not only knew he was obtaining an “unlawful benefit” but that his “objective” or “purpose” was to obtain that unlawful benefit. See 21 Am. Jur. 2d, Criminal Law §114 (2016) (explaining that specific intent requires both knowledge and purpose).
THOMAS, J., dissenting

The Court dismisses the significance of the different mens rea requirements, see ante, at 8, but this difference is important under basic principles of criminal law. The law recognizes that the same conduct, when committed with a higher mens rea, is more culpable and thus more deserving of punishment. See Schad v. Arizona, 501 U. S. 624, 643 (1991) (plurality opinion). For that reason, different mens rea requirements often differentiate culpability for the same conduct. See, e.g., 40 C. J. S., Homicide §80 (2014) (explaining that the distinction between first- and second-degree murder is based on the defendant’s state of mind); §103 (same for voluntary and involuntary manslaughter). Unless the Court means to cast doubt on this well-established principle, it should not casually dismiss the different mens rea requirements in the Omnibus Clause and the various misdemeanors in the Tax Code.

Even if the Omnibus Clause did overlap with these other misdemeanors, that would prove little. For better or worse, redundancy abounds in both the criminal law and the Tax Code. This Court has repeatedly declined to depart from the plain meaning of the text simply because the same conduct would be criminalized under two or more provisions. See, e.g., Loughrin v. United States, 573 U. S. ___, ___, n. 4 (2014) (slip op., at 7, n. 4) (“No doubt, the overlap between the two clauses is substantial on our reading, but that is not uncommon in criminal statutes”); Hubbard v. United States, 514 U. S. 695, 714, n. 14 (1995) (“Congress may, and often does, enact separate criminal statutes that may, in practice, cover some of the same conduct”); Sansone v. United States, 380 U. S. 343, 352 (1965) (allowing the Government to proceed on a felony tax evasion charge even though that charge “covered precisely the same ground” as two misdemeanors in the Tax Code). In fact, the Court’s interpretation of the Omnibus Clause does not eliminate the redundancy. Certain
misdemeanor offenses in the Tax Code—such as failing to obey a summons, §7210—apply to conduct that takes place during a proceeding and, thus, would still violate the Omnibus Clause under the Court’s interpretation. The Court’s interpretation also makes the Omnibus Clause largely redundant with 18 U. S. C. §1505, which already prohibits “corruptly . . . endeavor[ing] to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States.” Avoiding redundancy is thus not a reason to favor the Court’s interpretation. Cf. Marx v. General Revenue Corp., 568 U. S. 371, 385 (2013) (“[T]he canon against surplusage ‘assists only where a competing interpretation gives effect to every clause and word of a statute’”).

C

The Court contends that its narrow reading of “due administration of this title” is supported by three decisions interpreting other obstruction statutes, though it admits that the “language and history” of the Omnibus Clause “differ somewhat” from those other obstruction provisions. Ante, at 9 (citing United States v. Aguilar, 515 U. S. 593 (1995); Arthur Andersen LLP v. United States, 544 U. S. 696 (2005); Yates v. United States, 574 U. S. ___ (2015)

*The Court also relies on legislative history to support its interpretation. See ante, at 5–6. Even assuming legislative history could impose a requirement that does not appear in the text, the Court cites nothing in the legislative history that limits the Omnibus Clause to proceedings—or even uses the word “proceeding.” In fact, the legislative history does not say anything at all about the Omnibus Clause. As Marinello concedes, the vague snippets of legislative history that the Court cites are discussing a different portion of 26 U. S. C. §7212(a), involving threats against IRS officers and their family members. See Reply Brief 11 (“The conceded focus of §7212(a)’s legislative history was the officers clause” and it was “relative[ly] silent[ly] regarding [the Omnibus Clause]”).
THOMAS, J., dissenting

(plurality opinion)). “[D]iffer somewhat” is putting it lightly. The differences between the Omnibus Clause and those other obstruction statutes demonstrate why the former does not contain the Court’s proceeding requirement.

_Aguilar_ interpreted 18 U. S. C. §1503. The omnibus clause of §1503 forbids corruptly endeavoring to obstruct “the due administration of justice.” The Court concluded that this language requires the prosecution to prove a “nexus” between the defendant’s obstructive act and “judicial proceedings.” 515 U. S., at 599–600. But this nexus requirement was based on the specific history of §1503. The predecessor to that statute prohibited obstructing “the due administration of justice” “in any court of the United States.” _Pettibone v. United States_, 148 U. S. 197, 202 (1893) (citing Rev. Stat. §5399). Based on this statutory history, the Court assumed that §1503 continued to refer to the administration of justice in a court. _Aguilar, supra_, at 599. None of that history is present here.

_Arthur Anderson_ is even further afield. There the Court interpreted 18 U. S. C. §1512(b)(2)(A), which prohibits “knowingly . . . corruptly persuad[ing] another person . . . with intent to . . . cause or induce [that] person to . . . withhold testimony, or withhold a record, document, or other object, from an official proceeding.” Relying on _Aguilar_, the Court concluded that §1512(b)(2)(A) required the Government to show a “nexus” with “[a] particular proceeding.” 544 U. S., at 707–708. But this nexus requirement came from the statutory text, which expressly included “an official proceeding.” If anything, then, §1512(b)(2)(A) cuts against the Court’s interpretation of the Omnibus Clause because it shows that Congress knows how to impose a “proceeding” requirement when it wants to do so. See _Kucana v. Holder_, 558 U. S. 233, 248 (2010); _Jama_, 543 U. S., at 341.

_Yates_ underscores this point. There the Court inter-
preted 18 U. S. C. §1519, which prohibits obstructing “the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States.” The four Justices in the plurality recognized that this language made §1519 broader than other obstruction statutes: Section 1519 “covers conduct intended to impede any federal investigation or proceeding, including one not even on the verge of commencement.” 574 U. S., at ___ (slip op., at 18). The plurality contrasted the term “official proceeding” with the phrase “investigation or proper administration of any matter within the jurisdiction of any department or agency,” noting that the latter is broader. Id., at ___–___ (slip op., at 12–13). The same is true for the broad language of the Omnibus Clause.

In sum, these cases demonstrate that, when text and history justify it, this Court interprets obstruction statutes to include a proceeding requirement. But we have never inserted such a requirement into an obstruction statute without textual or historical support. Today the Court does precisely that.

D

All else having failed, the Court invokes lenity-sounding concerns to justify reading its proceeding requirement into the Omnibus Clause. See ante, at 4, 7. But the rule of lenity applies only if after applying ordinary tools of statutory interpretation, “there remains a grievous ambiguity or uncertainty in the statute such that the Court must simply guess as to what Congress intended.” Barber v. Thomas, 560 U. S. 474, 488 (2010) (citation and internal quotation marks omitted). The Court identifies no such grievous ambiguity in the Omnibus Clause, and breadth is not the same thing as ambiguity. The Omnibus Clause is both “very broad” and “very clear.” Yates, supra, at ___ (KAGAN, J., dissenting) (slip op., at 15). Lenity does not apply.
THOMAS, J., dissenting

If the Court is concerned that the Omnibus Clause does not give defendants “fair warning” of what it prohibits, ante, at 7, I am hard pressed to see how today’s decision makes things better. The Court outlines its atextual proceeding requirement in only the vaguest of terms. Under its interpretation, the prosecution must prove a “nexus” between the defendant’s conduct and some “particular administrative proceeding.” Ante, at 10. “[P]articular administrative proceeding” is defined negatively as “not . . . every act carried out by IRS employees in the course of their ‘continuous, ubiquitous, and universally known’ administration of the Tax Code.” Ante, at 10–11. Further, the Government must prove that the proceeding was “reasonably foreseeable” to the defendant. Ante, at 11. “Reasonably foreseeable” is again defined negatively as “not . . . that the defendant knew the IRS may catch onto his unlawful scheme eventually.” Ibid. It is hard to see how the Court’s statute is less vague than the one Congress drafted, which simply instructed individuals not to corruptly obstruct or impede the IRS’ administration of the Tax Code.

E

To be sure, §7212(a) is a sweeping obstruction statute. Congress may well have concluded that a broad statute was warranted because “our tax structure is based on a system of self-reporting” and “the Government depends upon the good faith and integrity of each potential taxpayer to disclose honestly all information relevant to tax liability.” United States v. Bisceglia, 420 U. S. 141, 145 (1975). Whether or not we agree with Congress’ judgment, we must leave the ultimate “[r]esolution of the pros and cons of whether a statute should sweep broadly or narrowly . . . for Congress.” United States v. Rodgers, 466 U. S. 475, 484 (1984). “[I]t is not our task to assess the consequences of each approach and adopt the one that produces the least

The Court frets that the Omnibus Clause might apply to “a person who pays a babysitter $41 per week in cash without withholding taxes,” “leaves a large cash tip in a restaurant,” “fails to keep donation receipts from every charity,” or “fails to provide every record to an accountant.” *Ante*, at 7. Whether the Omnibus Clause would cover these hypotheticals—and whether the Government would waste its resources identifying and prosecuting them—is debatable. But what should not be debatable is that the statute covers Marinello, who systematically shredded documents and hid evidence about his company’s earnings to avoid paying taxes even after warnings from his lawyer and accountant. It is not hard to find similar cases prosecuted under the Omnibus Clause. See, e.g., *United States v. Sorenson*, 801 F. 3d 1217, 1221–1222 (CA10 2015) (defendant hid taxable income in elaborate system of trusts); *Floyd*, 740 F. 3d, at 26–27, 31–32 (defendant created elaborate scheme to avoid paying payroll taxes).

The Court, in its effort to exclude hypotheticals, has constructed an opening in the Omnibus Clause large enough that even the worst offenders can escape liability. In doing so, it failed to heed what this Court recognized in a similar case: “[T]he authority vested in tax collectors may be abused, as all power is subject to abuse. However, the solution is not to restrict that authority so as to undermine the efficacy of the federal tax system.” *Bisceglia*, *supra*, at 146.

* * *

Regardles of whether this Court thinks the Omnibus Clause should contain a proceeding requirement, it does not have one. Because the text prohibits all efforts to obstruct the due administration of the Tax Code, I respectfully dissent.
18 USC §1001. Statements or entries generally

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully-

(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;  
(2) makes any materially false, fictitious, or fraudulent statement or representation; or  
(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both. If the matter relates to an offense under chapter 109A, 109B, 110, or 117, or section 1591, then the term of imprisonment imposed under this section shall be not more than 8 years.

(b) Subsection (a) does not apply to a party to a judicial proceeding, or that party's counsel, for statements, representations, writings or documents submitted by such party or counsel to a judge or magistrate in that proceeding.

(c) With respect to any matter within the jurisdiction of the legislative branch, subsection (a) shall apply only to-

(1) administrative matters, including a claim for payment, a matter related to the procurement of property or services, personnel or employment practices, or support services, or a document required by law, rule, or regulation to be submitted to the Congress or any office or officer within the legislative branch; or

(2) any investigation or review, conducted pursuant to the authority of any committee, subcommittee, commission or office of the Congress, consistent with applicable rules of the House or Senate.

18 USC §1621. Perjury generally

Whoever-

(1) having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true; or

(2) in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code, willfully subscribes as true any material matter which he does not believe to be true;

is guilty of perjury and shall, except as otherwise expressly provided by law, be fined under this title or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States.
12:30 p.m. to 1:30 p.m. - 1 Ethics CLE Credit

Taking Positions Contrary to Regulations: Update on Deference and Disclosure
Ann F. Thomas, Otto L. Walter Distinguished Professor of Tax Law, Director, Graduate Tax Program, New York Law School

Zhanna A. Ziering, Esq., 2006, Member, Caplin & Drysdale

Comments:
Professor Alan I. Appel, Distinguished Practitioner Professor of Law; Director of International Tax Studies; Director, Center for International Law; and co-Director of Center for Business and Financial Law, New York Law School

Materials:
“Taking Positions Contrary to Regulations: Update on Deference and Disclosure” (PowerPoint slides will be made available after the presentation)
CLE MATERIALS FOR FOURTH SESSION

1:45 p.m. to 3:00 p.m. - 1.5 Ethics CLE Credits

ACTEC’s New Model Engagement Letters –
Promoting Competent and Ethical Representation of Clients

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Materials:
COMMENTARIES

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on the Model Rules of Professional Conduct
Op. No. 01-04 (2001). Charging an annual fee for estate planning or asset protection services based on a percentage of the value of the client’s assets would be ethical “only in extraordinary circumstances.” The opinion does not suggest any circumstances where the arrangement would be appropriate.

Virginia:
Op. 1754 (2001). It is not unethical for an attorney and an insurance agent to share the commission generated by the purchase of a survivorship life insurance policy to fund client’s irrevocable life insurance trust provided full and adequate disclosure is made to the client.

**MRPC 1.6: CONFIDENTIALITY OF INFORMATION**

(a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
   (1) to prevent reasonably certain death or substantial bodily harm;
   (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer’s services.
   (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client’s commission of a crime or fraud in furtherance of which the client has used the lawyer’s services.
   (4) to secure legal advice about the lawyer’s compliance with these Rules;
   (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of the client; or
   (6) to comply with other law or a court order.
   (7) to detect and resolve conflicts of interest arising from the lawyer’s change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

**ACTEC COMMENTARY ON MRPC 1.6**

*Legal Assistants, Secretaries and Office Staff.* In the absence of express contrary instructions by a client, the lawyer may share confidential information with members of the lawyer’s office staff to the extent reasonably necessary to the representation. As indicated in MRPC 5.3 (Responsibilities Regarding Nonlawyer Assistants), the lawyer is required to assure that staff members respect the confidentiality of clients’ affairs. The lawyer should “give such assistants appropriate instructions concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to the
representation of the client, and should be responsible for their work product.” Comment to MRPC 5.3 (Responsibilities Regarding Nonlawyer Assistants).

Consultants and Associated Counsel. The lawyer should obtain the client’s consent to the disclosure of confidential information to other professionals. However, the lawyer may be impliedly authorized to disclose confidential information to other professionals and business consultants to the extent appropriate to the representation. Thus, the client may reasonably anticipate that a lawyer who is preparing an irrevocable life insurance trust for the client will discuss the client’s affairs with the client’s insurance advisor. Additionally, in order to satisfy the lawyer’s duty of competence, the lawyer may, without the express consent of the client, consult with another professional regarding draft documents or the tax consequences of particular actions, provided that the client’s identity and other confidential information is not disclosed. In such a case the lawyer is responsible for payment of the consultant’s fee. As indicated in the ACTEC Commentary on MRPC 1.1 (Competence), with the client’s consent, the lawyer may associate other professionals to assist in the representation.

Preserving Confidentiality. A lawyer must make reasonable efforts to prevent inadvertent or unauthorized disclosure of or unauthorized access to client confidences. If a lawyer has “outsourced” legal work to lawyers or non-lawyers who are independent contractors in this country or abroad, the same duty to make reasonable efforts to protect confidentiality applies. Particular care should be taken to ensure that electronic storage sites and transmission methods provide adequate protection for the confidentiality of any client information entrusted to them. Depending on the specific needs and instructions of the client, greater security measures may be required in some cases. The duty to protect client confidences extends to protecting information that has been stored electronically on storage devices such as computers, copy machines, smart phones and flash drives, as well as on remote storage devices provided by third-party vendors (“cloud computing”).

Conversely, where a lawyer has received client confidences relating to another firm’s client that the recipient lawyer believes were not intentionally transmitted to the recipient lawyer by the client or the firm retained by the client, the lawyer has a duty to notify the sender. See MRPC 4.4(b) (Respect for Rights of Third Persons). Whether the recipient lawyer may use the confidences thus transmitted is not addressed in the model rules, but may be addressed by the law of a particular jurisdiction.

Implied Authorization to Disclose. The lawyer is also impliedly authorized to disclose otherwise confidential information to the courts, administrative agencies, and other individuals and organizations as the lawyer believes is reasonably required by the representation. A lawyer is impliedly authorized to make arrangements, in case of the lawyer’s death or disability, for another lawyer to review the files of his or her clients. As stated in ABA Formal Opinion 92-369 (1992), “[r]easonable clients would likely not object to, but rather approve of, efforts to ensure that their interests are safeguarded.”

A lawyer has no implied authority to disclose client confidences in the context of electronic bulletin boards, social media, continuing legal education seminars or similar public forums where persons from outside the lawyer’s firm may be participating. The prohibition on disclosure includes information that could reasonably lead to the discovery of confidential information. Thus, a lawyer may use a hypothetical to discuss issues relating to a representation only so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.
Whether there is implied authority to disclose information related to a representation that is generally known is unclear. There is no such exception expressly stated in MRPC 1.6. As to former clients, MRPC 1.9(c) states that a lawyer may use information to the disadvantage of the former client if the information has become generally known. The Restatement of the Law Governing Lawyers defines “confidential client information” more narrowly than the model rules, excepting from the concept “information that is generally known.” See Restatement section 59. But even the Restatement adds the caveat that “the fact that information has become known to some others does not deprive it of protection if it has not become generally known in the relevant sector of the public….Information is not generally known when a person interested in knowing the information could obtain it only by means of special knowledge or substantial difficulty or expense.” Section 59, cmt. d.

Other Rules Affecting a Lawyer’s Duty of Confidentiality. There are other rules that may impact the lawyer’s duties regarding a client’s confidential information. For example, see IRC Section 7525 (confidentiality privileges relating to taxpayer communications with federally authorized tax practitioners), Treasury Department Circular 230 (e.g., 31 C.F.R. 10.20 and 10.26(b)(4)), and MRPC 1.6(b)(6) (right to disclose when required by other law). See also MRPC 1.6(b)(2).

Obligation After Death of Client. In general, the lawyer’s duty of confidentiality continues after the death of a client. Accordingly, a lawyer ordinarily should not disclose confidential information following a client’s death. However, if consent is given by the client’s personal representative, or if the decedent had expressly or impliedly authorized disclosure, the lawyer who represented the deceased client may provide an interested party, including a potential litigant, with information regarding a deceased client’s dispositive instruments and intent, including prior instruments and communications relevant thereto. The personal representative or client may also authorize disclosure of other confidential information learned during the representation if there is a need for that information. A lawyer may be impliedly authorized to make appropriate disclosure of client confidential information that would promote the client’s estate plan, forestall litigation, preserve assets, and further family understanding of the decedent’s intention. Disclosures should ordinarily be limited to information that the lawyer would be required to reveal as a witness.

Disclosures to Client’s Agent. If a client becomes incapacitated and a person appointed as attorney-in-fact begins to manage the client’s affairs, the attorney-in-fact often will ask the lawyer for copies of the client’s estate planning documents in order to manage the client’s assets consistent with the estate plan. However, the mere fact that the attorney-in-fact has been appointed does not waive the attorney’s duty of confidentiality. The terms of the power of attorney or the instructions to the lawyer at the time the power of attorney was drafted may authorize disclosure to the attorney-in-fact in those circumstances. The attorney can avoid the issue by talking with the client about the client’s preferences regarding disclosure. At the time of the request for disclosure, the attorney may also comply with the request if, after considering the specific circumstances and the specific information being requested by the attorney-in-fact, the attorney reasonably concludes that disclosure is impliedly authorized to carry out the purpose of the representation of the client.

Protection Against Reasonably Certain Death or Substantial Bodily Harm. A lawyer may reveal information insofar as the lawyer believes it reasonably necessary to prevent reasonably certain death or substantial bodily harm. Estate planning clients may disclose to their lawyer that they intend to do injury to themselves: they may be engaged in estate planning, for example, because they are planning suicide and they may disclose this. Such a client may be of diminished capacity. See MRPC 1.14 (Client with Diminished Capacity). But one need not be of diminished capacity to contemplate suicide, for example, if
one has contracted a debilitating disease which has radically reduced one’s quality of life. An estate planner who encounters this situation is not required to disclose the plan under the model rules, and may well conclude that it is the client’s well-considered and rational decision. But a lawyer may nonetheless reasonably conclude, given the specific facts of a client’s situation, that the client should be prevented from carrying through on the plan. The model rule entrusts to the lawyer discretion to make this very difficult decision.

Disclosures by Lawyer for Fiduciary. The duties of the lawyer for a fiduciary are affected by the nature of the client and the objectives of the representation. See ACTEC Commentary on MRPC 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer). Special care must be exercised by the lawyer if the lawyer represents the fiduciary generally and also represents one or more of the beneficiaries of the fiduciary estate.

As indicated in the ACTEC Commentary on MRPC 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer), the lawyer and the fiduciary may agree between themselves that the lawyer may disclose to the beneficiaries or to an appropriate court any action or inaction on the part of the fiduciary that might constitute a breach of trust. Whether or not the lawyer and fiduciary enter into such an agreement, the lawyer for the fiduciary ordinarily owes some duties (largely restrictive in nature) to the beneficiaries of the fiduciary estate. See ACTEC Commentary on MRPC 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer). The existence of those duties alone may qualify the lawyer’s duty of confidentiality with respect to the fiduciary. Moreover, the fiduciary’s retention of the lawyer to represent the fiduciary generally in the administration of the fiduciary estate may implicitly authorize the lawyer to make disclosures in order to protect the interests of the beneficiaries. It should be noted that the evidentiary attorney-client privilege is in some jurisdictions subject to the so-called fiduciary exception, which provides generally that a trustee cannot withhold attorney-client communications from the beneficiaries of the trust if the communications related to exercise of fiduciary duties. See United States v. Jicarilla Apache Nation, 131 S. Ct. 2313 (2011); Restatement (Third) of the Law Governing Lawyers §84 (2000).

In addition, the lawyer’s duties to the court may require the lawyer for a court-appointed fiduciary to disclose to the court certain acts of misconduct committed by the fiduciary. See MRPC 3.3(c) (Candor Toward the Tribunal), which requires disclosure to the court “even if compliance requires disclosure of information otherwise protected by MRPC 1.6.” In addition, the lawyer may not knowingly provide the beneficiaries or others with false or misleading information. See MRPCs 4.1-4.3 (Truthfulness in Statements to Others; Communication with Person Represented by Counsel; and Dealing with Unrepresented Person).

Disclosure of a Fiduciary’s Commission of, or Intent to, Commit a Fraud or Crime. When representing a fiduciary generally, the lawyer may discover that the lawyer’s services have been used or are being used by the client to commit a fraud or crime that has resulted or will result in substantial injury to the financial interests of the beneficiary or beneficiaries for whom the fiduciary is acting. If such fiduciary misconduct occurs, in most jurisdictions, the lawyer may disclose confidential information to the extent necessary to protect the interests of the beneficiaries. The lawyer has discretion as to how and to whom that information is disclosed, but the lawyer may disclose confidential information only to the extent necessary to protect the interests of the beneficiaries.
Whether a given financial loss to a beneficiary is a “substantial injury” will depend on the facts and circumstances. A relatively small loss could constitute a substantial injury to a needy beneficiary. Likewise, a relatively small loss to numerous beneficiaries could constitute a substantial injury. In determining whether a particular loss constitutes a “substantial injury,” lawyers should consider the amount of the loss involved, the situation of the beneficiary, and the non-economic impact the fiduciary’s misconduct had or could have on the beneficiary.

In the course of representing a fiduciary, the lawyer may be required to disclose the fiduciary’s misconduct under the substantive law of the jurisdiction in which the misconduct is occurring. For example, the elder abuse laws of some states require a lawyer who discovers the lawyer’s conservator/client has embezzled money from an elderly, protected person to disclose that information to state agencies, even though the lawyer’s services were not used in conjunction with the embezzlement. Under such circumstances, MRPC 1.6(b)(6) (“to comply with other law”) would authorize that disclosure.

Example 1.6-1. Lawyer (L) was retained by Trustee (T) to advise T regarding administration of the trust. T consulted L regarding the consequences of investing trust funds in commodity futures. L advised T that neither the governing instrument nor local law allowed the trustee to invest in commodity futures. T invested trust funds in wheat futures contrary to L’s advice. The trust suffered a substantial loss on the investments. Unless explicitly or implicitly required to do so by the terms of the representation, L was not required to monitor the investments made by T or otherwise to investigate the propriety of the investments. The following alternatives extend the subject of this example:

L, in preparing the annual accounting for the trust, discovered T’s investment in wheat futures and the resulting loss. T asked L to prepare the accounting in a way that disguised the investment and the loss. L may not participate in a transaction that misleads the court or the beneficiaries with respect to the administration of the trust—which is the subject of the representation. L should attempt to persuade T that the accounting must properly reflect the investment and otherwise be accurate. If T refuses to accept L’s advice, L must not prepare an accounting that L knows to be false or misleading. If T does not properly disclose the investment to the beneficiaries, in some states L may be required to disclose the investment to them. In others, it may be permitted under MRPC 1.6(b)(3) or other exceptions to the duty of confidentiality. In states that neither require nor permit such disclosures, the lawyer should resign from representing T.

