ACTEC – HEARTLAND OF AMERICA FELLOWS INSTITUTE

KANSAS CITY PROGRAM

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ENGAGEMENT AGREEMENTS: AN ATTORNEY'S ETHICAL RESPONSIBILITY

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ENGAGEMENT LETTERS & ETHICS

A. INTRODUCTION

1. PURPOSE OF ENGAGEMENT LETTERS

Engagement letters are the foundation upon which the attorney-client relationship is built. If well drafted and signed in the initial stages of the attorney-client relationship, the engagement letter will prove to be beneficial in many aspects of the attorney-client relationship and ensure that the relationship continues past the completion of the original scope of work for which one is engaged.

Engagement letters establish the scope and objectives of an engagement, set forth the basis upon which fees will be determined and explain how conflicts of interest and confidentiality will be handled. It is strongly encouraged that engagement letters be used to avoid a misunderstanding as to the scope or duration of the representation, a dispute as to fees to be charged, or problems when a conflict of interest arises. Without a written engagement letter, specifically agreeing to the fee to be charged, the fee charged may be challenged in a subsequent proceeding before the County Court or District Court wherein the standard of review is "reasonableness" for such fee disputes.

Engagement letters for estate planning and estate and trust administration are recommended to assist the attorney to provide ethical services based upon a family-oriented practice model and to demonstrate how trust and estate lawyers use engagement letters to promote competent and ethical representation of their clients.

Generally, the same ethical rules apply to a lawyer who prepares a client's estate plan or who represents a fiduciary or beneficiary as to any other attorney-client relationship. The lawyer has a general duty of competence, diligence, and loyalty, not to mention the duties that go with acting as an officer of the Court. In the trusts and estates context, however, whether in preparation of an estate plan or in the representation of fiduciaries or beneficiaries in the courts of trust or estate administration, or in litigation, special problems may arise, leading not only to unique ethical problems but also to potentially greater exposure to malpractice claims.

Engagement letters should be drafted to carefully meet the specifics of each engagement but should not and cannot replace a lawyer's own independent judgment. No single letter, no single form, and no comprehensive checklist will cover all situations, as each engagement is unique.

In the drafting of the engagement letter, each attorney is challenged to draft an engagement letter that reflects the lawyer's style and practice but incorporate state ethical guidelines and requirements.

If you have a well-written engagement letter at the beginning of the attorney-client relationship, you have a higher probability of successfully collecting your fees, should

a fee review proceeding occur before the Court. See the following statutory sections and case law for Nebraska, Uniform Probate Code, Uniform Trust Code and Uniform Power of Attorney Code jurisdiction:

§30-2482 – Review of compensation for personal representative and employees;

§30-3864 – Compensation of trustee;

§30-4012 – Reimbursement and Compensation for Power of Attorney;

Restatement (Third) of Trusts § 38 (2012); and

TransCanada Keystone Pipeline, LP v. Nicholas Family Ltd. Partnership, 299 Neb. 276, (2018)

Notable rules from the Model Rules of Professional Conduct (MRPC) addressing these issues are set forth below:

§ 1.2 – Scope of representation and allocation of authority between client and lawyer;

§ 1.4 – Communications;

§ 1.5 – Fees;

§ 1.6 – Confidentiality of information;

§1.7 – Conflict of interest; current clients;

§ 1.8 – Conflict of interest; current clients; specific rules;

§ 1.9 – Duties to former clients;

§ 1.14 – Client with diminished capacity;

§ 1.16 – Declining or terminating representation.

This presentation looks at the relationship between the trusts and estates lawyer and the client, whether in the context of estate planning, trust or estate administration, or litigation. Of necessity, it also examines