L first learned of T’s investment in commodity futures when L reviewed trust records in connection with preparation of the trust accounting for the year. The accounting prepared by L properly disclosed the investment, was signed by T, and was distributed to the beneficiaries. L’s legal advice to T as to appropriate investments was proper. L was not obligated to determine whether or not T made investments contrary to L’s advice. L may not give legal advice to the beneficiaries but may recommend that they obtain independent counsel. In jurisdictions that permit the lawyer for a fiduciary to make disclosures to the beneficiaries regarding the fiduciary’s possible breaches of trust, L should consider whether to make such a disclosure.

_Conditioning Appointment of Fiduciary on Permitting Disclosure._ A lawyer may properly assist a client by preparing a will, trust or other document that conditions the appointment of a fiduciary upon the fiduciary’s agreement that the lawyer retained by the fiduciary to represent the fiduciary with respect to the fiduciary estate may disclose to the beneficiaries or an appropriate court any actions of the fiduciary that might
constitute a breach of trust. Such a conditional appointment of a fiduciary should not increase the lawyer’s duties other than the possible duty of disclosing misconduct to the beneficiaries. If the lawyer retained pursuant to such an appointment learns of acts or omissions by the fiduciary that may, or do, constitute a breach of trust, the lawyer should call them to the attention of the fiduciary and recommend that remedial action be taken. Depending upon the circumstances, including the nature of the actual or apparent breaches, their gravity, the potential that the acts or omissions might continue or be repeated, as well as the actual or potential injury suffered by the fiduciary estate or the beneficiaries, the lawyer for the fiduciary whose appointment has been so conditioned may properly disclose to the designated persons and to the court any actions of the fiduciary that may constitute breaches of trust even if such disclosure might not have been required or permitted absent the agreement.

Client Who Apparently Has Diminished Capacity. As provided in MRPC 1.14 (Client with Diminished Capacity), a lawyer for a client who has, or reasonably appears to have, diminished capacity is authorized to take reasonable steps to protect the interests of the client, including the disclosure, where appropriate and not prohibited by state law or ethical rule, of otherwise confidential information. See ACTEC Commentary on MRPC 1.14 (Client with Diminished Capacity), ABA Inf. Op. 89-1530 (1989), and Restatement (Third) of the Law Governing Lawyers, §§24, 51 (2000). In such cases the lawyer may either initiate a guardianship or other protective proceeding or consult with diagnosticians and others regarding the client’s condition, or both. In disclosing confidential information under these circumstances, the lawyer may disclose only that information necessary to protect the client’s interests [MRPC 1.14(c) (Client with Diminished Capacity)].

Prospective Clients. A lawyer owes some duties to prospective clients including a general obligation to protect the confidentiality of information obtained during an initial interview. See Restatement (Third) of the Law Governing Lawyers, §§15, 60 (2000). Under MRPC 1.18(b) (Duties to Prospective Clients), even though a lawyer-client relationship does not result from the initial consultation, the lawyer “shall not use or reveal information learned in the consultation, except as MRPC 1.9 would permit with respect to information of a former client.” In addition, a lawyer who is not retained may be disqualified from representing a party whose interests are adverse to the prospective client in the same or a substantially related matter. See ACTEC Commentary on MRPC 1.18 (Duties to Prospective Client).

Joint and Separate Clients. Subject to the requirements of MRPCs 1.6 and 1.7 (Conflict of Interest: Current Clients), a lawyer may represent more than one client with related, but not necessarily identical, interests (e.g., several members of the same family, more than one investor in a business enterprise). The fact that the goals of the clients are not entirely consistent does not necessarily constitute a conflict of interest that precludes the same lawyer from representing them. See ACTEC Commentary on MRPC 1.7 (Conflict of Interest: Current Clients). Thus, the same lawyer may represent a husband and wife, or parent and child, whose dispositive plans are not entirely the same. When the lawyer is first consulted by the multiple potential clients, the lawyer should review with them the terms upon which the lawyer will undertake the representation, including the extent to which information will be shared among them. Nothing in the foregoing should be construed as approving the representation by a lawyer of both parties in the creation of any inherently adversarial contract (e.g., a marital property agreement) which is not subject to rescission by one of the parties without the consent and joinder of the other. See ACTEC Commentary on MRPC 1.7 (Conflict of Interest: Current Clients). In the absence of any agreement to the contrary (usually in writing), a lawyer is presumed to represent multiple clients with regard to related legal matters jointly, but the law is unclear as to whether all information must be shared between them. As a result, an irreconcilable conflict may arise if one co-client shares information that he or she does not want shared with the other (see
discussion below). Absent special circumstances, the co-clients should be asked at the outset of the representation to agree that all information can be shared. The better practice is to memorialize the clients’ agreement and instructions in writing, and give a copy of the writing to the client.

Multiple Separate Clients. There does not appear to be any authority that expressly authorizes a lawyer to represent multiple clients separately with respect to related legal matters. However, with full disclosure and the informed consents of the clients, this may be permissible if the lawyer reasonably concludes he or she can competently and diligently represent each of the clients. Some estate planners represent a parent and child or other multiple clients as separate clients. A lawyer who is asked to provide separate representation to multiple clients in related matters should do so with care because of the stress it necessarily places on the lawyer’s duties of impartiality and loyalty and the extent to which it may limit the lawyer’s ability to advise each of the clients adequately. For example, without disclosing a confidence of one estate planning client who is the parent of another estate planning client and whose estate plan differs from what the child is expecting, the lawyer may have difficulty adequately representing the child/client in his or her estate planning because of the conflict between the duty of confidentiality owed to the parent and the duty of communication owed to the child. See ACTEC Commentary on MRPC 1.7 (Conflict of Interest: Current Clients), example 1.7.1a. Within the limits of MRPC 1.7 (Conflict of Interest: Current Clients), it may be possible to provide separate representation regarding related matters to adequately informed clients who give their consent to the terms of the representation. Changed circumstances may, however, create a non-waivable conflict under MPRC 1.7 (Conflict of Interest: Current Clients) and require withdrawal even if the clients consented. See Hotz v. Minyard, 403 S.E.2d 634 (S.C. 1991) (discussed in annotations). The lawyer’s disclosures to, and the agreement of, clients who wish to be separately represented should, but need not, be reflected in a contemporaneous writing. Unless required by local law, such a writing need not be signed by the clients.

Confidences Imparted by One Joint Client. As noted earlier, except in special circumstances, joint clients should be advised at the outset of the representation that information from either client may be required to be shared with the other if the lawyer considers such sharing of information necessary or beneficial to the representation. This advice should be confirmed in writing, and the lawyer should consider asking the clients to acknowledge that understanding in writing. Absent an advance agreement that adequately addresses the handling of confidential information shared by only one joint client, a lawyer who receives information from one joint client (the “communicating client”) that the client does not wish to be shared with the other joint client (the “other client”) is confronted with a situation that may threaten the lawyer’s ability to continue to represent one or both of the clients. As soon as practicable after such a communication, the lawyer should consider the relevance and significance of the information and decide upon the appropriate manner in which to proceed. The potential courses of action include, inter alia, (1) taking no action with respect to communications regarding irrelevant (or trivial) matters; (2) encouraging the communicating client to provide the information to the other client or to allow the lawyer to do so; and, (3) withdrawing from the representation if the communication reflects serious adversity between the parties. For example, a lawyer who represents a husband and wife in estate planning matters might conclude that information imparted by one of the spouses regarding a past act of marital infidelity need not be communicated to the other spouse. On the other hand, the lawyer might conclude that he or she is required to take some action with respect to a confidential communication that concerns a matter that threatens the interests of the other client or could impair the lawyer’s ability to represent the other client effectively (e.g., “After she signs the trust agreement, I intend to leave her…” or “All of the insurance policies on my life that name her as beneficiary have lapsed”). Without the informed consent of the other client, the lawyer should
not take any action on behalf of the communicating client, such as drafting a codicil or a new will, that might damage the other client’s economic interests or otherwise violate the lawyer’s duty of loyalty to the other client.

In order to minimize the risk of harm to the clients’ relationship and, possibly, to retain the lawyer’s ability to represent both of them, the lawyer may properly urge the communicating client himself or herself to impart the confidential information directly to the other client. See ACTEC Commentary on MRPC 2.1 (Advisor). In doing so, the existence of an agreement at the outset of the representation that all information will be shared is particularly helpful. The lawyer may properly remind the communicating client of the explicit or implicit understanding that relevant information would be shared and of the lawyer’s obligation to share the information with the other client. The lawyer may also point out the possible legal consequences of not disclosing the confidence to the other client, including the possibility that the validity of actions previously taken or planned by one or both of the clients may be jeopardized. In addition, the lawyer may mention that the failure to communicate the information to the other client may result in a disciplinary or malpractice action against the lawyer.

If the communicating client continues to oppose disclosing the confidence to the other client, the lawyer faces an extremely difficult situation with respect to which there is often no clearly proper course of action. In such cases the lawyer should have a reasonable degree of discretion in determining how to respond to any particular case. In fashioning a response, the lawyer should consider his or her duties of impartiality and loyalty to the clients; any express or implied agreement among the lawyer and the joint clients that information communicated by either client to the lawyer or otherwise obtained by the lawyer regarding the subject of the representation would be shared with the other client; the reasonable expectations of the clients; and the nature of the confidence and the harm that may result if the confidence is, or is not, disclosed. In some instances the lawyer must also consider whether the situation involves such adversity that the lawyer can no longer effectively represent both clients and is required to withdraw from representing one or both of them. See ACTEC Commentary on MRPC 1.7 (Conflict of Interest: Current Clients). A letter of withdrawal that is sent to the other client may arouse the other client’s suspicions to the point that the communicating client or the lawyer may ultimately be required to disclose the information.

Separate Representation of Related Clients in Unrelated Matters. The representation by one lawyer of related clients with regard to unrelated matters does not necessarily involve any problems of confidentiality or conflicts. Thus, a lawyer is generally free to represent a parent in connection with the purchase of a condominium and a child regarding an employment agreement or an adoption. Unless otherwise agreed, the lawyer must maintain the confidentiality of information obtained from each separate client and be alert to conflicts of interest that may develop. The separate representation of multiple clients with respect to related matters, discussed above, involves different considerations.

Detection of Conflicts of Interest. Under MRPC 1.6(b)(7), a lawyer may disclose client confidences to detect and resolve conflicts of interest that might arise from a new lawyer joining a firm or from changes in the composition or ownership of the firm. But any such disclosures must be limited to what is reasonably necessary, and they may not be made to the prejudice of clients. Thus, disclosure should ordinarily be limited to the names of the persons and entities involved in a matter, a brief summary of the general issues involved, and information as to whether the matter has terminated or is ongoing. Sometimes even that amount of information might prejudice a client. Suppose that a firm is doing joint estate planning for a husband and wife and a lawyer from another firm who is defending the husband in a paternity action is
considering joining the estate planning firm. The paternity lawyer may disclose to the estate planning firm that he is representing the husband, but disclosure of the nature of the representation to the estate planning firm might seriously harm the husband and compromise the ability of the estate planning firm to continue its work for the wife. The paternity lawyer, in such a situation, should disclose only enough to allow the paternity lawyer and the estate planning firm to know that there might be a conflict of interest.

**ANNOTATIONS**

See Caveat to Annotations on page 13
(Limiting the Scope and Purpose of the Annotations)

Joint and Separate Clients

Cases

Florida:

*Cone v. Culverhouse*, 687 So.2d 888 (Fla. App. 1997). In this case the court discussed the “common interest” exception to the lawyer-client communications privilege. Under state statute there is no lawyer-client communication privilege where the communication is relevant to a matter of common interest between two or more clients, such as a husband and wife, with regard to their estate planning, if the communication was made by either of them to the lawyer whom they retained or consulted in common.

*Witte v. Witte*, 126 So.3d 1076 (Fla. App. 2012). This is a marital dissolution case involving an elderly couple, which has relevance for communications with elderly clients. Husband asserted that wife could not claim attorney-client privilege for communications with her attorney because her daughter and son-in-law were present during those communications. The court remanded, finding that the wife was elderly, had several cognitive impairments and needed her daughter and son-in-law to help her communicate with the lawyer. She also needed the daughter and son-in-law’s help in translating several of her financial documents, which were written in Hebrew. The court remanded for a determination of whether the communications “were intended to remain confidential as to other third parties, and whether the disclosure to [them], within the factual circumstances presented by this case, was reasonably necessary for the transmission of the communications.”

New Jersey:

*A v. B v. Hill Wallack*, 726 A.2d 924 (N.J. 1999). Construing New Jersey’s broad client-fraud exception to the state’s version of MRPC 1.6, the Supreme Court of New Jersey held that a law firm that was jointly representing a husband and wife in the planning of their estates was entitled to disclose to the wife the existence (but not the identity) of husband’s child born out of wedlock. The court reasoned that the husband’s deliberate failure to mention the existence of this child when discussing his estate plan with the law firm constituted a fraud on the wife which the firm was permitted to rectify under MRPC 1.6(c). Interestingly, the law firm learned about the child born out of wedlock not from the husband but from the child’s mother who had retained the law firm. The court also based its decision permitting disclosure on the existence of a written agreement between the husband and wife, on the one hand, and the law firm, on the other, waiving any potential conflicts of interest with the court suggesting that the letter reflected the couple’s implied intent to share all material information with each other in the course of the estate planning. The court cites extensively and approvingly to the **ACTEC Commentaries** and to
the *Report* of the ABA Special Probate and Trust Division Study Committee on Professional Responsibility discussed immediately below.

**Ethics Opinions**

**ABA:**
Op. 08-450 (2008). This opinion concentrates on the insurance defense scenario, but has useful things to say for estate planners representing multiple clients on the same or related matters. With regard to the interplay between the duty of confidentiality and the duty to inform:

> Lawyers routinely have multiple clients with unrelated matters, and may not share the information of one client with other clients. The difference when the lawyer represents multiple clients on the same or a related matter is that the lawyer has a duty to communicate with all of the clients about that matter. Each client is entitled to the benefit of Rule 1.6 with respect to information relating to that client's representation, and a lawyer whose representation of multiple clients is not prohibited by Rule 1.7 is bound to protect the information of each client from disclosure, whether to other clients or otherwise.

> The question generally will be whether withholding the information from the other client would violate the lawyer's duty under Rule 1.4(b) to `explain a matter to the extent reasonably necessary to permit the [other] client to make informed decisions regarding the representation.’ If so, the interests of the two clients would be directly adverse, requiring the lawyer's withdrawal under Rule 1.16(a)(1) because the lawyer's continued representation of both would result in a violation of Rule 1.7. The answer depends on whether the scope of the lawyer's representation requires disclosure to the other client.

**District of Columbia:**
Op. 296 (2000). A lawyer who undertakes representation of two clients in the same matter should address in advance and, where possible in writing, the impact of joint representation on the lawyer’s duty to maintain client confidences and to keep each client reasonably informed, and obtain each client’s informed consent to the arrangement. The mere fact of joint representation, without more, does not provide a basis for implied authorization to disclose one client’s confidences to another. Without express consent in advance, the lawyer who receives relevant information from one client should seek consent of that client to share the information with the other or ask the client to disclose the information to the other client directly. If the lawyer cannot achieve disclosure, a conflict of interest is created that requires withdrawal.

**Florida:**
Op. 95-4 (1997). “In a joint representation between husband and wife in estate planning, an attorney is not required to discuss issues regarding confidentiality at the outset of representation. The attorney may not reveal confidential information to the wife when the husband tells the attorney that he wishes to provide for a beneficiary that is unknown to the wife. The attorney must withdraw from the representation of both husband and wife because of the conflict presented when the attorney must maintain the husband’s separate confidences regarding the joint representation.” This opinion is also discussed in the Annotations following the ACTEC Commentary on MRPC 1.7.
New York:

Op. 555 (1984). A lawyer retained by A and B to form a partnership, who received communication from B indicating that B was violating the partnership agreement, may not disclose the information to A although it would not be within the lawyer-client evidentiary privilege. The lawyer must withdraw from representing the partners with respect to partnership affairs. A minority of the Ethics Committee dissented on the ground that “the attorney must at least have the discretion, if not the duty in the circumstances presented, to disclose to one partner the facts imparted to him by the other partner, that gave rise to the conflict of interests necessitating the lawyer’s withdrawal as attorney for the partnership.”

Op. 1002 (2014). Lawyer who was a prosecutor was executor for his father, who was a solo practitioner and who held original wills of clients at his death. Lawyer as executor may examine the wills and may disclose information necessary to transfer or dispose of the wills. Because the lawyer did not acquire the wills incident to his law practice, MR 1.6 and 1.15 are not applicable.

## Related Secondary Materials

ABA, Probate and Trust Division, Report of the Special Study Committee on Professional Responsibility, Report: Comments and Recommendations on the Lawyer’s Duties in Representing Husband and Wife; Preparation of Wills and Trusts that Name Drafting Lawyer as Fiduciary; and Counseling the Fiduciary, 28 REAL PROPERTY, PROBATE & TRUST JOURNAL 765-863 (1994). The representation of a husband and wife is one of the subjects that has been studied by the ABA Probate and Trust Division Special Study Committee on Professional Responsibility (“the ABA Special Committee”). Id. at 765-802. The ABA Special Committee recommends the practice of having an agreement that sets out the ground rules of representation. Id. at 801. Absent such an agreement, a representation of husband and wife is a joint representation. Id. at 778. The ABA Committee takes the position that a lawyer may represent a husband and wife separately, agreeing to maintain the confidences of each, provided the mode of representation is clearly spelled out in an agreement. Id. at 794. Even where there is such an agreement to represent spouses separately, however, if a lawyer’s independence of judgment and duty to one spouse are compromised by the disclosure of adverse confidences by the other, the lawyer must be prepared to withdraw. Id. at 800.

In the context of a joint representation, problems arise where one spouse tells the lawyer of a fact or goal that he or she desires to remain confidential from the other spouse. Id. at 783-93. If a confidence is communicated by one spouse, the Report suggests that the lawyer must inquire “into the nature of the confidence to permit the lawyer to determine whether the couple’s difference that caused the information to be secret constitutes either a material potential for conflict or a true adversity.” Id. at 784. The Report goes on to describe three broad types of confidences that may cause the lawyer to conclude that the differences between the spouses make the spouses’ interests truly adverse: (1) Action-related confidences, in which the lawyer is asked to give advice or prepare documents without the knowledge of the other spouse, that would reduce or defeat the other spouse’s interest in the confiding spouse’s property or pass the confiding spouse’s property to another person; (2) Prejudicial confidences, which seek no action by the lawyer, but nonetheless indicate a substantial potential of material harm to the interests of the other spouse; and (3) Factual confidences which indicate that the expectations of one spouse with respect to an estate plan, or the spouse’s understanding of the plan, are not true. Id. at 785-86. Because an unexpected letter of withdrawal may not protect a confidence from disclosure, the ABA Committee concluded that “[t]he lawyer must balance the
potential for material harm arising from an unexpected withdrawal against the potential for material harm arising from the failure to disclose the confidence” to the other spouse.” *Id.* at 792.

**Obligation Continues After Death**

**Cases**

**Federal:**

*Swidler & Berlin v. U.S.*, 524 U.S. 399 (1998). “[T]he general rule with respect to confidential communications … is that such communications are privileged during the testator’s lifetime and, also, after the testator’s death unless sought to be disclosed in litigation between the testator’s heirs. [Citation omitted.] The rationale for such disclosure is that it furthers the client’s intent. [Citation omitted.] Indeed, in *Glover v. Patten*, 165 U.S. 394, 406-408 (1897), this Court, in recognizing the testamentary exception, expressly assumed that the privilege continues after the individual’s death. The Court explained that testamentary disclosure was permissible because the privilege, which normally protects the client’s interest, could be impliedly waived in order to fulfill the client’s testamentary intent. [Citations omitted.]

*United States v. Yielding*, 657 F.3d 688 (8th Cir. 2011). Husband and Wife were charged with Medicare fraud. W died, and H subpoenaed files from W’s attorneys, claiming that as Personal Representative of her estate, he was waiving attorney-client privilege. He wanted to use the files to shift blame to W. Eighth Circuit held that trial court judge properly quashed the subpoena. “A personal representative of a deceased client generally may waive the client’s attorney-client privilege … only when the waiver is in the interest of the client’s estate and would not damage the client’s reputation.” H argued that W’s reputation was already damaged, but court held that waiving the privilege could cause further damage.

**California:**

*HLC Properties Ltd. v. Superior Court (MCA Records Inc.)*, 24 Cal. Rptr. 3d 1999 (2005). Construing California’s Evidence Code, the Supreme Court of California held that, “the attorney-client privilege of a natural person transfers to the personal representative after the client’s death, and the privilege thereafter terminates when there is no personal representative to claim it.” Therefore, the company taking over responsibility for running the business ventures of the deceased entertainer Bing Crosby did not succeed to the entertainer’s attorney-client privilege.

**New York:**

*Mayorga v. Tate*, 752 N.Y.S. 2d 353 (App. Div. 2002). A decedent’s personal representative may waive the attorney-client privilege to obtain disclosure in a malpractice case against the decedent’s former attorney.

**Ethics Opinions**

**District of Columbia:**

Op. 324 (2004). A decedent’s former attorney may reveal confidences obtained during the course of the professional relationship between the decedent and the attorney only where the attorney reasonably believes that the disclosure is impliedly authorized to further the decedent’s interest in settling her estate. In “rare situations” where the attorney is unsure what the client would have wanted the attorney
to do, the attorney should seek an order from the court supervising disposition of the estate and present the materials at issue for an in camera review. For example, if the surviving spouse needed the information to fulfill the spouse’s duties as executor to administer the estate, disclosure is clearly warranted. If on the other hand, the surviving spouse is or was engaged in litigation with the deceased spouse, disclosure, absent a court order, might be inappropriate.

Hawaii:
Op. 38 (1999). An estate planning attorney may disclose confidential information about a deceased client if the attorney reasonably and in good faith determines that doing so would carry out the deceased client’s estate plan or if the attorney is authorized to do so by other law or court order. A waiver by the personal representative of the deceased client’s estate is not a proper basis for disclosing confidential information.

Iowa:
Op. 98-11 (1998). The Board in this case was asked to provide an opinion on what types of matters involving his deceased clients an attorney could testify to in a deposition. The Board noted the existence of its earlier Opinions 88-11 and 91-24 and the recent decision of the U.S. Supreme Court in Swidler & Berlin v. U.S., supra. Noting that the U.S. Supreme Court had held that the attorney-client communications privilege survives the death of the client and that a series of narrow tests must be met before an exception to the general rule that privileged communications survive the death of the testator may be applied, the Board stated, “these tests require findings of fact, which are legal questions which must be determined by a court of law and not by this Board. Upon the determination of these fact questions, it may well be that ethical questions may arise but in the meantime this Board does not have jurisdiction to issue an opinion in this kind of a question.”

Missouri:
Op. 940013 (1994). Confidentiality restrictions apply in a situation where an attorney prepared a will for a decedent and the decedent’s heirs and their attorneys wanted to discuss the matter with decedent’s attorney with respect to a possible will contest action. This prohibition against disclosing confidential information prohibits any disclosure of decedent’s competency without a court order to do so.

Op. 990146 (1999). An attorney who prepared a will and filed the will in probate but never opened an estate for a deceased client may not voluntarily provide the estate planning file or information about the advice provided to the deceased to a personal representative, unless the deceased expressly consented to such a disclosure. The duty of confidentiality survives the death of a client. If the attorney, whose services are eventually terminated by the personal representative, is subpoenaed to provide such information, he may “only do so after the factual and legal issues related to confidentiality are fully presented to the court” and the court issues an order to disclose the information.

New York:
Nassau County Bar Op. 304 (2003). A lawyer who was representing a wife in secret planning for divorce may not after her death disclose confidences to her husband as personal representative. Husband had sought return of a retainer and then sought the lawyer’s file. Acknowledging the general rule that a decedent’s personal representative may waive the attorney-client privilege, the committee concluded that such a waiver was appropriate “if and when acting in the interest of the decedent-client and his or her estate.” See also Nassau County Bar Op. 89-26 (1989).
North Carolina:
2002 Op. 7 (2003). A lawyer may reveal the relevant confidential information of a deceased client in a will contest proceeding if the attorney-client privilege does not apply to the lawyer’s testimony.

Pennsylvania:
Phila. Bar Op. 91-4 (1991). A lawyer may not disclose to a client’s children the contents of a deceased client’s prior will: “The earlier will constitutes confidential information relating to your representation of the testator, and your duty not to reveal its contents continues even after your client’s death.”

Op. 2003-11. The executor of the testator’s estate does have the authority to consent to the disclosure of confidential information pertaining to the estate planning and other aspects of the representation of the testator.

Related Secondary Materials

Restatement (Third) of the Law Governing Lawyers (2000), §81A Dispute Concerning a Decedent’s Disposition of Property, Comment b:

... The attorney-client privilege does not apply to a communication from or to a decedent relevant to an issue between parties who claim an interest through the same deceased client, either by testate or intestate succession or by an inter vivos transaction.

Client with Diminished Capacity

Cases

See MRPC 1.14(c) and cases collected under MRPC 1.14 in these Commentaries.

Ethics Opinions

Alabama:
Op. 89-77 (1987). The lawyer for a guardian who discovers embezzlement by the guardian may not disclose misconduct that is confidential information, must call on client to restore funds, and if client refuses to do so lawyer must withdraw. The lawyer may not represent a client who fails to account for the embezzled funds.

California:
Op. 1989-112. This opinion states that a lawyer may not take steps to protect a client that might involve disclosure of the client’s condition if the client objects. This opinion is also discussed under MRPC 1.14.

Illinois:
Op. 00-02 (2000). A lawyer may not provide a copy of a psychiatric report relating to the lawyer’s client with diminished capacity to the client’s father. The father previously had retained the lawyer to represent the child (an adult). Lawyer should advise father to seek independent counsel.

91
Maine:
Op. 84 (1988). The lawyer for an elderly client believed to be incapable of making rational financial decisions may inform the client’s son if the son has no adverse interest. Alternatively, the lawyer may seek help from the state adult guardianship service, etc.

Missouri:
Op. 20000208 (2000). Attorney prepared a will for a client in the past and had ceased contact with that client since that transaction. Second attorney contacted the first attorney as to the mental capacity of the client during the period of drafting the will, for the purpose of representing the client in another action. The first attorney may discuss the competency of the client without a court order if client is capable of giving consent. If the client is incapable of giving consent to the disclosure by the first attorney concerning his mental state at the time of the drafting, the attorney is prohibited from disclosing information related to his representation of client without a court order. Also, if no court order exists for the disclosure and the client is incapable of giving his consent, an attorney may discuss the client’s competency with client’s child if the client’s child has been named as attorney-in-fact under a durable power of attorney, dependent upon the exact terms of that power of attorney.

Ohio:
Cleveland Bar Op. 86-5 (1986). A lawyer who represented a husband and wife may initiate a guardianship proceeding for the incompetent husband but may not take a position contrary to the interests of the wife. However, if interests of the husband and wife conflict, the lawyer must withdraw from representing either.

Cleveland Bar Op. 89-3 (1989). The lawyer for a person with diminished capacity has a duty to choose a course of action in accordance with the best interests of the client, which may include moving for the appointment of a guardian for purposes of a tort action, but must avoid unnecessarily revealing confidential information. The lawyer should avoid the conflict involved in representing the client and petitioning for the appointment of a guardian.

Tennessee:
Op. 2014-F-158. The opinion addresses an “increasingly common” problem: whether to disclose estate planning documents of a now-incapacitated client to third parties such as guardians. The opinion distinguishes between judicial proceedings and requests outside of judicial proceedings. In a judicial proceeding, the lawyer must assert the attorney-client privilege but must disclose the documents if the privilege claim is overruled by the court. Outside of a court proceeding, “neither RPC 1.6(a)(1), RPC 1.9(c)(1), nor accompanying comments permit someone other than the client or former client to waive confidentiality on behalf of the client,” so a guardian cannot waive confidentiality. However, Tenn. Code Ann. § 34-3-107(2)(F) allows a court to vest conservators with the power to receive or release confidential information of the incapacitated person, so in that circumstance the lawyer may be able to disclose under the “other law” exception to 1.6. The lawyer may determine that disclosure is impliedly authorized but the lawyer must exercise reasonable professional judgment and “consider the client’s wishes or intent” in such determination, and “doubt should be resolved in favor of not disclosing.”
Disclosures by Lawyer for Fiduciary

Rules Variations

Washington:
WRPC 1.6 allows a lawyer to inform the court of misconduct by a court-appointed fiduciary as follows:

(b) A lawyer to the extent the lawyer reasonably believes necessary … (7) may reveal information relating to the representation of a client to inform a tribunal about any breach of fiduciary responsibility when the client is serving as a court-appointed fiduciary such as a guardian, personal representative, or receiver.

Cases

Federal:
United States v. Jicarilla Apache Nation, 131 S. Ct. 2313 (2011). The litigation involved the federal government’s management of funds held by the government in trust for the benefit of the Jicarilla Apache Nation. The tribe sought discovery of documents and communications between the government and its lawyers concerning management of the funds, and the government asserted attorney-client privilege. The lower courts nevertheless ordered disclosure because of the fiduciary exception to the attorney-client privilege. The Supreme Court held that the fiduciary exception did not apply in this case. The Court discussed the history and purpose of the exception, and held that it did not apply here for two primary reasons: first, the advice given was for the benefit of the government in its governing role, as opposed to the circumstance of private trusts where the beneficiary is the “real” client. It was significant to the court that the government lawyers were not paid out of trust funds. Second, the Court distinguished between the common law duty of broad disclosure to beneficiaries of a private trust and the limited disclosure required by statute with respect to the tribe’s funds held in trust by the government. Other federal cases considering the fiduciary exception in the ERISA context have held that it applies to ERISA trustees. See Solis v. Food Employers Labor Relations Ass’n, 644 F.3d 221 (4th Cir. 2011); Harvey v. Standard Ins. Co., 275 F.R.D. 629 (N.D. Ala. 2011) (distinguishing Jicarilla); Moore v. Metropolitan Life Ins. Co., 799 F. Supp. 2d 1290 (M.D. Ala. 2011).

Arkansas:
Estate of Torian v. Smith, 564 S.W.2d 521 (Ark. 1978). The Supreme Court of Arkansas here held that the attorney-client privilege did not bar testimony by the attorney for the executor of the decedent’s will relating to a consultation which took place before the will was filed for probate in another state since the executor, in consulting with the attorney, was necessarily acting for both itself as executor and for the beneficiaries under the will, all of whom were therefore to be treated as joint clients.

California:
Moeller v. Superior Court (Sanwa Bank), 69 Cal. Rptr. 2d 317 (1997). This case holds that, since the powers of a trustee are not personal to any particular trustee but, rather, are inherent in the office of trustee, when a successor trustee (who in this case also happened to be a beneficiary of the trust) takes office, the successor assumes all powers of the predecessor trustee, including the power to assert (or waive) the attorney-client communications privilege.
Wells Fargo Bank v. Superior Court (Boltwood), 91 Cal. Rptr. 2d 716 (2000). This case holds that since the attorney for the trustee of a trust is not, by virtue of that relationship also the attorney for the beneficiaries of the trust, the beneficiaries are not entitled to discover the confidential communications of the trustee with the trustee’s counsel, regardless of whether or not the communications dealt with trust administration or allegations of trustee misconduct. In addition, the work product of trustee’s counsel is not discoverable. These results obtain regardless of the fact that the fees for the attorney’s services are paid from the trust.

Florida:

First Union Nat’l Bank of Florida v. Whitener, 715 So.2d 979 (Fla. App. 1998), review denied, 727 So.2d 915 (1999). In this discovery dispute, a trust beneficiary who had brought a breach of fiduciary duty action against the trustee bank sought information and documents exchanged between the trustee and its attorneys. The court held that the attorney’s client was the trustee and not the beneficiary. The attorney had been hired by the trustee after the beneficiary had retained counsel and was questioning the trustee’s conduct. The court also found that Florida’s version of the fraud exception to the attorney-client communications privilege did not apply and that the trustee’s earlier voluntary production of certain letters from its attorney to the trustee did not waive the attorney-client privilege as to undisclosed documents.

Jacob v. Barton, 877 So.2d 935 (Fla. App. 2004). A trust beneficiary sought discovery of the trustees’ attorneys’ billing records. In deciding whether the attorney-client privilege and work product doctrine applied to the billing records, a court must decide whose interests the attorneys represent—the trustee’s or the beneficiary’s. According to the court, to the extent the attorneys’ work concerns the trustee’s dispute with the beneficiary, their client is the trustee. Since the record before the appellate court was limited, it could not determine whether the billing records contained privileged information. The appellate court therefore quashed the circuit court’s order granting unlimited discovery of the billing records and directed it to determine whether any of the billing records would be protected.

Illinois:

In re Estate of Minsky, 376 N.E.2d 647, 650 (Ill. App. 1978) (no discussion of confidentiality). “As an attorney and officer of the court, the lawyer was under an obligation to inform the court of any suspicions of fraud or wrongdoing on the part of the executor.”

New York:

Hoopes v. Carota, 531 N.Y.S.2d 407, 410 (App. Div. 1988), aff’d mem., 543 N.E.2d 73 (1989). In this case the court allowed the beneficiaries of a trust to discover communications between the defendant-trustee and the lawyer who advised the defendant generally with respect to administration of the trust. The opinion recognizes the distinction between a representation of the trustee qua trustee and a representation of the trustee “in an individual capacity.” The Appellate Division opinion states that the lawyer-client evidentiary privilege:

[D]oes not attach at all when a trustee solicits and obtains legal advice concerning matters impacting on the interests of the beneficiaries seeking disclosure, on the ground that a fiduciary has a duty of disclosure to the beneficiaries whom he is obligated to serve as to all his actions, and cannot subordinate the interests of the beneficiaries, directly affected by the advice sought to his own private interests under the guise of privilege.
Pennsylvania:

*Follansbee v. Gerlach and Reed Smith*, 2002 WL 31425995, 22 Fid.Rep.2d. 319 (Pa. Com. Pl. 2002). The beneficiaries of a trust have a right to see routine correspondence between the trustee and its counsel during the trust administration and that right may not be denied unless the correspondence was developed in the contemplation of litigation and has been appropriately cloaked with the attorney-client privilege.

South Carolina:

*Floyd v. Floyd*, 615 S.E.2d. 465 (S.C. App. 2005). Distinguishing *Barnett Nat’l Bank v. Compson*, supra, MRPC 1.2, from Delaware, and instead relying on *Riggs Nat’l Bank of Washington, D.C. v. Zimmer*, supra MRPC 1.2, from D.C., the court here found that the beneficiary of a trust was entitled to review the opinions of the trustees’ counsel to ensure that the trustee was acting in accordance with the dictates of his fiduciary duties, particularly where, as here, the opinions in question were paid for with trust funds.

**Ethics Opinions**

Illinois:

Op. 91-24 (1991). The lawyer retained by a guardian represents both the guardianship estate and the guardian in a representative capacity. It was assumed that the guardian did not reasonably believe that the lawyer represented her personally. “Accordingly, the communication by the guardian to the attorney, even if made in confidence, (and the other information acquired by the attorney in the course of his representation of the estate) would not be covered by the attorney-client privilege nor would it be considered a ‘secret’ of the guardian….. The guardian is not represented personally by the attorney but is represented only in his capacity as guardian for closing out the guardianship estate.” The lawyer’s duty to the estate requires that “he take the steps necessary to protect the estate from the possibly fraudulent action of the guardian. If the attorney does not take steps to have the propriety of the taking of the money determined now, he runs the risk that both his and the guardian’s actions will later be determined fraudulent.”

Op. 98-07 (1998). A lawyer representing a guardian who has filed annual accountings, now known to have been false, must take appropriate remedial action to avoid assisting the guardian in concealing from the court the guardian’s misappropriation of estate assets, even if the disclosure of client information otherwise protected by MRPC 1.6 may be required.

Kentucky:

Op. 401 (1997). In representing a fiduciary, the lawyer’s client relationship is with the fiduciary and not with the trust or estate, nor with the beneficiaries of a trust or estate. The fact that a fiduciary has obligations to the beneficiaries of the trust or estate does not in itself either expand or limit the lawyer’s obligations to the fiduciary nor impose on the lawyer obligations toward the beneficiaries that the lawyer would not have toward other third parties. The lawyer’s obligation to preserve client’s confidences under MRPC 1.6 is not altered by the circumstance that the client is a fiduciary. A lawyer has a duty to advise multiple parties who are involved with a decedent’s estate or trust regarding the identity of the lawyer’s client and the lawyer’s obligations to that client. A lawyer should not imply that the lawyer represents the estate or trust or the beneficiaries of the estate or trust because of the
probability of confusion. Further, in order to avoid such confusion, a lawyer should not use the term “lawyer for the estate” or the term “lawyer for the trust” on documents or correspondence or in other dealings with the fiduciary or the beneficiaries. A lawyer may represent the fiduciary of a decedent’s estate or a trust and the beneficiaries of an estate or trust if the lawyer obtains the consent of the multiple clients, and explains the limitations on the lawyer’s actions in the event a conflict arises and the consequences to the clients if a conflict occurs.

New York:
Op. 797 (2006). A lawyer hired by the named executor and decedent’s only heir to probate the estate files a petition to have the heir appointed as executor and he is appointed. Thereafter lawyer learns that the client is a convicted felon who is not permitted to serve as executor under state law. Committee opines that under NY’s confidentiality rules, lawyer is not permitted to disclose this secret to the tribunal, but is permitted to withdraw his own certification that the client is authorized to serve. He must, therefore, withdraw that certification and is permitted to disclose the secret only to the extent that disclosure is implicit in the withdrawal. Thereafter, lawyer may be required to withdraw from representation if continuing to represent the client would require the lawyer to violate another rule, such as that prohibiting him from assisting his client in an illegal act.

North Carolina:
2002 Op. 3. Lawyer for the personal representative may seek removal of his client if the personal representative has breached fiduciary duties and has refused to resign. Lawyer should first determine if actions of representative constitute grounds for removal under the law.

Oregon:
Op. 2005-119. A lawyer who represents widow as an individual and widow in her capacity as personal representative, has only one client. The fact that widow may have multiple interests as an individual and as a fiduciary does not mean that lawyer has more than one client, even if widow’s personal interests may conflict with her obligations as a fiduciary. Representing one person who acts in several different capacities is not the same as representing several different people. Consequently, the current-client conflict rules in Oregon RPC 1.7, do not apply to lawyer’s situation. If the client confides in the lawyer that she has breached her duties as fiduciary in the past, he is not free to disclose this unless one of the exceptions to Rule 1.6 applies. Neither may he make affirmative misrepresentations about such conduct. The lawyer may be required to withdraw if not withdrawing would involve the lawyer in misconduct. If the client informs lawyer she plans to engage in criminal conduct in the future, he is permitted (but not required) to disclose this to prevent the crime under Oregon Rule 1.6(b)(1) (future crime exception).

Pennsylvania:
Philadelphia Bar Op. 2008-9. A lawyer was retained to represent a Personal Representative (PR) and helped her administer the estate, then thought to consist of $300,000. Thereafter U.S. Bonds in the name of the decedent worth $360,000 were discovered and the lawyer turned them over to the PR. Now the PR has dropped out of touch and will not communicate with lawyer. Opinion concludes that under PA’s equivalent of MR 1.6(b)(2) and (3), lawyer is permitted to disclose PR’s misconduct and, assuming representations have been made to the court sufficient to trigger Rule 3.3, the lawyer is required to disclose this information to the court. He will also be required to withdraw under Rule 1.16.
Disclosure to Third Party

Cases

Connecticut:
Gould, Larson, Bennet, Wells and McDonnell, P.C. v. Panico, 273 Conn. 315, 869 A.2d 653 (2005). “The principal issue on appeal is whether, in the context of a will contest, the exception to the attorney-client privilege, as recognized by this court in Doyle v. Reeves, 112 Conn. 521, 152 A. 882 (1931), that communications between a decedent and the attorney who drafted the executed will may be disclosed, applies when the communications do not result in an executed will. Specifically, we consider whether, in a probate proceeding in the course of a dispute among heirs, an attorney may be compelled to disclose testamentary communications that have not culminated in an executed will. We conclude that the exception to the privilege does not apply when the communications do not culminate in the execution of a will.” “[O]ur research reveals that the overwhelming majority of courts to consider the issue have not broadened the [testamentary] exception under such circumstances.”

New Hampshire:
In re Lane’s Case, 153 N.H. 10, 889 A.2d 3 (2005). Lawyer who had represented the executor in a probate that had closed was charged with disclosing confidences of his former client to the client’s disadvantage. By the time the confidences were disclosed, the lawyer had married the former client’s sister and lawyer’s wife (the sister) was in litigation with her brother, her husband’s former client, over the brother’s management of the estate. Without the consent of his former client, lawyer disclosed to his wife’s lawyer the existence of a $100,000 life insurance policy that his former client denied existed. Although the court concluded that lawyer had used this information to the disadvantage of his former client, it credited the lawyer’s argument that disclosure was permitted under an exception of NH’s (then) version of Rule 1.6 which permitted disclosure to prevent a client from committing a crime the lawyer believes is “likely to result in …substantial injury to the financial interest or property of another.” The court affirmed the dismissal of the disciplinary proceedings.

In re Stomper, 82 A.3d 1278 (N.H. 2013). Dispute between children of deceased parents. One child had assisted parents in preparing estate plan leaving everything to that child. Other children challenged the estate plan and asked for file of an attorney who had consulted with parents but had withdrawn before documents were executed. Attorney claimed they were privileged but court ordered disclosure of the documents based on the exception to the privilege for communications relating to an issue between parties claiming through the same deceased client. The child opposing disclosure claimed the exception only applied if the estate plan was executed, but that argument was rejected.

New York:
Estate of Walsh, 17 Misc.3d 407, 840 N.Y.S.2d 906 (N.Y. Sur. 2007). Lawyer who formerly represented the decedent and now is personal representative of an estate is representing himself as PR and petitions for discovery. Court holds he has waived the attorney-client privilege as to communications he had with another lawyer about the decedent’s affairs insofar as he has attached those communications to his petition. As personal representative, he may waive decedent’s attorney-client privilege.
**Ethics Opinions**

**California:**

Op. 2007-173. A lawyer may not deposit a will with a private will depository under California statutes without the client’s express consent. A lawyer may not register identifying information about a client’s testamentary documents with a private will registry unless the lawyer has a basis in the client file and/or in statements made by the client and all the other facts and circumstances that this would further the client’s interest and be neither embarrassing nor likely to be detrimental to the client.

**Maine:**

Op. 192 (2007). A lawyer may not disclose confidential information of a deceased client to a court-appointed personal representative simply because the personal representative requests it and waives the attorney-client privilege. The lawyer is required to make an independent investigation as to the requested disclosure. “If... the attorney believes that the information sought to be disclosed would not further the client’s purpose or would be detrimental to a material interest of the client, the attorney may waive the privilege only as required by law or by court order. Thus, despite a PR's waiver of the attorney-client privilege, the attorney may still be ethically obligated to claim the privilege on behalf of his former client if, for example, the information had been specifically sought to be kept unqualifiedly confidential by the client or if disclosure of the information would embarrass or otherwise be detrimental to a material interest of the client.”

**Maryland:**

Op. 2009-05 (2008). Where a firm drafts a will for a client who dies before executing it and the decedent’s personal representative requests it, the firm must deliver the will to the PR. The PR is deemed the firm's client in the matter and the letters of administration constitute a court order entitling the PR to possession of the decedent’s property, including the draft will. Delivery of the draft does not amount to an impermissible disclosure under the confidentiality rules.

**Missouri:**

Op. 930172 (1993). If an attorney accepts referrals for estate planning from insurance agent whereby the agent obtains all the information from the clients, compiles the information in a form, sends that information to the attorney, and the attorney then prepares the estate planning documents which are returned to the clients via the agent, then the attorney is in violation of MRPC 7.3(b). The agent in this situation is engaging in “in-person solicitation” on behalf of the attorney which is prohibited under the Model Rules. By assisting the agent and the client in filling out the estate planning documents, the attorney is participating in the unauthorized practice of law in violation of MRPC 5.5. Also, MRPC 1.6 is violated by the attorney-agent relationship because the agent is delivering confidential legal documents between the attorney and the clients.

Op. 2006-0004. A lawyer who prepared an agreement for the decedent has been subpoenaed in litigation between the heirs, various entities, and the decedent’s estate to produce all files and documentation regarding the decedent. The lawyer may not divulge confidential information until ordered to do so after the issue of confidentiality has been fully presented. The lawyer should seek to ensure that any such order is as specific and limited as possible. It is not necessary for the inquiring lawyer to present the issue of confidentiality if he knows that another lawyer will fully present the issue.
New Jersey:
Op. 719 (2010). Lawyer representing personal representative with bad credit history asked whether it was ethical to comply with surety company’s demands that in order to issue fiduciary bond for client, lawyer would have to, among other items, agree to be liable to the surety if the lawyer does not remain involved as promised; provide a retainer agreement indicating the client's agreement to the lawyer's continuing involvement; pay the bond premiums; “work to protect the interests of the administrator and surety”; provide legal services for the benefit of the surety in connection with the joint control agreement; provide the surety with full details about any disputes regarding estate matters; and notify the surety of any change in legal representation, any allegations of breach of fiduciary duty on the part of the administrator, and any objections to a request by the administrator for commissions or fees. The ethics committee found that the agreement would violate several ethics rules, including confidentiality, conflicts of interest, giving financial assistance to a client, independent judgment of lawyer, allowing third parties to affect lawyer’s judgment, lawyer’s right to practice, and requirements of withdrawal of representation. The opinion noted similarities with issues raised with respect to third-party financing of litigation.

Pennsylvania:
Philadelphia Bar Op. 2007-6. A lawyer who did estate planning for a decedent, and knew his wish that his daughter receive no share of his estate, is permitted to disclose contents of decedent’s will to daughter, even though it was not probated and is not public, if disclosure was impliedly authorized. Relying on and quoting the ACTEC Commentaries, the committee notes that “If the inquirer feels that doing so would likely promote the husband's estate plan, forestall litigation, preserve assets, and further his daughter's understanding of his intentions then it would be permissible. However, if the inquirer does not feel that there is such implied authorization, then without being required by the Court to produce the will, he may not disclose its contents. The Committee notes that even if the inquirer concludes that he has implied authorization to reveal the contents of the will that he is not required to do so, only that he may choose to do so.”

Philadelphia Bar Op. 2008-10. Eleven years after lawyer had prepared estate planning documents for a client (C), the client’s step-daughter (D) and her son (S) came to lawyer and said that C wanted lawyer to revise the will to provide bequests to D, S and a sibling of S. There were significant discussions about C’s mental health and the reasons for the change. Lawyer went with D and S to visit C in the hospital, and lawyer concluded C lacked mental competency and refused to prepare the documents. C died a year later and a will contest was mounted in New Jersey which, among other things, called into question the work of lawyer in helping C execute the original documents. The executor of C’s estate has asked about the procedures followed when C executed the documents and lawyer wants to know what he can disclose about this and about the conversations with D & S 11 years later. Committee, relying on and quoting ACTEC Commentaries, says that disclosures about advice and procedures followed when the will was executed may be impliedly authorized if they will promote former client’s interests but even if they are not, the executor may waive the deceased client’s right to confidentiality. Moreover, PA’s equivalent of MR 1.6(b)(5) permits disclosure since lawyer’s conduct has now been called into question. As for conversations with D & S, since they were not prospective clients but rather seeking to have lawyer provide additional legal work for C, “such discussions are not confidential and can be revealed to whomever the inquirer and his partner wish.” Finally, committee cautions that under the
conflict of laws provision of Rule 8.5, New Jersey ethics rules may apply to the NJ will contest, rather than Pennsylvania ethics rules.

Philadelphia Bar Op. 2013-6. Client is in a coma and near death. Lawyer had prepared a power of attorney naming friend as agent, and a will leaving the estate primarily to charity and naming lawyer as executor. Lawyer has just learned that the client placed her financial accounts into JTWROS with friend, with assistance from financial advisor. Friend states that the reason was to facilitate the friend paying bills. The lawyer: (a) must try to communicate with client to determine if client intended to give the accounts to friend at death, and if so, take no other action; (b) if unable to determine client’s intent, may notify the state attorney general if the lawyer believes consistent either with competent representation of client while alive or with gathering estate assets as executor, provided that during client’s life lawyer must limit disclosure to only information as is necessary to effectuate the client’s intent, under 1.6(a) and 1.14.

Rhode Island:
Op. 2013-05. A lawyer who drafted and supervised execution of a trust amendment for a now deceased client must assert confidentiality and privilege when the trustee (client’s daughter) is questioning the amendment. If a court orders disclosure the lawyer must try to minimize the disclosure when complying.

South Carolina:
Op. 93-04 (1993). A lawyer drafted a trust agreement and pour-over will for a competent client who, at the same time, executed a durable general power of attorney appointing a friend and authorizing the friend “to do and perform all and every act, deed, matter and thing whatsoever in [sic] about my estate, property, and affairs as fully and effectually to all intents and purposes as I might or could do in my own proper person if personally present...” When the friend asked the lawyer for a copy of the will and trust agreement, the lawyer should inform the client of the request and not provide the friend with the information without the client’s consent. If the client becomes incompetent, the lawyer is authorized to open his file to the friend, absent prior instruction from the client to the contrary.

Op. 08-09 (2008). Lawyer is approached by A who is concerned about the wellbeing of his cousin (C) who is mentally incapacitated. C’s mother and father are deceased although the estate of only the first to die has been probated. No guardianship has been established for C. Lawyer advises A about how to protect C. “Lawyer has reason to believe A was not receptive to such advice. Lawyer refused to participate since he has reason to believe that A [and others] are intending to transfer Cousin’s property without consideration of Cousin’s best interests.” Lawyer inquires as to his right to disclose this information to agencies who can protect C. Committee analyzes who might be the client, or prospective client here and discusses the lawyer’s duties under RPC 1.18 and 1.6 and concludes that SC RPC 1.6(b)(1) would permit the lawyer to disclose “regardless of the identity of the client.” That SC Rule permits a lawyer to disclose confidences to prevent a client from committing a crime.

South Dakota:
Op. 2007-3. A lawyer who has prepared a will for an elderly client and who has been instructed by the client to reveal the contents to no one is bound by that instruction notwithstanding that the inquirer holds a durable power of attorney from the client. Here, the holder of the power demanded (through an attorney) to see the principal’s will under the authority of the durable power. Subsequent to the
execution of the power, the lawyer consulted the client (again) about his wishes and he again instructed that no one should see his will. Based on the circumstances and the communications from the client, "the Niece is not a ‘client’ for the ‘specific purpose’ of reviewing Client's Will. First, absent a guardianship, conservatorship or other legal limitation, Client can revoke or modify the attorney-in-fact's authority. Second, if the general POA ever gave the Niece the authority to review the Will, the [subsequent] communication from Client to Attorney revoked it. Attorney believes that Client is slipping, but, until he is adjudicated unable to make such decisions, Rules 1.6, and 1.14(a) and (c) require that Attorney continue to protect Client's confidences.”

Washington:
Op. 2188 (2008). A lawyer was hired by a wife to assist her in a legal action for separation and pays him fees in advance; but then dies before the work is done. The lawyer has a duty to take reasonable steps to identify who is entitled to these fees and to pay them to that person. If doing so requires communications with the husband, the lawyer is impliedly authorized to disclose that he holds funds in trust, but is not permitted to disclose the basis for the representation except to the extent determined by a court.

**MRPC 1.7: CONFLICT OF INTEREST: CURRENT CLIENTS**

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
1. the representation of one client will be directly adverse to another client; or
2. there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
1. the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
2. the representation is not prohibited by law;
3. the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
4. each affected client gives informed consent, confirmed in writing.

**ACTEC COMMENTARY ON MRPC 1.7**

*General Nonadversary Character of Estates and Trusts Practice; Representation of Multiple Clients.* It is often appropriate for a lawyer to represent more than one member of the same family in connection with their estate plans, more than one beneficiary with common interests in an estate or trust administration matter, co-fiduciaries of an estate or trust, or more than one of the investors in a closely held business. See ACTEC Commentary on MRPC 1.6 (Confidentiality of Information). In some instances the clients may actually be better served by such a representation, which can result in more economical and better coordinated estate plans prepared by counsel who has a better overall understanding of all of the relevant family and property considerations. The fact that the estate planning goals of the clients are not entirely consistent does not necessarily preclude the lawyer from representing them. Advising related clients who
have somewhat differing goals may be consistent with their interests and the lawyer’s traditional role as the lawyer for the “family.” Multiple representation is also generally appropriate because the interests of the clients in cooperation, including obtaining cost-effective representation and achieving common objectives, often clearly predominate over their limited inconsistent interests. Recognition should be given to the fact that estate planning is fundamentally nonadversarial in nature and estate administration is usually nonadversarial.

Disclosures to Multiple Clients. Before, or within a reasonable time after commencing the representation, a lawyer who is consulted by multiple parties with related interests should discuss with them the implications of a joint representation (or a separate representation, if the lawyer believes that mode of representation to be more appropriate and separate representation is permissible under the applicable local rules). See ACTEC Commentary on MRPC 1.6 (Confidentiality of Information). In particular, the prospective clients and the lawyer should discuss the extent to which material information imparted by either client would be shared with the other and the possibility that the lawyer would be required to withdraw if a conflict in their interests developed to the degree that the lawyer could not effectively represent each of them. The information may be best understood by the clients if it is discussed with them in person and also provided to them in written form, as in an engagement letter or brochure. As noted in the ACTEC Commentary on MRPC 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer), a lawyer may represent co-fiduciaries whose interests do not conflict to an impermissible degree. A lawyer who represents co-fiduciaries may also represent one or both of them as beneficiaries so long as no disabling conflict arises.

Before accepting a representation involving multiple parties, a lawyer should consider meeting with the prospective clients separately, which may allow each of them to be more candid and, perhaps, reveal conflicts of interest. Failure initially to meet with the prospective clients separately risks the possibility that information will be revealed by one of them in a joint meeting that would disqualify the lawyer from representing either of them because of the duties owed to a prospective client under MRPC 1.18 (Duties to Prospective Client).

Existing Client Asks Lawyer to Prepare Will or Trust for Another Person. A lawyer should exercise particular care if an existing client asks the lawyer to prepare for another person a will, trust, power of attorney or similar document that will benefit the existing client, particularly if the existing client will pay the cost of providing the estate planning services to the other person. The lawyer would, of course, need to communicate with the other person and decide whether to undertake representation of that person as a new client, along with all the duties such a representation involves, before agreeing to prepare such a document. If the representation of both the existing client and the new client would create a significant risk that the representation of one or both clients would be materially limited, the representation can only be undertaken as permitted by MRPC 1.7(b). In any case, the lawyer must comply with MRPC 1.8(f) (Conflict of Interest: Current Clients: Specific Rules) and should consider cautioning both clients of the possibility that the existing client may be presumed to have exerted undue influence on the other client because the existing client was involved in the procurement of the document.

Joint or Separate Representation. As indicated in the ACTEC Commentary on MRPC 1.6 (Confidentiality of Information), a lawyer usually represents multiple clients jointly. Representing a husband and wife is the most common situation. In that context, attempting to represent a husband and wife separately while simultaneously doing estate planning for each, is generally inconsistent with the lawyer’s duty of loyalty to
Consider Possible Presence and Impact of Any Conflicts of Interest. A lawyer who is asked to represent multiple clients regarding related matters must consider at the outset whether the representation involves or may involve impermissible conflicts, including ones that affect the interests of third parties or the lawyer’s own interests. The lawyer must also bear this concern in mind as the representation progresses: What was a tolerable conflict at the outset may develop into one that precludes the lawyer from continuing to represent one or more of the clients.

Example 1.7-2. Lawyer (L) represents Trustee (T) as trustee of a trust created by X. L may properly represent T in connection with other matters that do not involve a conflict of interest, such as the
preparation of a will or other personal matters not related to the trust. $L$ should not charge the trust for any personal services that are performed for $T$. Moreover, in order to avoid misunderstandings, $L$ should charge $T$ for any substantial personal services that $L$ performs for $T$.

Example 1.7-3. Lawyer ($L$) represented Husband ($H$) and Wife ($W$) jointly with respect to estate planning matters. $H$ died leaving a will that appointed Bank ($B$) as executor and as trustee of a trust for the benefit of $W$ that meets the QTIP requirements under I.R.C. 2056(b)(7). $L$ has agreed to represent $B$ and knows that $W$ looks to him as her lawyer. $L$ may represent both $B$ and $W$ if the requirements of MRPC 1.7 are met. If a serious conflict arises between $B$ and $W$, $L$ may be required to withdraw as counsel for $B$ or $W$ or both. $L$ may inform $W$ of her elective share, support, homestead or other rights under the local law without violating MRPC 1.9 (Duties to Former Clients). However, without the informed consent of all affected parties confirmed in writing, $L$ should not represent $W$ in connection with an attempt to set aside $H$’s will or to assert an elective share. See ACTEC Commentaries on MRPC 1.0(e) (Terminology) (defining informed consent) and MRPC 1.0(b) (Terminology) (defining confirmed in writing).

Conflicts of Interest May Preclude Multiple Representation. Some conflicts of interest are so serious that the informed consent of the parties is insufficient to allow the lawyer to undertake or continue the representation (a “non-waivable” conflict). Thus, a lawyer may not represent clients whose interests actually conflict to such a degree that the lawyer cannot adequately represent their individual interests. A lawyer may never represent opposing parties in the same litigation. A lawyer is almost always precluded from representing both parties to a prenuptial agreement or other matter with respect to which their interests directly conflict to a substantial degree. Thus, a lawyer who represents the personal representative of a decedent’s estate (or the trustee of a trust) should not also represent a creditor in connection with a claim against the estate (or trust). This prohibition applies whether the creditor is the fiduciary individually or another party. On the other hand, if the actual or potential conflicts between competent, independent parties are not substantial, their common interests predominate, and it otherwise appears appropriate to do so, the lawyer and the parties may agree that the lawyer will represent them jointly subject to MRPC 1.7 (Conflict of Interest: Current Clients).

A lawyer who is asked to represent a corporate fiduciary in connection with a fiduciary estate should consider discussing with the fiduciary the extent to which the representation might preclude the lawyer from representing an adverse party in an unrelated matter. In the absence of a contrary agreement, a lawyer who represents a corporate fiduciary in connection with the administration of a fiduciary estate should not be treated as representing the fiduciary generally for purposes of applying MRPC 1.7 (Conflict of Interest: Current Clients) with regard to a wholly unrelated matter. In particular, the representation of a corporate fiduciary in a representative capacity should not preclude the lawyer from representing a party adverse to the corporate fiduciary in connection with a wholly unrelated matter, such as a real estate transaction, labor negotiation, or another estate or trust administration. Nonetheless, the corporate fiduciary might be of a different view; and it would be useful to clarify this in advance. Where the lawyer is trying to keep open the possibility of such a future adverse representation on an unrelated matter, the lawyer should ask the corporate fiduciary for a prospective waiver as to such representations, as explored in the next section. Where a lawyer is already representing another party adverse to the corporate fiduciary on an unrelated matter, it will be necessary for the lawyer to comply with MRPC 1.7(b) as to both clients before undertaking to represent the corporate fiduciary.
Prospective Waivers. A client who is adequately informed may waive some conflicts that might otherwise prevent the lawyer from representing another person in connection with the same or a related matter. These conflicts are said to be “waivable.” Thus, a surviving spouse who serves as the personal representative of her husband’s estate may give her informed consent, confirmed in writing, to permit the lawyer who represents her as personal representative also to represent a child who is a beneficiary of the estate. The lawyer also would need an informed consent from the child that is confirmed in writing before undertaking such a dual representation. However, a conflict might arise between the personal representative and the beneficiary that would preclude the lawyer from continuing to represent both, or either, of them.

Comment 22 to MRPC 1.7, as amended in 2002, states:

[22] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails.

ABA Formal Ethics Opinion 05-436 (2005), interpreting MRPC 1.7(b), provides: “A lawyer in appropriate circumstances may obtain the effective informed consent of a client to future conflicts of interest” in a “wider range of future conflicts than would have been possible under the Model Rules prior to their amendment.”

Comment 22 to MRPC Rule 1.7 continues:

The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. ... [I]f the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation.

As used in Comment 22 and ABA Formal Ethics Opinion 05-436 (2005), the term “waiver” means “informed consent,” as defined in MRPC 1.0 (Terminology).

Several additional limitations and requirements apply to prospective waivers: 1) Some conflicts, of course, are not consentable [see MRPC 1.7(b)(2) and (3)]; 2) the client’s informed consent must be confirmed in writing [see MRPC 1.7(b)(4)]; 3) a client’s informed consent to a future conflict, “without more, does not constitute the client’s informed consent to the disclosure or use of the client’s confidential information against the client [see MRPC 1.6 (Confidentiality of Information)]”; and 4) in any event, the lawyer considering taking on a later matter arguably covered by an informed prospective consent must nevertheless determine whether accepting the later engagement is prohibited for any other reason under either MRPC 1.7(b) or MRPC 1.9 (Duties to Former Clients). ABA Formal Opinion 05-436 at 4-5. Finally, the lawyer in any event would need the consent of the other client whose interests are affected by the representation. MRPC 1.7(a).

Lawyers should also note that neither Comment 22 nor ABA Formal Opinion 05-436 will be binding on the jurisdiction in which a lawyer practices. This is important because MRPC 1.7 limits the circumstances to
which it applies under both paragraph (a) and (b) to situations where “a concurrent conflict of interest [exists] under paragraph (a).” Accordingly, a state disciplinary authority could argue that since Rule 1.7 applies only to a concurrent conflict of interest, neither Comment 22 nor ABA Formal Ethics Opinion 05-436 (2005) accurately reflects the text of MRPC 1.7, so MRPC 1.7(b) would not control a future conflict of interest.

In addition, the lawyer should consider the impact, if any, that MRPC 1.8 (h) could have on a state disciplinary authority. It provides: “A lawyer shall not make an agreement prospectively limiting the lawyer’s liability to a client for malpractice unless the client is independently represented in making the agreement.” A claim that a lawyer asserted the interests of another party in conflict with a client’s interest normally constitutes a breach of fiduciary duty, rather than malpractice. Even so, both as a matter of substantive law and pursuant to the Rules of Professional Conduct of a particular state, the disciplinary authority or court may believe that of the two types of misconduct, a client’s right to bring a claim in the future for breach of the lawyer’s fiduciary duty to the client deserves greater protection than a client’s right to bring a future claim for malpractice. Thus, a state disciplinary authority or court could apply MRPC 1.8(h) to a future conflict of interest on the basis that “malpractice” includes a “breach of fiduciary duty” to the client.

Selection of Fiduciaries. The lawyer advising a client regarding the selection and appointment of a fiduciary should make full disclosure to the client of any benefits that the lawyer may receive as a result of the appointment. In particular, the lawyer should inform the client of any policies or practices known to the lawyer that the fiduciaries under consideration may follow with respect to the employment of the scrivener of an estate planning document as counsel for the fiduciary. The lawyer may also point out that a fiduciary has the right to choose any counsel it wishes. If there is a significant risk that the lawyer’s independent professional judgment in the selection of a fiduciary would be materially limited by the lawyer’s self-interest or any other factor, the lawyer must obtain the client’s informed consent, confirmed in writing. If the client is selecting a fiduciary that is affiliated with the lawyer, such as a trust company owned by the lawyer’s firm, the lawyer must obtain the client’s informed consent, confirmed in writing.

Appointment of Scrivener as Fiduciary. An individual is generally free to select and appoint whomever he or she wishes to a fiduciary office (e.g., trustee, executor, attorney-in-fact). Comment [8] to MRPC 1.8 makes clear that Rule 1.8(c) “does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client’s estate or to another potentially lucrative fiduciary position” provided that doing so does not run afoul of MRPC 1.7. As a general proposition, lawyers should be permitted to assist adequately informed clients who wish to appoint their lawyers as fiduciaries. Accordingly, a lawyer should be free to prepare a document that appoints the lawyer to a fiduciary office so long as the client is properly informed, the appointment does not violate the conflict of interest rules of MRPC 1.7, and the appointment is not the product of undue influence or improper solicitation by the lawyer.

The designation of the lawyer as fiduciary will implicate the conflict of interest provisions of MRPC 1.7 when there is a significant risk that the lawyer’s interests in obtaining the appointment will materially limit the lawyer’s independent professional judgment in advising the client concerning the choice of an executor or other fiduciary. See ACTEC Commentary on MRPC 1.8. (Conflict of Interest: Current Clients: Specific Rules) (addressing transactions entered into by lawyers with clients).
For the purposes of this Commentary, a client is properly informed if the client is provided with information regarding the role and duties of the fiduciary, the ability of a lay person to serve as fiduciary with legal and other professional assistance, and the comparative costs of appointing the lawyer or another person or institution as fiduciary. The client should also be informed of any significant lawyer-client relationship that exists between the lawyer or the lawyer’s firm and a corporate fiduciary under consideration for appointment.

**Designation of Scrivener as Attorney for Fiduciary.** The ethical propriety of a lawyer drawing a document that directs a fiduciary to retain the lawyer as his or her counsel involves essentially the same issues as does the appointment of the scrivener as fiduciary. However, although the appointment of a named fiduciary is generally necessary and desirable, it is usually unnecessary to designate any particular lawyer to serve as counsel to the fiduciary or to direct the fiduciary to retain a particular lawyer. Before drawing a document in which a fiduciary is directed to retain the scrivener or a member of his firm [see MRPC 1.8(k) (Conflict of Interest: Current Clients: Specific Rules)] as counsel, the scrivener should advise the client that it is neither necessary nor customary to include such a direction in a will or trust. A client who wishes to include such a direction in a document should be advised as to whether or not such a direction is binding on the fiduciary under the governing law. In most states such a direction is usually not binding on a fiduciary, who is generally free to select and retain counsel of his or her own choice without regard to such a direction. See also the discussion of the lawyer serving as both fiduciary and counsel to the fiduciary in ACTEC Commentary on MRPC 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer).

**Representation of Fiduciary in Representative and Individual Capacities.** Frequently a lawyer will be asked to represent a person in both an individual and a fiduciary capacity. A surviving spouse or adult child, for example, may be both an executor and a beneficiary of the estate, and may want the lawyer to represent him or her in both capacities. So long as there is no risk that the decisions being or to be made by the client as fiduciary would be compromised by the client’s personal interest, such a “dual capacity representation” poses no ethical problem. The easiest case would be where the client is the sole beneficiary of the estate as to which the client is the fiduciary. But even there, since a fiduciary owes duties to creditors of the estate, it is possible for a conflict to emerge. Given the potential for such conflicts, a lawyer asked to undertake such a dual capacity representation should explain to the client the nature of the fiduciary role and insist that the client execute an informed waiver of any right to have the lawyer advocate for the client’s personal interest in a way that is inconsistent with the client’s fiduciary duty. If the client is not willing to do this, the lawyer should decline to undertake the dual capacity representation. If such a dual capacity representation has been undertaken and no such waiver has been obtained, and such a conflict arises, the lawyer should withdraw from representing the client in both capacities.

In this situation, the question arises whether it is also necessary to obtain waivers from beneficiaries or others who are interested in the estate, but who are not the lawyer’s clients. MRPC 1.7(a)(2) notes that if there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to …a third person” then MRPC 1.7(b) must be complied with, including the duty to get informed consent found in MRPC 1.7(b)(4). Waivers from beneficiaries and other third parties do not seem called for by the rules, nor do they seem necessary or appropriate. First, MRPC 1.7(b)(4) only contemplates waivers from “affected client[s].” Second, as long as the lawyer has explained to the client his or her responsibilities to third persons, such as non-client beneficiaries or creditors, and obtained the
requisite client waivers, this should allow the lawyer to honor those responsibilities consistent with representation of the client.

Example 1.7.4 X dies leaving a will in which X left his entire estate in trust to his spouse A for life, remainder to daughter B, and appointed A as executor. A asked L to represent her both as executor and as beneficiary and to advise her on implications both to her and to the estate of certain tax elections and plans of division and distribution. L explained to A the duties A would have as personal representative, including the duty of impartiality toward the beneficiaries. L also described to A the implications of the common representation, to which A consented, including an informed agreement to forego any right to have the L advocate for A’s personal interest insofar as it conflicts with A’s duties as executor. L may properly represent A in both capacities. However, L should inform B of the dual representation and indicate that B may, at his or her own expense, retain independent counsel. In addition, L should maintain separate records with respect to the individual representation of A, who should be charged a separate fee (payable by A individually) for that representation. L may properly counsel A with respect to her interests as beneficiary. However, L may not assert A’s individual rights on A’s behalf in a way that conflicts with A’s duties as personal representative. If a conflict develops that materially limits L’s ability to function as A’s lawyer in both capacities, L should withdraw from representing A in both capacities. See MRPC 1.7 (Conflict of Interest: Current Clients) and MRPC 1.16 (Declining or Terminating Representation).

Example 1.7.5 X dies, leaving a will giving X’s estate equally to his three children. Child A was appointed executor. A engages L to represent her as executor. A dispute arises among the three children over distribution of X’s tangible personal property, and A asks L to represent her in resolving the dispute with her siblings. Depending on how the dispute progresses, L may need to advise A to obtain independent counsel to represent her in the dispute. In addition, L may need to advise A to resign as executor if the dispute gives rise to an actual conflict with her fiduciary duties.

Client with Diminished Capacity. As provided by MRPC 1.14 (Client with Diminished Capacity), a lawyer may take reasonable steps to protect the interests of a client the lawyer reasonably believes to be suffering from diminished capacity, including the initiation of protective proceedings. See ACTEC Commentary on MRPC 1.14 (Client with Diminished Capacity). Doing so may create a conflict of interest between the lawyer and the client. The client might, for example, oppose the protective action being taken by the lawyer and consider it a breach of the duty of loyalty. In such a circumstance, the lawyer is entitled to continue to take protective action, but where possible, should call the court’s attention to the client’s opposition and ask that separate counsel be provided to represent the client’s stated position if the client has not already retained such counsel. A lawyer who is retained on behalf of the client to resist the institution of a protective action may not take positions that are contrary to the client’s position or make disclosures contrary to MRPC 1.6 (Confidentiality of Information).

Rebates, Discounts, Commissions and Referral Fees. As indicated in the ACTEC Commentary on MRPC 1.5 (Fees), a lawyer should not accept a rebate, discount, commission or referral fee from a nonlawyer in connection with the representation of a client except insofar as is authorized by MRPC 7.2(b). The receipt by the lawyer of such a payment involves a conflict of interest with respect to the client. It is improper for a lawyer, who is subject to the strict obligations of a fiduciary, to benefit personally from such a representation. The client is generally entitled to the benefit of any economies achieved by the lawyer.
Significant Risks Arising From a Lawyer’s Own Interests. Estate planners are often asked questions about techniques for avoiding taxes and/or creditors. Some of these techniques involve sophisticated instruments which are expensive for the client and may not be appropriate for the client’s situation. MRPC 1.7(a)(2) notes that “[a] concurrent conflict of interest exists if …there is a significant risk that the representation of [a client] will be materially limited by …a personal interest of the lawyer.” It is a conflict of interest and also a violation of the duty of competence for a lawyer to recommend to a client work that the client does not need, but which will increase fees for the lawyer. See MRPC 1.1 (Competence). If the lawyer is recommending investment vehicles or products in which the lawyer has a financial stake apart from the time required to prepare the instrument, the situation may be considered a business transaction with the client. In that case, the requirements of MRPC 1.8(a) (Conflict of Interest: Current Clients: Specific Rules) will need to be satisfied.

Confidentiality Agreements. A lawyer generally should not sign a confidentiality agreement that bars the lawyer from disclosing to the lawyer’s other current and future clients the details of an estate planning strategy developed by a third party for the benefit of the lawyer’s client. As stated in Ill. Op. 00-01, a lawyer who signs such a confidentiality agreement creates an impermissible conflict with the lawyer’s other clients who might benefit from the information learned in the course of representing this client. “In the case at hand, the Lawyer’s own interests in honoring the Confidentiality Agreement would ‘materially limit’ [the Lawyer’s] responsibilities to Clients B, C and D because Lawyer would be prohibited from providing beneficial tax information to Clients B, C and D.” See MRPC 5.6 (Restrictions on Right to Practice) and Restatement of the Law Governing Lawyers §59, cmt. e (“Confidential client information does not include what a lawyer learns about the law, legal institutions such as courts and administrative agencies, and similar public matters in the course of representing clients.”). See also ACTEC Commentary on MRPC 1.6 (Confidentiality of Information).

ANNOTATIONS
See Caveat to Annotations on page 13
(Limiting the Scope and Purpose of the Annotations)

Concurrent Conflicts of Interest Generally

Cases

See also cases cited in the Annotations following the ACTEC Commentary on MRPC 1.5 regarding rebates, discounts, commissions and referral fees.

Federal:
Abbott v. U.S. I.R.S., 399 F.3d 1083 (9th Cir. 2005), aff’g Estate of Sexton v. C.I.R., T.C. Memo. 2003-41 (2003). It was not an impermissible conflict under Rule 1.7 for lawyer simultaneously to represent an estate before the IRS while also serving as an expert consultant to the IRS on an unrelated matter. In his role as expert consultant, he did not represent the IRS, so there were no adverse clients. Nor was there any evidence that lawyer’s representation of the estate was materially limited by the work he did for the IRS.

planning lawyer represented the co-CEOs and 99% owners of a closely held corporation, Transperfect, and then moved to the law firm representing the defendant in a patent infringement case earlier brought by Transperfect. She continued to represent the co-CEOs with respect to estate planning and related matters after the move, without obtaining an adequate conflict waiver. Transperfect moved to disqualify defendant’s firm, and the federal magistrate granted the motion. The court noted that, although this was a case of an after-acquired client (the CEOs) causing the disqualification of representation of a prior client (Motionpoint), it was nonetheless a concurrent conflict because the affairs of the estate planning clients were inextricably intertwined with the business and financial matters of Transperfect, and the applicable California rule required per se disqualification. The district court denied the defendant’s motion for relief from the disqualification.

Scanlon v. Eisenberg, 913 F. Supp. 2d 591 (N.D. Ill. 2012). Plaintiff was beneficiary of discretionary trusts set up by her father and uncle. The law firm that represented the trustee of the trusts also represented General Growth, the company whose stock was held by the trusts, and other family members. The lawyers also held General Growth stock and controlled the corporate trustee. The lawyers had represented plaintiff for all of her legal matters throughout her life. Plaintiff sued the lawyers for malpractice for several questionable transactions involving the trusts, and the lawyers responded that there was no attorney-client relationship with plaintiff with respect to her position as beneficiary of the trusts. In response to a Rule 12(b)(6) motion to dismiss by the lawyers, the court determined that the attorney-client relationship between the plaintiff and the lawyers was sufficiently broad to include her interest as beneficiary of the trust and so was sufficient to ground plaintiff’s malpractice and breach of fiduciary duty claims.

Arizona: In re Estate of Shano, 869 P.2d 1203 (Ariz. App. 1993). This decision involves a lawyer who represented a friend of the decedent who was one of the primary beneficiaries of a holographic will executed by the decedent two days prior to his death. The lawyer obtained the friend’s appointment as special administrator. The lawyer also later undertook to represent an independent third party who was appointed as administrator, whose legal positions included opposition to claims made against the estate by the decedent’s surviving spouse. This decision upholds an order disqualifying the lawyer from representing the administrator because of the conflict of interest between his duties to the decedent’s friend and to the administrator and, derivatively, to the persons entitled to receive the decedent’s estate.

Arkansas: Craig v. Carrigo, 12 S.W.3d 229 (Ark. 2000). An attorney should not represent a client if the representation will be directly adverse to another client. It is not necessarily a conflict of interest for an attorney to represent both the estate and the only devisee in the will. The core issue is whether the existence of a parallel legal position held by the personal representative for the estate, and one of the potential heirs of the estate, has been shown to be prejudicial to the other potential heirs. Actions taken by the attorney throughout the proceeding reflect conscientious legal services consistent with the duties of counsel for a personal representative in an ancillary probate. His obligations as estate counsel do not include advocacy for any individual heirs; however, his obligations do not prevent the estate from having positions that are consistent with the interests of some individual heirs.
California:

_Estate of Buoni_, 2006 Cal. App. Unpub. LEXIS 9368, 2006 WL 2988737 (2006). A personal representative of the estate who was also a creditor was represented by one lawyer in both capacities. An estate beneficiary sought to disqualify the lawyer based on the conflict, but the court refused the disqualification. The conflict here is the PR’s, not that of his attorney, but even if there is a conflict for the attorney, it is cured by California law which contemplates that when the PR is a creditor, the creditor’s claim is submitted to the court for approval or rejection. If it is rejected, PR may sue to enforce the creditor’s claim and the court is empowered to appoint a separate lawyer to defend against the claim. Given this procedure, representation of one person in both capacities is not a disqualifying conflict.

_Baker Manock & Jensen v. Superior Court (Salwasser)_ (2009). Law firm represented one son (George) of the decedent both as executor and in his own right as beneficiary. When the firm, on behalf of George personally, opposed a brother’s petition that would have reduced the probate estate assets and also reduced George’s own share, the brother sought to disqualify the firm for its conflict. The trial court granted the motion to disqualify but the court of appeals reversed, reasoning that the positions taken by George personally and those he took as executor were the same: to avoid loss of probate assets. Even if the firm were viewed as representing two Georges (one personally, the other as executor) who could theoretically have adverse interests, that was not the case here so there was no conflict.

Colorado:

_Estate of Klarner_, 98 P.3d 892 (Colo. App. 2003). Husband (Albert) had two daughters by a prior marriage and his wife (Marian) had two sons by a prior marriage. They had no children during the second marriage. After Albert died, Law firm became co-trustee of Albert’s QTIP Trust whose remaindermen (at Marian’s death) were his two daughters. Law firm was also a co-trustee of a trust set up by Marian after Albert died (Marian Trust). Marian’s two sons were the beneficiaries; Albert’s daughters were not. When Marian died, husband’s QTIP trust was included in her estate for estate tax purposes. A decision had to be made whether she had waived her estate’s right to reimbursement from Albert’s QTIP trust in the amount of estate taxes incurred as a result of the inclusion of the QTIP in her estate. The court held that the law firm, as co-trustee of both trusts, had an insuperable conflict because claiming reimbursement was owed would benefit the beneficiaries of widow’s estate (her sons) to the detriment of the beneficiaries of the QTIP trust (Albert’s daughters). In fact, the Law firm claimed that the widow had not waived the right to reimbursement and did seek reimbursement, but this court found that this was error; she had waived. Noting that it was within the trial court’s discretion whether to deny or reduce fees, it remanded for a determination of the appropriate remedy to be imposed as a result of the conflict.

District of Columbia:

_In re Evans_, 902 A.2d 56 (D.C. 2006). Attorney, as owner of a real estate title company, was contacted to close a real estate loan to be secured by a residential property. He discovered that the borrower did not own the residential property because it was still owned by the unprobated estate of her deceased mother. Thereupon he undertook, as lawyer, to represent the borrower and probate her mother’s estate, without disclosing his conflict as owner of the title company with a financial interest in closing the loan, and he failed to obtain an informed waiver of the conflict. In probating the estate, he failed to act
competently in violation of Rule 1.1 and, further, engaged in actions prejudicial to the administration of justice in violation of Rule 8.4(d). He was suspended for six months.

Florida:

*Chase v. Bowen*, 771 So.2d 1181 (Fla. App. 2000). This case holds that no conflict of interest exists when a lawyer revises a will to disinherit a beneficiary whom the lawyer represents on an unrelated matter.

*Harvey E. Morse P.A. v. Clark*, 890 So.2d 496 (Fla. App. 2004). Court held that law firm representing Clark, the trustee of a revocable living trust, had an unwaived concurrent conflict of interest because it simultaneously represented Harvey E. Morse, PA, in an unrelated matter, and Morse was adverse to Clark in this case. Morse was the assignee of intestate heirs of the estate in this case and its interest was to maximize assets in the probate estate of which it was a partial assignee at the expense of the revocable trust of which Clark was trustee. Therefore the law firm must be disqualified from representing Clark.

*Gunster, Yoakley & Stewart, P.A. v. McAdam*, 965 So.2d 182 (Fla. App. 2007). Court affirms a $1 million malpractice judgment in case brought by personal representatives against lawyer for decedent based on lawyers’ failure to disclose conflict which may have impacted their recommendation to decedent that he appoint JP Morgan to a fiduciary role, and their failure to fund a revocable living trust before decedent’s death.

Georgia:

*Estate of Peterson*, 565 S.E.2d 524 (Ga. App. 2002). Attorney who drafted will under which he was named as executor was disqualified from acting because, although he had informed testator orally of potential conflict of interest, he failed to either obtain client’s consent in writing or to give client written notice as required by applicable Georgia ethics opinion (GAO 91-1).

Illinois:

*Fitch v. McDermott, Will and Emery, LLP*, 401 Ill.App.3d 1006, 929 N.E.2d 1167 (2010). Son of decedent alleged that law firm committed malpractice in failing to advise him of its conflict of interest in simultaneously representing both him and the co-trustees of the trust set up by his mother when he wished to buy a farm held in the trust. The court held that, because firm was representing him for purposes of prenuptial and estate planning matters, and was not advising him about purchase of the farm, it had no conflict.

Indiana:

*Matter of Taylor*, 693 N.E.2d 526 (Ind. 1998). Knowing that he was a principal beneficiary of his father’s will, lawyer advised his stepmother that she could execute a waiver of her right to claim a forced share of his father’s estate in connection with a bankruptcy proceeding she was contemplating. The court held that in doing so, he violated Rule 1.7(a) because his ability to represent his stepmother was materially limited by his personal interest. He was suspended for four months.

Kansas:

*In re Estate of Koch*, 849 P.2d 977, 977-998 (Kan. App. 1993). In this action two respected commentators on ethics testified on behalf of opposing parties. The court upheld a will that was drafted
for the testator by a lawyer who also represented the testator and two of her sons in litigation involving
a charitable foundation brought by her other two sons. Her will, which left the bulk of her estate to her
four sons, included a no-contest clause and a provision that conditioned the gifts on the dismissal by a
beneficiary of any litigation that was pending against her within 60 days following her death. The
lawyer did not discuss the testator’s will with her sons, including the two sons who were clients of the
firm in the litigation. The sons were all unaware of the terms of their mother’s will, which was prepared
“without any evidence of extraneous considerations.” The court continued that:

The scrivener’s representation of clients who may become beneficiaries of a will does not by itself
result in a conflict of interest in the preparation of the will. Legal services must be available to the
public in an economical, practical way, and looking for conflicts where none exist is not of benefit
to the public or the bar.

Kentucky:

Kentucky Bar Ass’n v. Roberts, 431 S.W.3d 400 (2014). “[I]t is clear that representing the estate, the
executor of the estate, and two of the heirs (one of whom was accused and eventually found guilty of
killing the testator) creates a conflict of interest…. Roberts could not have reasonably believed that the
representation would not be adversely affected when one of the clients is on trial for killing the testator
and a negative outcome in that case would bar that client from taking under the will. No amount of
consent and consultation allows waiver of this limit.”

Louisiana:

Succession of Lawless, 573 So. 2d 1230 (La. App. 1991). This case involved removal of the lawyer who
was designated in the decedent’s will as lawyer for the executor. The court found that just cause existed
for the lawyer’s removal because of (1) a conflict under MRPC 1.7 concerning a gift of $50,000 to the
lawyer that was included in a holographic codicil that the executor wished to challenge; and (2) a
conflict arising in connection with a real estate listing agreement under which the lawyer’s wife, who
was a real estate agent, was to receive a percentage of the listing agent’s fee. With respect to the latter,
the court said that the lawyer had “acquired a pecuniary interest in the estate property requiring
adherence to MRPC 1.8(a).”

Maryland:

Attorney Grievance Com’n v. Ruddy, 411 Md. 30, 981 A.2d 637 (Md. 2009). Lawyer borrowed $95,000
interest free from his aunt and executed a promissory note. When she died, the note was in default, but
lawyer was appointed personal representative of the estate and apparently did the legal work for
himself. The court held that the mere fact that a lawyer is indebted to an estate for which he is serving as
personal representative and lawyer does not create a conflict of interest. But here the lawyer failed to
make arrangements for the payment of interest on the loan that was in default, and this violated Rule
1.7. The lawyer was reprimanded.

Atty Grievance Comm’n of Md v. Hodes, 441 Md. 136 (Md. 2014). The attorney represented an elderly
woman. After she entered assisted living, he and staff at his firm took over management of her finances.
He used his positions as her attorney-in-fact while she was alive to make self-interested distributions to
himself; after she died, as trustee of a foundation set up under her Will, he transferred funds to his
separate financial consulting business contrary to the terms of the trust. He argued that he was not
subject to discipline because his actions were taken in a “personal or non-legal capacity.” The court
rejected this argument, on the ground that some of the misconduct occurred while his client was alive and he was still representing her; but also because his roles as attorney-in-fact and trustee arose from the attorney-client relationship, and his intentionally dishonest conduct was a violation of Rule 8.4. He was disbarred.

Michigan:
Ervin v. Bank One Trust Co., 2005 Mich. App. LEXIS 528, 2005 WL 433573 (unpublished). Decision affirms a disqualification of a law firm from representing a beneficiary against a bank trustee when the same firm represents an affiliate of the bank trustee and had signed a retention agreement making clear that its representation of one bank affiliate would be deemed representation of all affiliates and subsidiaries and waivers would not be granted. Here the clients were directly adverse.

New Hampshire:
In re Wyatt’s Case, 159 N.H. 285, 982 A.2d 396 (2009). Lawyer was suspended for two years for conflicting concurrent and successive representations. After persuading an adult client (the ward) to submit to a voluntary conservatorship, lawyer simultaneously represented the ward and the conservator, and later also the ward’s wife, despite adversity between these clients, without a reasonable belief that these conflicts could be reconciled and without the informed consent of the clients. Later, after withdrawing from representation of the ward, he continued to represent the conservator and assisted him and the ward’s wife in an attempt to establish a health care guardianship of the ward, and also defended conservator against charges by the ward that the conservator had mismanaged his estate, all without the ward’s consent.

Williams v. L.A.E. Association, (N.H. Super. Ct. 1/6/2016). Lawyer had done estate planning work for two separate clients and after the estate planning work was complete, a partner of the estate planner undertook to represent property owners suing the estate planning clients in a dispute over elections to a property association board. Citing the ACTEC Commentaries and commentators relying on them, the court concludes that although the estate planning matters might be dormant, the estate planning clients remained current clients of the firm. Since they remained current clients of the estate planner, he would be disqualified from representing the plaintiffs in the adverse matter against his estate planning clients under Rule 1.7, and his conflict was imputed to his partner under Rule 1.10.

New Jersey:
Haynes v. First Nat’l State Bank, 432 A.2d 890 (N.J. 1981). At the behest of the testator’s daughter, who had been a client for some time, the lawyer drew a will and trust for the testator, who was a new client, which drastically changed the disposition of the testator’s estate in favor of the daughter who procured the will. “[I]t is clear that attorney [here] was in a position of irreconcilable conflict.” 432 A.2d at 901. “[T]here must be imposed a significant burden of proof upon the advocates of a will where a presumption of undue influence has arisen because the testator’s attorney has placed himself in a conflict of interest and professional loyalty between the testator and the beneficiary.” 432 A.2d at 900.

Greate Bay Hotel & Casino, Inc. v. Atlantic City, 624 A.2d 102 (N.J. Super. 1993). A law firm that represents a business trust does not represent the individual members of the trust. Accordingly, MRPC 1.7 does not preclude the law firm from representing an adverse party in litigation with a member of the trust with whom the law firm has no other connection.
Santacroce v. Neff, 134 F. Supp. 2d 366, 367 (D.N.J. 2001). This case involved a palimony action against the estate of a former lover. Here, the court applies the so-called “hot potato” doctrine to disqualify a firm that represented both the plaintiff and the estate at a time when they were adverse. In fact, the court found that while the firm was representing both the plaintiff and the Estate on ostensibly unrelated matters, it got wind that she was planning to file a palimony claim against the estate and so dropped her as a client “like a hot potato” to avoid a concurrent conflict with the estate, the more remunerative client. The court refused to let the firm convert her into a “former client” by such behavior and disqualified it under Rule 1.7.

New Mexico:

In re Stein, 143 N.M. 462, 177 P.3d 513 (2008). This is a disciplinary case in which a lawyer was disbarred for multiple conflicts of interest and misrepresentations to courts and a former client. At first, lawyer represented a husband (Bruce) who had set up trusts totaling more than $11 million and his wife (Ruth) who held a durable power of attorney for her husband. When a daughter sought to establish a guardianship for her father, lawyer ostensibly continued to represent both Bruce and Ruth. After a guardian ad litem was appointed for Bruce, and while the guardianship proceedings were pending, lawyer sought to have the trustee distribute the trust income to Ruth, even though Bruce was the income beneficiary. When that failed, without notifying Bruce’s guardian ad litem, lawyer filed two federal actions to obtain control over the assets for Ruth. He was disqualified from continuing to represent Bruce because his interests were adverse to those of his wife Ruth, and he was later disqualified from representing Ruth, as well, since she was adverse to his former client Bruce from whom he had not obtained consent. The lawyer was disbarred for these conflicts and related misconduct.

Spencer v. Barber, 299 P.3d 388 (N.M. 2013). This is a case involving multiple claims against an attorney who represented the personal representative in two wrongful death claims. The PR (Sam) was the mother of one of the decedents and grandmother of the other; she was also the driver of the vehicle that was involved in the fatal accident. The lawyer (Barber) hired to represent Sam as PR on these claims knew that the father/grandfather (Spencer)—Sam’s ex-husband—was also alive, but Sam told Barber that her position was that Spencer had no right to wrongful death shares because he had abandoned their daughter. Prior to settling the wrongful death claims, Barber met with Spencer and got him to agree to accept a specified amount in lieu of any claim as a statutory beneficiary of the wrongful death claim. When the claims settled for a much higher amount, Spencer sued Barber for malpractice and misrepresentation. In this case, the Supreme Court of New Mexico held that (a) Barber owed duties to Spencer as a statutory beneficiary which were complicated by the conflict of interest between his client Sam and Spencer; (b) Barber could have resolved that conflict in a number of ways, one of which would have been to notify Spencer that he, Barber, was not his lawyer, that Spencer could not rely on Barber to act for his benefit, and provide Spencer with sufficient information that he could understand why he needed independent representation; and (c) Spencer’s right to sue Barber for misrepresentation did not depend on any fiduciary duties owed Spencer. When Barber learned that Sam may have been liable for the accident, he developed still another potential conflict of interest between his duties to her as PR and her individual interests. For all these reasons, the court found that summary judgment had been improperly granted in favor of Barber and remanded for trial.

New York:

Matter of Birnbaum, 460 N.Y.S.2d 706, 707 (N.Y. Sur. 1983). The court denied a motion to disqualify the firm that represented one of the co-executors in her representative and individual capacities. In the
opinion the court stated that, “It is well settled that the common practice of having one attorney or one law firm represent an executor as fiduciary as well as a beneficiary of an estate does not create a conflict of interest for the attorneys… On the other hand, where the attorney represents his client in both capacities, he may not act to advance the personal interests of a fiduciary in such a way as to harm his other client, the estate.”

*In re Estate of Lowenstein*, 600 N.Y.S.2d 997, 998-999 (N.Y. Sur. 1993). In a suit brought by a lawyer to enforce a contract under which he was to be named as executor the court found the contract unenforceable and attorney had no claim for damages in amount of lost commissions. “[A] contract provision requiring the nomination of the attorney draftsman as fiduciary of the testator’s estate is unenforceable unless it is clearly demonstrated to the satisfaction of the court that special circumstances required the services of the attorney draftsman and that the nomination was not the product of overreaching.”

*Bishop v. Maurer*, 823 N.Y.S.2d 366 (App. Div. 2006). Conflicts waivers in an engagement letter—and in a related estate planning document—which plaintiff signed were enough to avoid a malpractice claim brought by husband against firm that did estate planning for him and his wife, notwithstanding his allegation that more was expected of the firm in light of the “apparently hostile relationship with his wife.” The engagement letter waiver stated: “Any relationship between a lawyer and a client is subject to Rules of Professional Conduct. In estate planning, ethical rules applicable to conflicts of interest and confidentiality are of primary concern. By countersigning a copy of this letter, you each acknowledge that you have had the opportunity to consult independent legal counsel with respect to your estate planning, and you each affirmatively waive with full understanding any conflict of interest inherent in your both relying on the advice of this firm and its attorneys.” These waivers were sufficient to rebut he client’s claim that defendants had failed to advise him of the conflict implicit in their simultaneous representation of him and his wife.

*Estate of Tenenbaum*, 2006 N.Y. Misc. LEXIS 9013, 235 N.Y.L.J. 2 (N.Y. Sur. 2006). This is a dispute between one of five co-executors (H), in her personal capacity, and several of the other co-executors. H argues that she is entitled to a particular piece of property based on a written note from the decedent. One of the respondent co-executors (M) seeks to disqualify the law firm which is representing H, claiming it is a conflict for the firm to represent H in both her personal capacity and as a co-executor where it must defend against her personal claim. Court denies M’s motion to disqualify H’s counsel, finding that while the law firm is representing her in both her personal and her fiduciary capacity, it is not representing her in her fiduciary capacity in defending against her personal petition here; indeed, she is not a respondent in this proceeding, even in her fiduciary capacity, but appears in the action only as the petitioner. Moreover, all the other co-executors have separate representation. Thus, the court found no conflict. Under the circumstances, the fact that her lawyer is representing her in her fiduciary capacity as to other estate administration matters does not require counsel’s disqualification. Another motion to disqualify M’s lawyer by another co-executor is described under MRPC 1.9.

*Tischler v. Fahnestock & Co., Inc.*, 871 N.Y.S.2d 887 (2009). Mother (R) of a disabled adult child (E) hired lawyer (L) who had formerly represented R to prosecute an action against a securities broker on behalf of E for malfeasance. Defendant counterclaimed against R alleging that she was responsible for any losses to E. L had court appoint a guardian ad litem for E who then continued the retention of L. L advised mother R that he did not represent her, and R retained separate counsel. Amidst several changes
in the guardianship for E, L was dismissed and a replacement GAL also served as counsel for E. When L sought quantum meruit fees (roughly $80,000) for his work for E, R challenged the lawyer’s fee petition on the ground that he had a conflict because he simultaneously represented both her (R) and E. Court, however, rejected the objection finding that the lawyer had never represented R but only E and therefore had no conflict. Indeed, L had avoided taking direction from R (who had contracted to pay his fees) once he discovered she did not have authority to act for E. The court granted the fee request to be paid from E’s recovery, rather than by R.

**Will of McElroy**, 34 Misc.3d 689, 935 N.Y.S.2d 855 (N.Y. Sur. 2011). Decedent left a will that put 2/3 of her residuary estate into a special needs trust for her only daughter and gave the remaining estate to grandchildren. A Guardian ad litem was appointed for the daughter, and the GAL filed objections to the will on her behalf. The lawyer who drafted will was named as executor and he was being represented by his law firm, which had represented daughter in the past and currently provided her with financial management assistance. The GAL moved to disqualify law firm for conflict of interest. The court agreed that the law firm had a conflict of interest and disqualified the law firm.

**North Dakota:**

*Disciplinary Action against McIntee*, 833 N.W.2d 431 (N.D. 2013). Attorney prepared will for testatrix, and when she died, represented a son and a daughter who were appointed as co-executors (and who were also beneficiaries under the will). Attorney was aware that there were potential problems in interpreting the will but did not advise co-executors of potential conflicts in the joint representation and did not get their consent. During the administration of the estate, the daughter executor complained about lack of information but the attorney did not advise her that she could get independent representation for her role as co-executor. After the probate was closed, attorney began to represent the son co-executor individually and filed suit against the daughter and other siblings for interpretation of the will terms regarding use of farmland. Court held: attorney violated 1.7 by not getting consent for the common representation, and violated 1.9 by filing suit against the daughter, a former client, in a substantially related matter in which her interests were materially adverse.

**Ohio:**

*Ivancic v. Enos*, 2012-Ohio-3639, 978 N.E.2d 927 (Ohio App. 2012). Enos hired lawyer Davies—who had formerly represented her deceased father—to probate her father’s estate. Davies did not tell client he was the estate’s largest creditor ($50,000) or that shortly before decedent had died, Davies had filed a lien against the decedent’s home to secure an alleged promissory note for services rendered to the decedent. Davies satisfied the lien from the estate assets without filing a creditor’s claim with the estate—which was required by Ohio law. Finally, although Enos had told Davies that she had a half-sister who had been raised by someone other than their father, Davies failed to investigate whether the half-sister had been adopted by the person who raised her. The appeals court affirmed a trial court determination that Davies breached a fiduciary duty owed to Enos in (a) failing to disclose his creditor status and obtaining a conflicts waiver or withdraw (b) collecting the lien without adequate disclosure to his client and without properly using the creditors’ claim process—a claim which he could not adequately document; and (c) failing to investigate the client’s half-sister’s adoption status. He was ordered to return fees paid to him and to pay the plaintiffs’ fees.
Oregon:

In re Schenck, 345 Or. 350, 194 P.3d 804 (2008). Lawyer was suspended for a year for multiple violations in connection with estate planning for sisters. One of the violations was to draft wills for the sisters while knowing that they were feuding at the time and had adverse interests (had an “actual conflict”) as to the disposition they intended relative to one another, in violation of Oregon’s then version of MRPC 1.7.

South Carolina:

Hotz v. Minyard, 304 S.C. 225, 403 S.E.2d 634 (1991). Lawyer Dobson had a long-standing attorney-client relation both with Hotz and her father Minyard. After Dobson had done some estate planning for Minyard relative to succession to his car business, Hotz met with Dobson to request a copy of her father's will. The will was favorable to Hotz and Dobson discussed the will with Hotz without telling her it had been revoked by a second will that he had also prepared. According to Dobson, Minyard had instructed him not to disclose the existence of the second will to his daughter. Hotz sued Dobson for malpractice. In reviewing summary judgment that had been granted in favor of Dobson, the court concluded that although Dobson represented Hotz’s father, not Hotz, regarding the will, “Dobson did have an ongoing attorney/client relationship with [Hotz] and there is evidence she had ‘a special confidence’ in him.” While Dobson had no duty to disclose the existence of a second will against the wishes of his client (Hotz's father), he owed Hotz a duty to deal with her in good faith and to not actively misrepresent the first will. Thus, the court concluded that summary judgment had been improperly granted to Dobson on this cause of action and remanded for a trial.

Smith v. Hastie, 367 S.C. 410, 626 S.E.2d 13 (S.C. App. 2005). In this malpractice case, appeals court reversed summary judgment that had been entered in favor of lawyer Hastie and remanded for trial on negligence and breach of fiduciary duty. Lawyer had represented husband and wife in setting up a family limited partnership and, in that role, had allegedly encouraged wife to transfer assets into the FLP without advising her of the potential conflict he had in representing both her and her husband, without inquiring into actual conflicts between them (there was substantial marital discord at the time), and without advising her of the implications of the FLP were the couple to divorce.

South Dakota:

Gold Pan Partners, Inc. v. Madsen, 469 N.W.2d 387 (S.D. 1991). An order affirming sale of real property of estate was vacated because of defects in proceedings, including “confused legal advice given the executrix and the decedent’s sons.” The court observed: “Counsel may have become involved in representing conflicting interests by advising the executrix in her personal capacity and advising the sons. We recognize estate attorneys often find themselves being ‘peacemakers.’ Nevertheless, they should exercise caution to avoid being compromised in the representation of conflicting interests.” 469 N.W.2d at 390, n. 4.

Texas:

Baker Botts LLP v. Cailloux, 224 S.W.3d 723 (Tex. App. 2007). Court reverses an equitable trust in the amount of $65.5 million imposed on Baker Botts & Wells Fargo (as executor) to remedy fiduciary breaches in their representation of a widow who disclaimed this amount from the estate of her deceased husband. The law firm had concurrently represented the widow, her deceased husband’s executor (Wells Fargo) and the charitable foundation that was the beneficiary of her disclaimer. Allegedly the widow’s waiver of the conflict was not sufficiently informed, and the trial court held that this was a
fiduciary breach. But the court of appeals reversed for lack of evidence that the fiduciary breach caused the widow to execute the disclaimer and because establishment of the equitable trust was without basis in fact or law.

*Hill v. Hunt*, 2008 U.S. Dist. LEXIS 68925, 2008 WL 4108120 (N.D. Tex. 2008). This is an action brought by a great grandson of HL Hunt against a variety of persons involved with the management of trusts set up by HL Hunt. Among the defendants is plaintiff’s father, a grandson of HL Hunt and this decision adjudicates the defendant father’s motion to disqualify the law firm representing the plaintiff son. Finding that the law firm had established an attorney-client relationship with the defendant father in the context of unrelated trust litigation in New York, and that this attorney-client relationship was continuing, the court concluded that there was a concurrent conflict for the firm to also be representing the father’s son as plaintiff in this suit against his father. The violation of Rule 1.7 and the surrounding circumstances convinced the court that the firm must be disqualified from representing the plaintiff son based on the appearance of impropriety and the likelihood of public suspicion.

Washington:

*Behnke v. Ahrens*, 172 Wn. App. 281, 294 P.3d 729 (2012). The co-trustees of a trust had paid large fees to attorney Ahrens for advice and implementation of a tax shelter to shelter capital gains upon sale of trust assets. Co-trustees were later advised by other attorneys that the IRS considered this an abusive tax shelter and that they should pay the taxes and penalties. They settled with the IRS and then sued the first lawyer—Ahrens—for fraud, consumer protection violation, common law breach of fiduciary duty, and breach of fiduciary duty based on RPCs. The court held that the attorney had violated RPC 1.7(b) and thus his fiduciary duty. While representing the trust and setting up the tax shelter, the lawyer had also been representing the vendor of the tax shelter, and had a financial interest in referring clients to the vendor, and did not fully disclose that relationship to the co-trustees and obtain written consent. Ahrens objected to imposing civil liability for a violation of the RPCs, but the court stated: “A trial court may properly consider the RPCs in an action by a client to recover attorney fees for the attorney's alleged breach of fiduciary duty.”

Ethics Opinions

ABA:

Op. 02-428 (2002). This opinion addresses the responsibilities of a lawyer whose estate planning services are recommended (and perhaps paid for) by a potential beneficiary of the relative. "A lawyer who is recommended by a potential beneficiary to draft a will for a relative may represent the testator as long as the lawyer does not permit the person who recommends him to direct or regulate the lawyer's professional judgment pursuant to Rule 5.4(c). If the potential beneficiary agrees to pay or assure the lawyer's fee, the testator's informed consent to the arrangement must be obtained, and the other requirements of Rule 1.8(f) must be satisfied. If the person recommending the lawyer also is a client of the lawyer, the lawyer must obtain clear guidance from her as to the extent to which he may use or reveal that person's protected information in representing the testator. The lawyer should advise the testator that he also is concurrently performing estate planning services for the other person. Ordinarily, there is no significant risk that the lawyer's representation of either client will be materially limited by his representation of the other client; therefore, no conflict of interest arises under Rule 1.7."
Op. 05-434 (2005). This opinion is discussed in the text of the Commentary. It addresses the responsibilities of a lawyer who represents a client (testator) who asks the lawyer to draft a new will, the effect of which is to disinherit the testator's son whom the lawyer is representing on an unrelated matter. The Committee concluded that drafting the will is not directly adverse to the son, and the lawyer does not need the son's consent to do the will. The Committee also concludes that ordinarily this situation does NOT pose a significant risk of material limitation of the estate planning work unless (perhaps) the lawyer begins advising the testator about whether to disinherit the son. The Committee does point out scenarios under which the lawyer may not be able to do the will, on which we will not elaborate here.

California:
San Diego Op. 1990-3. This opinion discusses the position of a lawyer who is asked by a son or daughter to prepare a new will for the child’s parent. The opinion concludes that the person who is to sign the instrument is the client of the lawyer:

As stated above, in our view the person who will be signing the document is clearly a client of the attorney, and must be treated as such. However, unless it is agreed upon in advance the Son or Daughter may also be considered clients of the attorney. If so, the provisions of Rule 3-310 apply. The attorney must disclose the potential conflicts of interest to the clients in writing, and obtain their informed written consent to the representation in order to proceed. Depending upon the specific facts, the conflicts of interest may be so great that the attorney would be well advised not to represent both even if the clients were willing to give their consent.

Maryland:
Op. 2003-08. A lawyer who chairs his church’s committee that promotes legacy giving from its parishioners may not prepare wills for parishioners who want to bequeath property to the church. The panel ruled that the lawyer’s responsibility for furthering the church’s financial interests would conflict with his representation of the parishioners and contravene MRPC 1.7(b). If the church is also the lawyer’s client, then MRPC 1.7(a) may be violated.

Missouri:
Op. 2006-0073. A lawyer may offer a discount on estate planning to clients who leave a portion of their estates to a not-for-profit organization if the lawyer clearly and fully discloses his relationship with the organization and objectively advises and consults with the clients about their options and the effects of their choices.

Nebraska:
Op. No. 12-08. Lawyer’s representation of co-trustees who were also beneficiaries of the trust was challenged on ground that the co-trustees/beneficiaries had conflicts. The validity of a trust amendment was being challenged by two other beneficiaries, and if successful their claim would reduce the share of the co-trustees/beneficiaries. The Advisory Committee concluded that there was no conflict since trustee clients were seeking to enforce the terms of the trust as written, and there was no conflict with another client or former client.

Nevada:
Op. 47 (2011). A lawyer who is on the board of directors of a company may not prepare the estate for a client who wishes to name the company as a beneficiary, at least not without a conflicts waiver. The lawyer is a fiduciary for the company and owes it duties of loyalty, impartiality, and confidentiality.
which would preclude him from fully disclosing to the estate planning client company information that might be relevant. Further, the lawyer’s information as to the company’s financial situation and his interest in furthering the economic goals of the company would create a conflict of interest were he to do the estate planning in question. If the lawyer reasonably believes that the client will not be adversely affected, however, he is entitled to ask the client for consent after full disclosure of the conflicts. The committee relied, among other things, on Maryland Bar Association Ethics Opinion 2003-08, *supra*, to the same effect as to a lawyer who sits on a church’s legacy committee.

**New Hampshire:**
Op. 2008-09/1. A lawyer may, at a client's request, draft an estate-planning document naming the lawyer as a fiduciary, but first must ensure that he is competent to perform the fiduciary role; discuss the client's options in choosing a fiduciary, including the relative costs of having the lawyer or someone else serve as fiduciary; and make a reasonable determination whether his personal interest in serving as fiduciary requires the client's informed consent. A lawyer may not nominate himself by default to serve as fiduciary in estate-planning documents he presents to a client. If a lawyer actively solicits clients to nominate the lawyer to serve as fiduciary, Rule 1.8(a) may apply.

**New York:**
Nassau County Op. 90-11 (1990). The lawyer who represented a decedent’s former wife in advancing a claim against the decedent’s estate may not later undertake to represent the decedent’s personal representative. “Because the interests of the former wife are different from the interests of the estate, inquiring counsel must not undertake to represent the estate. (See Disciplinary Rule 5-105).”

Op. 836 (2010). Lawyer who previously represented an incapacitated client in guardianship proceeding inquired whether lawyer could now represent client and the guardian in proceeding to terminate the guardianship. The opinion concludes that this is a consentable conflict (assuming lawyer reasonably believes that lawyer will be able to competently represent both clients) that requires informed consent of both the client and the guardian. Obtaining informed consent of client must take into account any limits on client’s capacity, but client’s existing determination of incapacity does not bar obtaining client’s consent. The requirement of the court’s approval of the termination of the guardianship mitigated concerns about the client’s ability to give informed consent.

**North Carolina:**
2000 Op. 9 (2001). Lawyer who is also a CPA may provide legal services and accounting services from the same office if he discloses his self-interest. Lawyer may offer legal services to existing client of accounting practice because this is a prior professional relationship with a prospective client.

**North Dakota:**
Op. 14-01. The lawyer prepared an estate plan for a husband and wife and represented husband in a child support matter, and never sent them a termination letter. Lawyer also drafted a power of attorney for wife’s aunt, appointing wife as agent. The aunt revoked the power of attorney and appointed new agents, and wanted the lawyer to represent her in suing the husband and wife to recover funds. The lawyer could not represent the aunt because the husband and wife were still the lawyer’s clients (1.7) and the matter is substantially related to lawyer’s prior representation of the couple (1.9).
Ohio:
Op. 2001-4. It is improper for a lawyer, who is also a licensed insurance agent, to sell annuities through the law firm to estate planning clients of the lawyer. A lawyer’s interest in selling an annuity and a client’s interest in receiving independent professional legal counsel free of compromise are differing interests. Even if full disclosure and meaningful consent may be obtained, there exists an appearance of impropriety. Also, a lawyer’s sale of annuities through a law firm may jeopardize the preservation of client confidences or secrets, for the records of a licensed insurance agent are subject to inspection by the state superintendent of insurance.

Oregon:
Op. 525 (1989). A lawyer who is on the board of a charity and also represents it may not represent both the charity and a donor in a unitrust transaction. However, the lawyer may draft the donor’s will in which the charity is designated as a beneficiary if the lawyer discloses his representation of the charity to the donor.

Pennsylvania:
Op. 2013-005. The attorney represents an estate as plaintiff in litigation against a company for negligent damage to property. The estate’s administrator was added as defendant under a contributory negligence theory. The estate and the administrator want the lawyer to represent both of them, but the lawyer cannot represent both because the estate has a directly adverse interest in establishing liability of the administrator. The lawyer cannot use or disclose any harmful information obtained from the administrator as a potential client.

South Carolina:
Op. 90-16 (1990). With full disclosure to its clients of all relevant factors, a law firm may refer estate planning clients to an insurance agency in which the law firm owns a 50% or greater interest. A similar arrangement regarding title insurance had previously been approved.

Washington:
Op. 2107 (2006). Insofar as the duties of a guardian for an incapacitated person diverge from those owed by the trustee of a special needs trust for the same person, for a lawyer who is guardian and counsel for the guardian to accept appointment as the trustee of a special needs trust would create an actual or a potential conflict. “[S]ince the incapacitated person probably lacks the mental capacity to understand a full disclosure and consent to the dual representation, the conflict cannot be waived pursuant to RPC 1.7(a) or 1.7(b).” Moreover, accepting the role of trustee for compensation would constitute a business transaction with a client, the “guardianship,” which would be governed by Rule 1.8(a). Accordingly, some other person should be appointed to serve as trustee.

Joint Representation: Disclosures

Cases

Louisiana:
In re Hoffman, 883 So. 2d 425 (La. 2004). An attorney represented three siblings in a will contest. The court held that the attorney violated MRPC 1.7(b) by failing to obtain the informed consent of each client to the representation. The attorney relied upon the daughter of one of his clients to prepare an
affidavit of representation, which in turn the attorney’s other clients signed without having the benefit of the advice of counsel. More importantly, according to the court, the attorney’s failure to appreciate the potential conflict between his clients led directly to his violation of MRPC 1.8(g) in the course of settling their claims. Instead of giving all three clients the opportunity to exercise their absolute right to control the settlement decision, the attorney, after obtaining only one client’s consent, accepted a settlement proposal on behalf of all of his clients. The attorney then compounded his misconduct by distributing the settlement proceeds in accordance with the wishes of only one client and over the objection of another client.

**Ethics Opinions**

**Florida:**

Eth. Op. 95-4 (1997). This opinion discusses whether a lawyer engaged in estate planning has an ethical duty to counsel a husband and wife concerning any separate confidences which either the husband or wife might wish the lawyer to withhold from the other. It holds that, until such time in a joint representation that an objective indication arises that the interests of the husband and wife have diverged or it objectively appears to the lawyer that a divergence of interests is likely to arise, a conflict of interest does not exist and, thus, the disclosure and consent requirements under the Florida Rules are not triggered.

**North Carolina:**

Op. RPC 229 (1996). This opinion holds that a lawyer who jointly represents a husband and wife in the preparation and execution of estate planning documents may not prepare a codicil to the will of one spouse without the knowledge of the other spouse if the codicil will adversely affect the interests of the other spouse or each spouse has agreed not to change the estate plan without informing the other.

**Oregon:**

Op. 2005-86. Ordinarily it is permissible for a lawyer to jointly represent and prepare wills for a married couple. “A lawyer is charged with all knowledge that a reasonable investigation of the facts would show. … Typically, such an investigation will not lead the lawyer to conclude that a conflict exists under Oregon RPC 1.7(a) when joint wills are contemplated, because the interests of spouses in such matters will generally be aligned. This will not always be the case, however. For example, … spouses with children by prior marriages may have very different opinions concerning how their estates should be divided. See, e.g., In re Plinski, 16 DB Rptr. 114 (2002) (husband and wife, who each had adult children from previous marriages, had interests that were adverse because value of their respective estates were substantially different, clients disagreed over distribution of assets, and wife was susceptible to pressure from husband on financial issues).” Absent further facts, opinion “declined to state whether, or under what circumstances, the interests of the spouses would be directly adverse or that a significant risk of materially limited representation would result in such cases.”
Joint Representation: Co-Fiduciaries

Cases

New York:

*In re Flasterstein’s Estate*, 210 N.Y.S.2d 307, 308 (N.Y. Sur. 1960). In this case the surrogate court denied a motion to disqualify a law firm that represented the executors, who were also residuary beneficiaries, because of an alleged inherent conflict of interest. The court observed:

It is axiomatic that executors and fiduciaries generally are entitled to representation by attorneys of their own choosing. The fact that the executors are financially interested in the estate as residuary legatees and may profit individually through the services of their attorneys is immaterial and does not lead to a conflict of interest. In instances where an executor may assert a personal claim against the testator or the estate it may be claimed that an attorney representing the executor in his representative capacity and individually appears for conflicting interests as the allowance of such a claim may reduce the shares of others beneficially interested in the estate. Such is not the situation here presented....

Ethics Opinions

Pennsylvania:

Op. 2006-20. It is permissible for a lawyer to represent a resigning trustee of a testamentary trust and also the successor trustee (who is a remainder beneficiary), notwithstanding the temporary overlap between the two representations and the potential for conflict, provided that the successor trustee will not oppose the accounting presented by the resigning trustee. Procedurally, the resigning trustee should prepare a preliminary verified accounting for the proposed successor and the successor should file a conditional waiver to the effect that “the proposed [successor] has reviewed the preliminary account and statement, and provided there are no substantial changes thereto, the proposed successor in the capacity of successor trustee does not intend to object to the official account when filed; and the proposed [successor] has reviewed the preliminary account and statement, and provided there are no substantial changes thereto, the proposed successor in the capacity of remainder beneficiary of the trust does not intend to object to the official account when filed.”

Virginia:

Va. Op. 1473 (1992). A lawyer who was retained “to represent the interests of the estate” is treated as having represented the co-executors (each of whom had separate counsel) and not “the estate.” The same lawyer may represent two of the executors in their capacity as trustees of a testamentary trust only with the consent of the third co-executor.

Va. Op. 1387 (1990). A law firm of which a co-fiduciary is a member may be retained to represent the fiduciaries with the consent of all fiduciaries. However, “the committee urges that the co-fiduciaries rather than the fiduciary/partner maintain the necessary communications with the firm throughout the administration of the estate.”
Appointment of Scrivener as Fiduciary

Cases

Tennessee:  
*Petty v. Privette*, 818 S.W.2d 743 (Tenn. App. 1989). The court held that the scrivener of a will that appointed him as executor could be protected by the terms of an exculpatory clause that exonerated him from liability for any act of negligence that did not amount to bad faith, if the scrivener rebuts the presumption that the inclusion of the exculpatory clause in the will resulted from undue influence exerted by the scrivener.

Washington:  
*Fred Hutchinson Cancer Research Center v. Holman*, 732 P.2d 974, 980 (Wash. 1987). In this case excessive compensation was recovered from the scrivener of a will who was subsequently appointed co-trustee of a large testamentary trust. The court held that an exoneration clause did not protect the scrivener against liability: “As the attorney engaged to write the decedent’s will, [defendant] is precluded from reliance on the clause to limit his own liability when the testator did not receive independent advice as to its meaning and effect.”

Wisconsin:  
*In re Disciplinary Proceedings Against Felli*, 291 Wis. 2d 529, 718 N.W.2d 70 (2006). An attorney was suspended for three years for drafting estate planning documents naming the attorney as a fiduciary in violation of Rule 1.7 and 7.3. The court distinguished its earlier case, *State v. Gulbankian*, 196 N.W.2d 733 (Wis. 1972), in which it had warned against this practice but had declined to discipline the lawyers involved in that case.

Ethics Opinions

Georgia:  
Op. 91-1 (1991). A lawyer who neither promotes his or her appointment nor exercises undue influence on the client may draft an instrument appointing the lawyer as fiduciary if the lawyer makes full disclosure to the client, obtains the client’s written consent, and charges a reasonable fee.

Illinois:  
Op. 99-08, 2000 WL 1597066. Lawyer engaged to prepare a trust for a client may, at the client’s direction, include a provision directing the trustee administering the trust to retain the lawyer for legal services, so long as (i) adequate disclosure (including disclosing that the trustee also would have the right to discharge the lawyer as its lawyer) is made, (ii) the client consents to the representation, and (iii) the lawyer concludes that his representation of the client will not be adversely affected by including such a provision.

Massachusetts:  
Op. 06-01 (2006). There is no per se rule against a lawyer drafting an estate planning document that names the lawyer as a fiduciary and, as such, retaining themselves as counsel, but these are personal interests of the lawyer that require analysis under Rule 1.7. The possibility of material limitation requires the lawyer to satisfy himself that the role is in the best interests of the client and will typically
require discussion of alternatives and of the method for calculating fees as fiduciary and as counsel. There is no requirement that Rule 1.8(a) be followed, but comment 8 to Model Rule 1.8 provides relevant guidance.

Michigan:
Eth. Op. RI 291 (1997). A lawyer who is drafting a will for a client may not suggest that he be named as personal representative or as trustee to serve without bond for a reasonable fee. However, the lawyer may accept the nomination if asked independently by the client.

New Jersey:
Eth. Op. 683 (1996). This opinion holds that, subject to the applicable statutory and substantive case law, as a matter of professional ethics, a scrivener may properly prepare a will naming himself as a fiduciary and may properly be paid for services in both capacities. In doing so, counsel should be aware of the disclosure and consultation requirements set forth in MRPC 1.7(b)(2).

New York:
N.Y. Op. 610 (1990). This opinion states that, “[e]xcept in limited and extraordinary circumstances, an attorney should not serve as draftsman of a will that names the lawyer as an executor and as a legatee.” The opinion refers to Surrogate’s Court Rules in Suffolk County that require that a will appointing an attorney as fiduciary be accompanied by an affidavit of the testator setting forth the following:

(1) that the testator was advised that the nominated attorney may be entitled to a legal fee, as well as to the fiduciary commissions authorized by statute;
(2) where the attorney is nominated to serve as a co-fiduciary that the testator was apprised of the fact that multiple commissions may be due and payable out of the funds of the estate; and
(3) the testator’s reason for nominating the attorney as fiduciary.

South Carolina:
S.C. Op. 91-07 (1991). It is not unethical for a lawyer to prepare a will at the direction of a client that names the lawyer as personal representative and trustee except under the circumstances proscribed under MRPC 1.8(c).

Virginia:
Op. 1358 (1990). A lawyer may draft a will naming the lawyer as personal representative or trustee or in which the fiduciary is directed to retain the lawyer as attorney if the client consents after being informed of alternate representatives, all fees involved, and of the lawyer’s own financial interest. A lawyer’s suggestion of himself as fiduciary may constitute improper solicitation.

Related Secondary Sources
Restatement (Third) of the Law Governing Lawyers (2000) §135 (A Lawyer with a Fiduciary or Other Legal Obligation to a Nonclient) addresses conflicts of interest that arise as a result of serving as a fiduciary, such as a personal representative or trustee. See, in particular, comment c and related illustrations.
MRPC 1.8: CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES

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

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

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

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

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift, unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer’s independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregate agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer’s disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

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

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.
A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

1. acquire a lien authorized by law to secure the lawyer’s fee or expenses; and
2. contract with a client for a reasonable contingent fee in a civil case.

A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

ACTEC COMMENTARY ON MRPC 1.8

Business Transactions with Client. MRPC 1.8(a) provides mandatory procedural safeguards when a lawyer engages in business transactions with a client. As explained in this Commentary, lawyers often provide services for clients that could be considered business transactions but should not be so considered. Like any lawyer, an estate lawyer who desires to enter into a business transaction with a client should follow the procedures set forth in MRPC 1.8(a). Lawyers who intend to take all or a part of their fee in the form of an interest in a client’s business or other nonmonetary property must comply not only with the primary fee rule (MRPC 1.5), but also with the more demanding requirements of MRPC 1.8(a). MRPC 1.8, cmt [1].

As to lawyers who seek or receive a commission or referral fee from a third party when providing legal services to a client, see ACTEC Commentary on MRPC 1.5 (Rebates, Discounts, Commissions or Referral Fees).

Prohibited Transactions. Unless the lawyer complies with the requirements of MRPC 1.8(a), a lawyer generally should not enter into purchase or sale transactions with a client or with the beneficiaries of a fiduciary estate if the lawyer is serving as fiduciary or as counsel to the fiduciary. Model Rule 1.8(a) “applies to lawyers purchasing property from estates they represent.” MRPC 1.8, cmt [1].

Gifts to Lawyer. MRPC 1.8 generally prohibits a lawyer from soliciting a substantial gift from a client, including a testamentary gift, or preparing for a client an instrument that gives the lawyer or a person related to the lawyer a substantial gift. A lawyer may properly prepare a will or other document that includes a substantial benefit for the lawyer or a person related to the lawyer if the lawyer or other recipient is related to the client. The term “related person” is defined in MRPC 1.8(c) and may include a person who is not related by blood or marriage but has a close familial relationship. In principle, therefore, an unmarried person living with another person in a committed marriage-like relationship, should qualify as “related” under this definition. It should also encompass persons in a stepchild/stepparent relationship and persons who have been raised by “de facto” parents but who have never formally been adopted, provided there is, in fact, a “close familial relationship.” However, the lawyer should exercise special care if the proposed gift to the lawyer or a related person is disproportionately large in relation to the gift the client proposes to make to others who are equally related. Neither the lawyer nor a person associated with the lawyer can assist an unrelated client in making a substantial gift to the lawyer or to a person related to the lawyer. See MRPC 1.8(k) (Conflict of Interest: Current Clients: Specific Rules).

For the purposes of this Commentary, the substantiality of a gift is determined by reference both to the size of the client’s estate and to the size of the estate of the designated recipient. The provisions of this rule extend to all methods by which gratuitous transfers might be made by a client including life insurance, joint
tenancy with right of survivorship, and pay-on-death and trust accounts. As noted in comment [8], the rule “does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client’s estate or to another potentially lucrative fiduciary position.” See also ABA Formal Opinion 02-426 (2002). The client’s appointment of the lawyer as a fiduciary is not a gift to the lawyer and is not a business transaction that would subject the appointment to MRPC 1.8. Nevertheless, such an appointment is subject to the general conflict of interest provisions of MRPC 1.7 (Conflict of Interest: Current Clients).

Exculpatory Clauses. Under some circumstances and at the client’s request, a lawyer may properly include an exculpatory provision in a document drafted by the lawyer for the client that appoints the lawyer to a fiduciary office. (An exculpatory provision is one that exonerates a fiduciary from liability for certain acts and omissions affecting the fiduciary estate.) The lawyer should not include an exculpatory clause without the informed consent of an unrelated client. An exculpatory clause is often desired by a client who wishes to appoint an individual nonprofessional or family member as fiduciary.

Payment of Compensation by Person Other than Client. It is relatively common for a person other than the client to pay for the client’s estate planning services. Examples include payment by a parent or other relative or by an employer. A lawyer asked to provide legal services on such terms may do so provided the requirements of MRPCs 1.5 (Fees), 1.7 (Conflict of Interest: Current Clients), and 1.8(f) are satisfied.

Example 1.8-1. Father (F), a client of Lawyer (L), has asked L to prepare an irrevocable trust for F’s daughter (D), who will soon attain her majority. D will be the settlor, since F wants D to transfer property to the trust that D will be entitled to receive from a custodianship that was established for D under the Uniform Transfers to Minors Act. F has indicated that he would pay the cost of L’s representation of D in connection with the preparation of the trust. Before undertaking to represent D, L should inform F regarding the requirements of MRPC 1.8—particularly that L must be free to exercise independent judgment in advising D in the matter. L must also obtain D’s informed consent to L being compensated by F. Since F is a client, L must be satisfied that representing both F and D is permissible. If there is significant risk that the L’s representation of D will be materially limited by the lawyer’s own interests in the fee arrangement or by L’s responsibilities to F, then L must be able to reasonably conclude that it will be possible to competently and diligently represent both clients and the consent of each must be confirmed in writing. See ACTEC Commentary to MRPC 1.7 (Conflict of Interest: Current Clients). If L cannot represent both F and D consistent with the provisions of MRPC 1.7 (Conflict of Interest: Current Clients), L should decline to represent D. L should not prepare the trust at F’s request without meeting with D personally—just as L should not draw D’s will without meeting with her personally.

Example 1.8-2. After a review of various forms of fringe benefit programs, Employer (E) is introduced to Lawyer (L) for the purpose of having L provide estate planning services for those of E’s employees who desire such services. E agrees to pay L for providing the contemplated professional services “that will benefit E’s employees.” Provided each employee gives an informed consent to L’s representation of the employee under the circumstances, and provided L exercises independent judgment on behalf of each employee-client, L may render the services requested by each employee.

Example 1.8-3. L represents Charity. Charity contacts L and tells her that a donor wishes to leave his estate entirely to Charity as long as Charity will cover the costs of drafting the Will. Charity asks L to
meet with the client and draft his Will, with the understanding that the Charity will pay L’s fees. L should inform Charity regarding the requirements of MRPC 1.8—particularly that L must be free to exercise independent judgment in advising donor in the matter, and that confidentiality of information regarding L’s representation of donor will be maintained, even if donor’s intentions regarding disposition of his estate vary from what Charity currently understands. L must also obtain donor’s informed consent to L being compensated by charity. Since Charity is a client, L must be satisfied that representing both Charity and donor is permissible. If there is significant risk that the L’s representation of donor will be materially limited by the lawyer’s own interests in the fee arrangement or by L’s responsibilities to Charity, then L must be able to reasonably conclude that it will be possible to competently and diligently represent both clients and the consent must be confirmed in writing.

**ANNOTATIONS**
See Caveat to Annotations on page 13
(Limiting the Scope and Purpose of the Annotations)

**Gifts to Lawyer**

**Statutes**

California:
California has enacted detailed legislation voiding any gift to a “disqualified person,” a term defined to include any individual having a fiduciary relationship to the transferor who drafts, transcribes or causes to be drafted or transcribed any instrument of transfer (i.e., will, trust, deed, etc.), relatives by blood or marriage of or cohabitants with such persons, and partners, shareholders and partnerships or corporations in which disqualified persons have a ten percent or more interest, and employees of any such entity. Exceptions to disqualification include: (i) if the otherwise disqualified person is related by blood or marriage to or a cohabitant with the transferor; (ii) if an independent attorney certifies that the transfer was not the product of fraud, menace, duress or undue influence. Cal. Prob.C. §§21380-92.

Texas:
Texas Probate Code §58b (adopted in 1997) provides in subsection (a): “A devise or bequest of property in a will to an attorney who prepares or supervises the preparation of the will or a devise or bequest of property in a will to an heir or employee of the attorney who prepares or supervises the preparation of the will is void.” Subsection (b) exempts “a bequest made to a person who is related within the third degree by consanguinity or affinity to the testator….”

**Cases**

Alabama:

*Cooner v. State Bar*, 59 So.3d 29 (Ala. 2010). Lawyer prepared a trust for his uncle by marriage, the surviving husband of his deceased aunt. The trust drafted by the lawyer named the lawyer as one of 13 beneficiaries of the residuary estate. The court concluded that the phrase “related to” in 1.8(c) referred to relatives by marriage as well as blood, and the death of the blood relative (his aunt) did not terminate the necessary relationship for the relevant exception to apply. Accordingly, he did not violate Rule 1.8(c).
California:

_Estate of Auen_, 35 Cal. Rptr. 2d 557, 562-563 (Cal. App. 1994). This decision upholds the invalidation of certain _inter vivos_ gifts and a will that made gifts to testator’s lawyer and her family because of the presumption that the lawyer exercised undue influence over the client. “The relation between attorney and client is a fiduciary relation of the very highest character…. Transactions between attorneys and their clients are subject to the strictest scrutiny…. These general principles applicable to the attorney-client relationship support the trial court’s reasoning that, when an attorney is acting as an attorney, any benefit other than compensation for legal services performed would be ‘undue.’”

Connecticut:

_Sandford v. Metcalfe_, 110 Conn. App. 162, 954 A.2d 188 (2008), _appeal denied_ 289 Conn. 931, 289 Conn. 931, 958 A.2d 160 (2008). It was undisputed that Sandford, a lawyer licensed in NY, went to the home of her ill friend in Connecticut, who asked her to draft a will for her which would leave a substantial bequest to Sandford; that Sandford told her she was not licensed in Connecticut and could not draft the will; but that she relented and drafted a will in which she was the beneficiary of half of decedent’s estate and a handyman the other half. Decedent died five days later at the hospital and her heirs at law failed to have the will denied probate and then sought to void the gift to Sandford on grounds of public policy. Noting that the permissibility of the gift under RPC 1.8(c) and/or the alleged unauthorized practice had not been adjudicated in the case, the court held it had no equitable power to void the gift to Sandford.

Florida:

_Agee v. Brown_, 73 So.3d 882 (Fla. 2011). Beneficiaries under a prior will filed will contest claiming that a later will was procured by undue influence. Personal Representative under later will answered that beneficiaries of prior will did not have standing, because the prior will was drafted by the attorney for the decedent who was named as a beneficiary and the will was therefore void. Court held that under 1.8(c), there was a rebuttable presumption of undue influence because the beneficiary/attorney drafted the will, but that did not change the status of the other beneficiaries under the will contest statute as interested persons with standing to challenge the later will.

Louisiana:

_Succession of Tanner_, 895 So.2d 584 (La. App. 2005). Legatees under the will of Tanner challenge a residuary bequest to his attorney valued at more than $500,000 on the ground that it violated Rule 1.8(c). The challenge was rejected based on evidence that the beneficiary lawyer had not drafted the will but had asked, on the client’s behalf, another lawyer in his office building (with whom he was not professionally affiliated) to do so because he knew the client intended a bequest of half the residue to him and knew he could not draft such a will. The drafter independently conferred with the client and satisfied himself that this was the client’s intent, and assisted him to execute the will.

_In re Cabibi_, 922 So.2d 490 (La. 2006). Attorney’s daughter, a notary employed by him, drafted and typed a codicil at a client’s request that made a substantial bequest to the attorney, her father, and sent it to the client. She did this while her father was absent from the office and without his knowledge. The client handwrote the codicil, based on the typed language, executed it as a holograph, and returned it to the office. Upon his return to the office, the attorney reviewed the codicil and filed it. He did not view the testator as a client but as a long-time personal friend who he knew had made similar bequests (apparently not drafted by the attorney) in the past. When she died, the codicil was challenged and set
aside because of the bequest to the attorney. In disciplinary proceedings, the disciplinary board recommended a three-month suspension, but the Supreme Court of Louisiana concluded that discipline was inappropriate. Although a technical violation had occurred which attorney should have corrected when he discovered the codicil, given the long-time friendship between the attorney and the decedent and his limited interaction with her as an attorney, discipline was not imposed.

Maryland:
Attorney Grievance Com’n v. Saridakis, 402 Md. 413, 936 A.2d 886 (Md. 2007). The testator was adamant that she wanted to give her estate planner a substantial bequest ($413,281.00 as it turned out). He resisted drafting such a bequest but when his client told him to obtain independent counsel, he drafted the bequest and asked another estate planner with whom he shared office space to serve as independent counsel for this gift. (Maryland’s version of Rule 1.8(c) has an express exception where the client is represented by independent counsel for the gift.) Serving in that role, the other lawyer met with the testator privately, satisfied himself that she was competent and intended the gift, and helped her execute the will. The Court held that while this was a good faith effort by the beneficiary/estate planner to comply with Rule 1.8(c), it was not good enough. The office-sharing lawyer is not sufficiently independent and so the beneficiary violated 1.8(c); the act was also prejudicial to the administration of justice and so also violated Rule 8.4(d). Nonetheless, the Court ordered the petition dismissed and let the attorney off with a warning.

Montana:
Stanton v. Wells Fargo Bank Montana, N.A., 335 Mont. 384, 152 P.3d 115 (Mont. 2007). Lawyer who was the ex son-in-law of decedent client drafted trust amendments, a will, and a stock gift of which he was the beneficiary. Court acknowledged that this drafting violated Rule 1.8(c) but refused to raise a presumption of undue influence and repeated earlier conclusions that “a violation of a professional conduct rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached.” It affirmed summary judgment in favor of the lawyer/drafter.

Nevada:
In re Jane Tiffany Living Trust 2001, 177 P.3d 1060 (Nev. 2008). Although the estate planner seems to have violated Nevada’s equivalent of former MR 1.8(c) by drafting a trust which named his partner as the beneficiary of a house that was transferred to the trust, the court held that this breach of the rules did not create a private right of action in heirs seeking to set aside the gift and the beneficiary/attorney had rebutted the presumption of undue influence that arose as a result of the gift.

New Hampshire:
Whelan’s Case, 619 A.2d 571, 573 (N.H. 1992). In this case a lawyer was censured for drafting a will in which the testatrix left her residence to the scrivener’s partner. The lawyer did not violate MRPC 1.8(c) or MRPC 1.10. Instead, the lawyer violated MRPC 5.1(c)(2) because the lawyer is responsible for the lawyer’s partner’s violation of MRPC 1.8(c) and MRPC 8.4(a). In its opinion the court observed that: “The respondent’s defense is basically one of ignorance of the Rules of Professional Conduct, which is no defense. We hold that lawyers, upon admission to the bar, are deemed to know the Rules of Professional Conduct.”
New York:

*Will of Cromwell, Dec’d*, 552 N.Y.S.2d 480 (N.Y. Sur. 1989). The gift of $500,000 to an attorney draftsman was held valid where it was not procured by fraud or undue influence and where there was a longstanding professional relationship between the attorney and the testator involving close family ties.

North Dakota:

*In re Disciplinary Action Against Boulger*, 637 N.W.2d 710 (N.D. 2001). Attorney drafted will for client/friend that gave attorney a 20% contingent devise of a large estate. The terms of the contingency were that the testator’s sons would have to predecease the testator, without issue. The contingency never materialized, and the attorney received no property from the estate. Nevertheless, the attorney was reprimanded. MRPC 1.8 prohibits an attorney from drafting an instrument giving herself a substantial gift. The extreme unlikelihood of the occurrence of the contingencies is immaterial. Simply because a gift is contingent, it is not rendered “insubstantial.”

Pennsylvania:

*In re Bloch*, 625 A.2d 57, 62-63 (Pa. Super. 1993). A will that named the scrivener’s father and his paramour as residuary legatees was not proved to be the result of undue influence. The court observed:

To the extent that the scrivener’s conduct is challenged as unethical behavior violative of the Rules of Professional Conduct, MRPC 1.8(c), our Supreme Court has held that enforcement of the Rules of Professional Conduct does not extend itself to allow courts to alter substantive law or to punish an attorney’s misconduct…. We have been presented with no evidence of undue influence engaged in by the scrivener as to the decedent, nor was there proof of a weakened intellect associated with the testatrix during the period the will in question was prepared…. Accordingly, we are not prepared to invalidate the will on the grounds that the scrivener acted in violation of the Code of Professional Conduct.

Ethics Opinion

New Hampshire:

Op. 2011-12/7 (4/11/12). An estate planning client wishes to leave (a) a gift in trust to his brother (who happens to be lawyer’s son-in-law) of a sports car; (b) a gift in trust to his sister-in-law (lawyer’s daughter) of a valuable painting; (c) a $50,000 endowment in trust to a hospital on whose endowment committee both client and lawyer (who is chair) sit; and (d) an unsolicited outright gift of theater tickets and the price of a nice dinner to lawyer. The committee concluded that: (a) the gift to client’s brother fits within the exception for gifts to those in a close familial relationship with the client (unless the client and the brother are estranged); (b) the gift to the lawyer’s daughter (client’s sister-in-law) is presumptively prohibited and would only fall within the exception if factual analysis were to show that client has a close familial relationship also with the sister-in-law comparable to other relationships clearly covered in MR 1.8(c); (c) the endowment gift is not precluded by MR 1.8(c) because it does not personally benefit lawyer, but must be analyzed under MR 1.7 given the potential conflict caused by lawyer’s interest in furthering the hospital’s goals. The lawyer should therefore not proceed here without reasonably concluding that he can draft such a gift competently and impartially and obtaining the client’s informed consent – relying on Maryland Bar Association Ethics Op. 2003-08. Finally, the unsolicited gift of theater and dinner tickets was permissible as an insubstantial gift given that the client’s estate was $3 million.
Transactions with Client or Beneficiary

Cases

California:
*Sodikoff v. State Bar*, 121 Cal. Rptr. 467 (1975). In this disciplinary action the court imposed a six-month suspension on a lawyer who represented the administrator of an estate who violated a position of trust and confidence that he voluntarily assumed *vis-a-vis* an elderly beneficiary, who lived in England. The lawyer, who had encouraged the beneficiary to sell real property, falsely advised the beneficiary that “one of our clients by the name of Acquistate, a California corporation” had made an offer to buy the property for $20,000. The lawyer failed to disclose to the beneficiary that Acquistate was not a client of the law firm but was the lawyer’s alter ego. The lawyer also failed to disclose that the property had been appraised at $46,500.

Florida:
The *Florida Bar v. Doherty*, 94 So.3d 443 (Fla. 2012). Doherty did estate planning for a client who also named him as trustee and personal representative. In the process of his estate planning for the client, the lawyer—who was a certified financial advisor and sold investment products—tried to sell annuities to the client without complying with RPC 1.7(a)(2) or RPC 1.8(a). Lawyer did not appeal the conclusion that he had failed to disclose his conflict of interest as a financial products salesperson and obtain client consent to that conflict, but he appealed the conclusion that he had violated RPC 1.8(a). He argued that, since he was not the vendor of the annuities but only the broker/agent, he was not entering into a transaction with client. But the court rejected this analysis, concluding that RPC 1.8(a) sweeps in such a broker relationship. The court noted that comment 1 to MR 1.8(a) makes it clear that the rule “applies to lawyers engaged in the sale of goods or services related to the practice of law, for example, the sale of title insurance or investment services to existing clients of the lawyer's legal practice.”

New Hampshire:
In *re Coffey's Case*, 152 N.H. 503, 880 A.2d 403 (2005). Lawyer was disbarred for taking advantage of an elderly client, with diminished capacity, during estate litigation. Client had acquired a house by right of survivorship, and lawyer was helping her to defeat claims to the house brought by dissatisfied estate heirs of one of the predeceasing joint tenants. When the client resisted his estimate of the likely cost of protecting her judgment on appeal, lawyer persuaded client to sell him a remainder interest in the house (she retained a life estate) in return for his fees, which were estimated at $30,000 or more. The house was valued at $200,000. The court found that he violated Rules 1.4, 1.5, 1.7, 1.8(a), 1.8(b) (using confidences to her disadvantage), and 1.8(j), among other rules.

New York:
Mc*Mahon v. Eke-Nweke*, 503 F. Supp. 2d 598 (E.D.N.Y. 2007). This is an action to set aside a lease agreement entered into between plaintiff-lessee and an attorney who had an ongoing attorney-client relationship (including estate planning work) with the lessor. The attorney moved for summary judgment and this decision denies the motion finding genuine issues have been raised, among other things, on plaintiffs’ claims of unconscionability and breach of fiduciary duty because there was evidence presented that attorney failed to advise his client to seek independent advice and the attorney failed to disclose his conflict of interest as required by NY’s equivalent of Rule 1.8(a).
Ohio:

*Stark Cty. Bar Assn. v. Marosan*, 119 Ohio St.3d 113, 892 N.E.2d 447 (2008). Lawyer was disbarred after persuading a client to invest in a land trust established by the lawyer. The lawyer continued to represent the client and also to serve as trustee of the land trust and represent the trust. He did not advise the client of his conflict and the advisability of retaining separate counsel.

Washington:

*LK Operating, LLC v. Collection Group, LLC*, 279 P.3d 448, 449 (Wash. App. 2012). This case involved a complicated estate plan in which two law partners set up irrevocable trusts for the benefit of their children and then set up a company called LK Operating (“LKO”) to manage the trusts. Each trust was the sole shareholder of a corporation and the five corporations were the sole members of LKO. LKO contributed funds to a business started by a client of the attorneys. LKO and the clients went to court over a dispute as to exact percentage owned by LKO. The court held that the attorney who arranged for the LKO investment had violated both 1.7 and 1.8(a). The trial court had relied on the 1.7 violation to order rescission of the agreement. The appeals court found no Washington authority for granting rescission based on RPC 1.7 and refused to do so in this case, worrying that burden of the rescission remedy could easily fall on innocent clients who should not pay for “the sins of its lawyer.” The court of appeals, however, held that the 1.8(a) violation justified recission. Even though the lawyer had not personally been a party to the transaction, the lawyer’s family interest in LKO was enough to trigger 1.8(a).

**Ethics Opinions**

Indiana:

Op. 1-2002. This opinion discusses three related issues faced by an attorney becoming a financial planner. In that capacity he may solicit by telephone, a practice forbidden to attorneys by MRPC 7.3. He may not, however, refer financial planning clients to another attorney for estate planning because the client was procured by telephone solicitation. The attorney may sell financial products to his law clients if he follows the narrow path left open for attorney-client transactions described in MRPC 1.8 including that the arrangement is objectively fair to the client, that the client be advised to seek counsel, and that the client consent to the arrangement in writing. It is also required that the attorney show that the non-lawyer activities can be distinguished from the law practice.

Missouri:

Informal Advisory Op. 20020024 (2002). It is allowable for an attorney to have a financial planning/insurance practice, independent of the attorney’s law practice. The attorney does not violate any ethics rules if he refers his legal clients to his financial planning/insurance practice so long as he advises the clients in writing of: (1) the differences in confidentiality, (2) the fact that he will receive compensation if they purchase the products from the attorney’s financial planning practice, and (3) that they have the right to consult with independent legal counsel regarding the advisability of purchasing these products. The attorney is allowed to let clients of the financial planning/insurance practice know that he is an attorney and his affiliation with his firm. Also, the attorney must notify the clients that they have the right to purchase the products from a different financial planning/insurance business. However, it would be a violation of “in-person solicitation” provisions under the model rules for the attorney, or
any employee of his financial planning/insurance business, to refer a client of that business to the attorney’s legal practice.

New Jersey:
Op. 696 (2005). A lawyer representing an executor, or serving as executor, may list estate real property for sale with an agency that employs the lawyer’s spouse only if Rule 1.8(a) is strictly complied with, regardless of whether the spouse will receive financial benefit as a result of the listing. If the lawyer represents the executor, the written consent of the executor will suffice; but if the lawyer is serving as the sole executor, nothing short of consent from all the beneficiaries will suffice to comply with Rule 1.8(a).

New York:
Op. 711 (1999). A lawyer may not sell long-term care insurance to the lawyer’s own clients if the representation relates to estate planning or other matters or areas of practice that might reasonably cause the lawyer’s professional judgment on behalf of the client to be affected by the lawyer’s own financial or business interest.

Pennsylvania:
Op. 2003-16. Although it is conceivable that an estate planning attorney could be ethically permitted to sell life insurance, securities, or other financial products to his or her client as part of the estate planning process, it is highly unlikely that the lawyer could satisfy MRPCs 1.7(b), 1.8(a) and 1.8(f).

Rhode Island:
Op. No. 99-08 (1999). Lawyer may not provide both legal services and investment services to same client. Inherent conflict makes it impossible to satisfy requirements of fairness and reasonableness to client.

Appointment of Scrivener as Attorney for Fiduciary

Ethics Opinion

Mississippi:
Op. 73 (1990). A lawyer may at client’s request draft a will naming scrivener as attorney for the estate.

Serving as Fiduciary and Counsel for Fiduciary

Statute

California:
California by statute prohibits lawyers who are serving as fiduciaries from collecting dual compensation unless such dual compensation is specifically authorized by the court in the conservatorship, guardianship or estate context or, in the case of inter vivos trusts, following advance notice to the beneficiaries and no objection by the beneficiaries. A purported waiver of these provisions in any instrument of transfer is void as against public policy. Cal. Prob. C. §§10804, 15687.
Cases

South Dakota:

In re Discipline of Martin, 506 N.W.2d 101 (S.D. 1993). In this case a lawyer was suspended for two years for multiple infractions including preparation of a will that named the lawyer as executor and trustee, which would allow him to manage the estate, including his debts to it. Lawyer never advised aged client to obtain independent advice.

Ethics Opinions

Missouri:

Op. 970130 (1997). If an attorney drafts an irrevocable life insurance trust for a client and the client requests that the attorney serve as the primary trustee of that trust, then the attorney may serve the primary trustee, but he must comply with all the requirements of MRPC 1.8.

Op. 970138 (1997). An attorney, who is a co-trustee of a 501(c) charitable trust, is not prohibited from performing legal services for the trust if the attorney follows the guidelines set out in MRPC 1.8. The legal services that the attorney may provide include “preparation of necessary documents for loans from trust funds secured by real estate.” The attorney, however, is prohibited from participating in the decisions of the trustees regarding hiring and compensation of the attorney to perform the legal services.

New Hampshire:

Op. 2008-09/1. A lawyer may, at a client's request, draft an estate planning document naming the lawyer as a fiduciary, but first must ensure that he is competent to perform the fiduciary role; discuss the client's options in choosing a fiduciary, including the relative costs of having the lawyer or someone else serve as fiduciary; and make a reasonable determination whether his personal interest in serving as fiduciary requires the client's informed consent. A lawyer may not nominate himself by default to serve as fiduciary in estate planning documents he presents to a client. If a lawyer actively solicits clients to nominate the lawyer to serve as fiduciary, Rule 1.8(a) may apply.

Other Issues

Cases

Ohio:

Disciplinary Counsel v. Kimmins, 123 Ohio St.3d 207 (2009). Lawyer was charged with misconduct relative to one client who had originally hired him to help him with a dispute involving his mother’s estate. Concerned about the client’s mental health and financial affairs, the lawyer loaned the client $5,000 in violation of Rule 1.8(e) and had him execute a power of attorney appointing the lawyer as his attorney-in-fact. After having his client admitted to a hospital for depression, lawyer proceeded to clean up the client’s property without his consent, and to lie about his condition and the condition of the property, to his children. The lawyer was suspended for one year with this suspension stayed on conditions.
Ethics Opinions

ABA:
Op. 02-428 (2002). Opinion addresses the responsibilities of a lawyer whose estate planning services are recommended (and perhaps paid for) by a potential beneficiary of the relative. "A lawyer who is recommended by a potential beneficiary to draft a will for a relative may represent the testator as long as the lawyer does not permit the person who recommends him to direct or regulate the lawyer's professional judgment pursuant to Rule 5.4(c). If the potential beneficiary agrees to pay or assure the lawyer's fee, the testator's informed consent to the arrangement must be obtained, and the other requirements of Rule 1.8(f) must be satisfied. If the person recommending the lawyer also is a client of the lawyer, the lawyer must obtain clear guidance from her as to the extent to which he may use or reveal that person's protected information in representing the testator. The lawyer should advise the testator that he also is concurrently performing estate planning services for the other person. Ordinarily, there is no significant risk that the lawyer's representation of either client will be materially limited by his representation of the other client; therefore, no conflict of interest arises under Rule 1.7."

North Carolina:
2006 Op. 11. “[O]utside of the commercial or business context, a lawyer may not, at the request of a third party, prepare documents, such as a will or trust instrument, that purport to speak solely for principal without consulting with, exercising independent professional judgment on behalf of, and obtaining consent from the principal.” The opinion clarifies NC 2003 Formal Ethics Opinion 7 which addressed requests by third persons to draft powers of attorney. The 2003 opinion grounded its conclusions on MR 5.4(c) and MR 1.8(f), and explained that sometimes it is the person requesting the work that is the client rather than the intended signer. “[T]he purpose and goals of the engagement determine the identity of the client, not the signatory on the document prepared by the lawyer.” But lawyers need to be vigilant that they are not being asked to assist an improper purpose in violation of MR 1.2(d). The 2006 opinion makes clear that the 2003 opinion applies to “all such legal documents for the principal upon the request of another.”

MRPC 1.9: DUTIES TO FORMER CLIENTS

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client, unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:
(1) whose interests are materially adverse to that person, and
(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter, unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

138
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
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction</td>
<td>1</td>
</tr>
<tr>
<td>Purpose of the Engagement Letters and Checklists</td>
<td>1</td>
</tr>
<tr>
<td>Organization of the Engagement Letters</td>
<td>2</td>
</tr>
<tr>
<td>Caveat: Limitations Regarding the Use of the Checklists and Forms</td>
<td>2</td>
</tr>
<tr>
<td>User Comments</td>
<td>3</td>
</tr>
<tr>
<td>General Checklist</td>
<td>4</td>
</tr>
<tr>
<td><strong>Chapter 1. Estate Planning Representation of One Person or Spouses</strong></td>
<td>9</td>
</tr>
<tr>
<td>Introduction</td>
<td>9</td>
</tr>
<tr>
<td>References to the ACTEC Commentaries (Fifth Edition)</td>
<td>9</td>
</tr>
<tr>
<td>Supplemental Checklist for Representation of Spouses</td>
<td>10</td>
</tr>
<tr>
<td>Form of an Engagement Letter for the Representation of Both Spouses Jointly in Estate Planning Matters</td>
<td>11</td>
</tr>
<tr>
<td>Form of an Engagement Letter for the Representation of One Person in Estate Planning Matters (Married or Unmarried)</td>
<td>16</td>
</tr>
<tr>
<td><strong>Chapter 2. Representation of Multiple Members of the Same Family Other Than or in Addition to Spouses</strong></td>
<td>21</td>
</tr>
<tr>
<td>Introduction</td>
<td>21</td>
</tr>
<tr>
<td>References to the ACTEC Commentaries (Fifth Edition)</td>
<td>21</td>
</tr>
<tr>
<td>Supplemental Checklist for Representing Multiple Members of the Same Family Other Than or in Addition to Spouses</td>
<td>23</td>
</tr>
<tr>
<td>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</td>
<td>24</td>
</tr>
<tr>
<td>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</td>
<td>30</td>
</tr>
<tr>
<td><strong>Chapter 3. Representation of Multiple Parties in a Business Context</strong></td>
<td>35</td>
</tr>
<tr>
<td>Introduction</td>
<td>35</td>
</tr>
<tr>
<td>References to the ACTEC Commentaries (Fifth Edition)</td>
<td>35</td>
</tr>
<tr>
<td>Supplemental Checklist for the Representation of Multiple Parties in a Business Context</td>
<td>37</td>
</tr>
<tr>
<td>Form of an Engagement Letter for Representation in Connection with the Organization of a New Business Entity (Representing the Entity Only)</td>
<td>39</td>
</tr>
<tr>
<td>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)</td>
<td>45</td>
</tr>
<tr>
<td>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)</td>
<td>52</td>
</tr>
</tbody>
</table>
Chapter 4. Estate Planning Lawyer Serving as a Fiduciary ................................................................. 59
  Introduction ......................................................................................................................... 59
  References to the ACTEC Commentaries (Fifth Edition) ..................................................... 59
  Supplemental Checklist for the Estate Planning Lawyer Serving as a Fiduciary .......... 60
  Form of a Letter Regarding the Appointment of the Lawyer as a Fiduciary ..................... 62

Chapter 5. Representation of Executors and Trustees in Administration Matters .......... 67
  Introduction ......................................................................................................................... 67
  References to the ACTEC Commentaries (Fifth Edition) ..................................................... 67
  Supplemental Checklist for the Representation of Executors (or Other Personal
  Representatives) in an Estate Administration ................................................................. 68
  Form of an Engagement Letter for Estate Administration ................................................ 71
  Supplemental Checklist for the Representation of Trustees in a Trust Administration ..... 78
  Form of an Engagement Letter for Trust Administration .................................................. 81

Chapter 6. Representation of Guardians/Conservators ......................................................... 88
  Introduction ......................................................................................................................... 88
  References to the ACTEC Commentaries (Fifth Edition) ..................................................... 88
  Supplemental Checklist for the Representation of Guardians/Conservators.................. 90
  Form of an Engagement Letter for Guardianship Petition ................................................. 92

Chapter 7. Probate Litigation ............................................................................................... 98
  Introduction ......................................................................................................................... 98
  References to the ACTEC Commentaries (Fifth Edition) ..................................................... 98
  Supplemental Checklist for Probate Litigation ................................................................. 99
  Form of an Engagement Letter for the Representation of One or More
  Beneficiaries in Litigation Matters ...................................................................................... 101
  Form of an Engagement Letter for the Representation of One or More
  Fiduciaries in Litigation Matters ......................................................................................... 105

Chapter 8. Dealing with the Diminished Capacity or Death of a Client not
  Represented in a Fiduciary Capacity ................................................................................... 110
  Introduction ......................................................................................................................... 110
  References to the ACTEC Commentaries (Fifth Edition) ..................................................... 110
  Supplemental Checklist for Dealing with Diminished Capacity or Death .................... 111
  Optional Addition to Engagement Letters Dealing with the Potential for
  Diminished Capacity or Death of a Client ........................................................................... 112

Chapter 9. Termination of Representation .......................................................................... 114
  Introduction ......................................................................................................................... 114
  References to the ACTEC Commentaries (Fifth Edition) ..................................................... 114
  Supplemental Checklist for the Termination of Representation ..................................... 115
  Form of a Letter Withdrawing from Representation of All Clients
  When an Actual Conflict of Interest Arises ........................................................................... 116
  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 ..................................................................................................................................... 118
  Form of a Letter Concluding Representation of Client(s) Once Services
  Described in Engagement Letter Have Been Performed ................................................. 120
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.)
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).

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.

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 BeHandled.**

(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 privileged from disclosure 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.

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**[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.

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**[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 privileged from disclosure 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.
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.

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

(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-
Our Policies Concerning Client Files and Original Documents. You agree that we have the right to destroy the client file we create for you \([\text{NUMBER}]\) 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.

\[\text{Pick OPTION 1 or OPTION 2}\]

\[\text{Option 1: Firm does not hold clients’ original documents}\]

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 \([\text{NUMBER}]\) years since our last contact with you, then we have the right to destroy those documents.

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

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 \([\text{NUMBER}]\) 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,
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 Interest

(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 [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:

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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).
A. Separate Representation

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)

(Date)

[Addressee(s)]

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) Any one of you may terminate this engagement at any time by notice in writing to us. If we receive notice of termination from any one of you, we will promptly cease providing any service to that individual, subject to court approval as may be necessary. Such individual will remain responsible for paying for our services rendered up to the time we receive such notice in the manner mutually agreed upon above, and for additional reasonable services that we provide after that in connection with the transfer of responsibility for the matters pertaining to that individual to other counsel or to obtain court approval of our withdrawal.

(b) The firm may terminate this engagement of all or any of you by giving written notice to the appropriate party. If we send all or any of you notice of termination, you will each be responsible for paying the fees for your share of our services rendered up to the time we terminate our engagement in such manner as mutually agreed upon above, 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 CLIENTS ARE 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); and

(3) The other client also consents to our continuing representation of you and/or [NEW ENTITY]. If you make a good-faith objection to our statement, we will have the burden of proving that these conditions have been met.

[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 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 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 bePerformed

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 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); and
(3) The other client also consents to our continuing representation of you and/or [NEW ENTITY]. If you make a good-faith objection to our statement, we will have the burden of proving that these conditions have been met.

[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 Scriver 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]:

---

60
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 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].

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

(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 [DECEDEDENT’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 [DECEDEDENT] 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 privileged from disclosure 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

(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 privileged from disclosure 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

(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 privileged from disclosure 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 \([\text{NUMBER}]\) 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.

\([\text{Option where co-guardians are acting}]\)
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 \([\text{OTHER/OTHERS}]\) (or the \([\text{OTHER’S/OTHERS’}]\) 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

(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

[ENTITY FORMATION AND LITIGATION ENGAGEMENTS]²

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 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

² May also be adapted for use when law firm represents a beneficiary in a non-litigated matter.
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 while we represent you 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: (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.³

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.

³ 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]
Speaker Biographies
Professor Alan I. Appel

Professor Alan I. Appel specializes in international and domestic tax planning. He is on the Board of Advisors for the Journal of International Taxation and the Journal of Taxation and Regulation of Financial Institutions. He was formerly Council Director for the International Tax Committees as well as the Chair of the U.S. Activities of Foreigners and Tax Treaties Committee of the American Bar Association Section of Taxation. Professor Appel holds a J.D. from New York Law School and an L.L.M. from New York University. At New York Law School, he is the Director of the International Tax Program. He teaches courses in International Tax, Corporate Tax, and Federal Income Tax. Prior to joining New York Law School, he spent 13 years in the New York office of Bryan Cave LLP.
Megan L. Brackney

Partner

Megan L. Brackney joined Kostelanetz & Fink in 2004, and concentrates her practice in the areas of tax controversies, and civil and white collar criminal litigation. Ms. Brackney received her J.D. from the University of Kansas School of Law and her LL.M. in Taxation from New York University. Prior to joining Kostelanetz & Fink, LLP, Ms. Brackney was an Assistant United States Attorney for the Southern District of New York. Ms. Brackney is a member of the New York State Bar Association Tax Section’s Executive Committee, a Fellow of the American College of Tax Counsel, a Council Director for the American Bar Association Section of Taxation, and the former Chair of the Taxation Committee of the New York County Lawyers’ Association. Ms. Brackney annually contributes to the two-volume ABA publication, Effectively Representing Your Client Before the IRS and is a regular columnist for the “Tax Controversy Corner” of The Journal of Passthrough Entities, and serves on the editorial board of the Journal of Taxation and The Tax Lawyer. Ms. Brackney has been recognized by New York Super Lawyers” since 2012.
Lawrence S. Feld concentrates his practice in federal and state criminal and civil tax controversies and white collar criminal defense. Mr. Feld is a co-author of *Tax Fraud and Evasion*, a comprehensive two volume treatise on criminal and civil tax fraud and money laundering which is published by Thomsen Reuters. He is an adjunct professor at New York Law School where he teaches an advanced seminar on criminal tax enforcement. Mr. Feld has served as Chair of the Committee on Civil and Criminal Tax Penalties of the Section of Taxation of the American Bar Association. He is currently a Vice-Chair of the Tax Section’s Committee on Government Submissions. Mr. Feld is a former Chair of the Committee on Criminal Advocacy of the New York City Bar Association. He is a former Assistant U.S. Attorney for the Southern District of New York where he served as Assistant Chief Appellate Attorney for the Criminal Division.
William P. LaPiana believes that one of the best ways to analyze a society is to examine how its legal system deals with people’s most personal concerns.

And what is more personal, he asks, than how people choose to pass on their assets?

“Trusts and estates is one of the most dynamic areas of law today,” he says. “The law of trust investing has been completely reinvented by insights gained from economics; the idea of family has been transformed by the recognition of same-sex marriage and by medical technology allowing conception to be separated from intercourse, and perhaps most significantly of all, society’s view of accumulated wealth seems to be more favorable that it was a generation ago.”

All this change challenges the teacher to help students understand the state of the law today and to appreciate the possibilities for change, which, he adds “is what a law teacher must always do: we have to prepare our students for a lifetime of learning.”

“Professor LaPiana holds both a Ph.D. in History and a J.D. from Harvard, where he also received his B.A. and an M.A. After graduating from Harvard Law School in 1978, Professor LaPiana, who is originally from suburban Buffalo, spent four years as an associate at Davis Polk & Wardwell in New York. It was, he explains, all part of a plan to someday obtain an academic position.

“I thought every law school would need professors who had actual practice experience and who could teach something as central to the legal system as wills and trusts,” he recalls, “and I was right!” “What I didn’t foresee,” he adds, “were all the ways a professor of wills and trusts can work in cooperation with the practicing bar to make the law better. Over more than thirty year of
teaching some of my happiest memories and proudest accomplishments involve working on law reform in a variety of contexts.” After four years spent at the University of Pittsburgh Law School, Professor LaPiana joined the faculty at New York Law School in 1987. In 1993, he was named the Rita and Joseph Solomon Professor of the Law of Wills, Trusts and Estates.

His doctoral dissertation was published as Logic and Experience: The Origins of Modern American Legal Education (Oxford University Press, 1994). An analysis of the intellectual roots of the case method and of the reasons for its success, it is widely cited in discussions of legal education and, as Professor LaPiana notes, still sells enough copies to buy one average bottle of wine per year. In 2012 he published Inside Wills and Trusts: What Matters and Why, part of the “Inside” series of student study aids published by Wolters Kluwer. Prof. LaPiana’s other major publication is Drafting New York Wills and Related Documents, 4th edition, published by LexisNexis of which he is co-author with Prof. Ira Mark Bloom.

Professor LaPiana also has been active with the trusts and estates sections of both the New York State and the American Bar Associations, and is an academic fellow of the American College of Trust and Estate Counsel, serving on its Committees on State Laws and Legal Education. He is also a member of the American Law Institute and served on the Members Consultative Groups for the Restatements (Third) of Trusts and of Property (Donative Transfers). Since 2009 he has been a member of the Office of Court Administration Surrogates Court Committee and has served on the New York City Bar Associations Surrogates Court and Trusts and Estate Committee since 2011.

Prof. LaPiana was the reporter for the revised Uniform Disclaimer of Property Interests Act, which was promulgated by the Uniform Law Commission in 1999 and has been adopted in fifteen states, the District of Columbia, and the Virgin Islands. He was the American Bar Association advisor to the drafting committee for the Uniform Power of Attorney Act promulgated in 2006. Professor LaPiana has been a frequent speaker at continuing legal education events, including several conferences sponsored by the Real Property Trusts and Estates Law Section of the ABA and the Trusts and Estates Law Section of the New York State Bar Association, the Heckerling Institute, and the New York Estate Planning Institute. He has also been a regular participant since 1987 in the New York University Law School Legal History Colloquium.

Education:
Elizabeth Candido Petite

epetite@lindabury.com

53 Cardinal Dr
Westfield, New Jersey 07090

908.233.6800

Biography
Elizabeth Candido Petite, an Associate with the Firm, practices primarily in the areas of estate planning and administration and tax law.

Elizabeth is experienced in preparing estate planning documents including wills, revocable and irrevocable trusts, durable powers of attorney and advance directives for health care. Elizabeth also has experience creating and funding family limited liability companies and other corporate structures to transfer personal wealth and family businesses to the next generations. She offers practical solutions to problems, large and small, so that her clients have confidence in their estate plans.

Elizabeth also advises fiduciaries at all stages of the administration of trusts and estates. She utilizes her knowledge of tax laws and procedure to achieve tax-efficient results in controversies before the IRS and state taxing authorities. She also works on all types of non-tax issues that arise in the course of administration, such as probating wills and accountings. Elizabeth has experience in elder law, special needs planning and guardianships.

She is an active volunteer with the Junior League of Morristown and serves on the board of DMF Youth, Inc., a dance, fitness and life skill development program for underserved children in New York City.

Education
- LL.M. in Taxation, New York Law School, 2011
- J.D., New York Law School, 2010 cum laude
- B.A., University of Pennsylvania, 2007 cum laude

Practice Areas
- Tax
- Elder / Disability Law
- Personal Services
- Wills, Trusts & Estates

Admissions
- New Jersey, 2010
Elizabeth Candido Petite

- New York, 2011

**Professional & Bar Association Memberships**

- New York State Bar Association
- New Jersey Women Lawyers Association
In 1992, Ann F. Thomas began a second career in academic law with a fellowship year at the Bunting Institute at Radcliffe College, after 17 years (10 as partner) working in the corporate tax department at Fried Frank Harris Shriver & Jacobson, where she specialized in mergers and acquisitions. Professor Thomas spent two years as an adjunct professor at Yale Law School and joined New York Law School’s faculty in 1995.

Professor Thomas, who teaches a range of tax courses and is Director of the Graduate Tax Program, was drawn to academia because of the chance to explore and develop a subject she views as fundamental to how societies function.

We need to promote greater tax literacy among lawyers. Teaching is very rewarding from that point of view, Professor Thomas says. Some students here are already working in tax and a good number are interested in the tax field executive and corporate practice and they really add to the fruitful discussion of tax issues.

Professor Thomas says her first love in taxation research is in the corporate and business context, but she also concentrates her scholarship on income tax and urges a re-examination of the assumptions about marriage and family that underlie current policy.

Our tax subsidies should work to promote the care and nurturing of children. In modern society, families can come in many different configurations. Tax policy should support family life and not just the traditional sole-earner household, says Professor Thomas.
In 1999, Professor Thomas organized a symposium for the New York Law School Journal of Human Rights on the subject of Women, Equity, and Federal Tax Policy: Open Questions. More than 20 experts from across the country legal scholars, economists, and activists spent a full day examining tax policy problems that diminish the financial security of women, including the possible marriage penalty within the income tax code. With the help of the Marjorie Cook Foundation, the Journal of Human Rights distributed the symposium volume to every member of Congress, key Treasury and White House staff, law professors, and economists. The timing coincided with fierce debates in both houses of Congress over marriage and income tax. Although teaching tax law to future lawyers and practitioners is her primary mission, Professor Thomas uses her work in tax history to bring tax policy back to the citizens. As she sees it, tax literacy is the only way to ensure tax policies that reflect the needs of all citizens. We need to make the theory and the history of taxation more accessible so that voters can have a more informed view of our tax policy choices. Only then will they be able to set the agenda for future policy choices, she says.

Professor Thomas studies and teaches about comparative systems of corporate taxation around the world and sees a need in the increasingly global marketplace for an expansion of international cooperation on business and tax issues.

Professor Thomas is in the process of finishing a book examining the history of the U.S. tax system during the Progressive Era and the emergence of the modern income tax system in 1913.

Education:
Fellow, Bunting Institute at Radcliffe College, 1992
Harvard-Radcliffe, A.B. 1973
Yale, J.D. 1976
Zhanna A. Ziering is a Member in Caplin & Drysdale’s New York office. She offers guidance to individual and corporate clients who require sophisticated tax advice concerning their domestic tax issues, offshore assets, and U.S. reporting requirements.

Services

Clients rely on Ms. Ziering’s deep knowledge of tax controversies and tax litigation, as well as her experience with related civil, criminal, and regulatory proceedings. Ms. Ziering represents both individuals and corporations before the U.S. Tax Court, federal and state courts, and administrative agencies, including the Internal Revenue Service, the Department of Justice, and other federal and state government regulators. Illustrations of Ms. Ziering’s services include:

- advising clients on sensitive civil tax examinations by the IRS where fraud or substantial penalty issues may arise;
- counseling advisors and other professionals on tax matters arising from investigations with U.S. regulators; and
- defending clients in U.S. and state residency audits.

Ms. Ziering also serves as trusted counsel for clients facing offshore voluntary disclosure requirements on the federal and state levels. She advises clients on their U.S. tax reporting obligations relating to offshore assets and interests, and assists in responding to audits and inquiries from the IRS and other government agencies. Representative examples of Ms. Ziering’s legal services include:

- advising U.S. citizens living or working abroad, foreign nationals residing and working in the U.S., and foreign entities doing business in the U.S. about coming into tax compliance concerning their foreign accounts and
- representing clients in civil tax dispute with New York and New Jersey.

Ms. Ziering speaks fluent Russian.

Highlights

A strong supporter of the arts, Ms. Ziering offers pro bono tax representation to artists from a diverse range of industries, such as film, music, and fashion. She also provided counsel to low-income taxpayers with a broad range of tax issues through Duke University School of Law’s Low-Income Taxpayer Clinic and New York University School of Law’s Tax Clinic.
An active member of the legal community, Ms. Ziering currently serves as Subcommittee Chair for the Membership and Young Lawyer Liaison of the American Bar Association’s Section of Taxation, Court Procedure and Practice Committee. To stay abreast of ever-changing tax laws, she is also a proactive member in the Tax Sections of the New York State Bar Association and the New York County Lawyers’ Association.

Awards & Rankings

- *The Legal 500*, Recommended, 2017
- *Nolan Fellowship*, American Bar Association, Section of Taxation, 2013

Recent News

- Tax Notes Quotes 3 Caplin Tax Controversy Attorneys on the IRS's Aggressive FBAR Enforcement, *Tax Notes*, October 19, 2017
- 18 Caplin & Drysdale Lawyers Recognized in 2017 Legal 500 Ranking, *The Legal 500*, June 2, 2017

Click here for a full list of media coverage.
Recent Speaking Engagements

An avid lecturer on matters relating to tax law, Ms. Ziering has spoken on the following topics:

- Panelist, Civil and Criminal Tax Penalties: Reports of Subcommittees on Important Developments - Offshore Compliance and Enforcement, American Bar Association Section of Taxation 2018 Midyear Meeting, February 10, 2018
- Panelist, Tax Collection, Bankruptcy and Workouts: Recent Developments, American Bar Association Section of Taxation 2018 Midyear Meeting, February 9, 2018
- Panelist, Waking Up the Dead: Reopening Those Tax Assessments You Thought Were Final, New England IRS Representation Conference, November 17, 2017
- Speaker, Important Developments in Civil and Criminal Tax Penalties, ABA Section of Taxation, 2017 Joint Fall CLE Meeting, September 16, 2017
- Presenter, Developments in FBAR Litigation, American Bar Association, Section of Taxation, Administrative Practice Committee, July 19, 2017
- Presenter, International Tax Enforcement Update, Civil and Criminal International Tax Enforcement Update, June 14, 2017
- Presenter, Offshore Enforcement Update, 2017 ABA Section of Taxation May Meeting, May 13, 2017
- Panelist, International Information Reporting, 2017 ABA Section of Taxation May Meeting, May 13, 2017
- Panelist, How to Affirmatively Defend An FBAR Case, American Bar Association, 2017 Midyear Meeting, January 20, 2017
- Moderator, It's a Small World After All: Evidence in Offshore NonCompliance Cases (Part II), American Bar Association, 2016 Joint Fall Meeting, October 1, 2016

Click here for a full list of speaking engagements.

Recent Publications

- "INSIGHT: Last Call for OVDP: Use It or Lose It", with Benjamin Z. Eisenstat, *Bloomberg Tax: Daily Tax Report*, April 20, 2018
• “IRS to Revoke Passports for Seriously Delinquent Tax Debts Starting February 2018”, with Arielle M. Borsos, Dianne C. Mehany, Mark D. Allison, and Victor A. Jaramillo, Caplin & Drysdale Client Alert, February 12, 2018

• “Paradise Papers: U.S. Citizens and Residents Required to Report on Offshore Assets”, with Mark D. Allison, J. Clark Armitage, Peter A. Barnes, and Arielle M. Borsos, Caplin & Drysdale Client Alert, November 6, 2017

• “IRS Launches Issue Based Corporate Compliance Campaigns”, with Mark D. Allison, J. Clark Armitage, Kirsten Burmester, and Niles A. Elber, Global Tax Weekly, February 16, 2017

• “IRS Launches 13 Issue-Based Corporate Compliance Campaigns”, with Mark D. Allison, J. Clark Armitage, Kirsten Burmester, and Niles A. Elber, Caplin & Drysdale Client Alert, February 3, 2017


• “U.S. Passports in Jeopardy for Taxpayers Owing the IRS”, with Niles A. Elber, Dianne C. Mehany, and Victor A. Jaramillo, Caplin & Drysdale Client Alert, December 9, 2015

• “New Law Changes FBAR Filing Deadline”, with Charles M. Ruchelman, Mark D. Allison, Niles A. Elber, and Mark E. Matthews, Caplin & Drysdale Client Alert, August 10, 2015


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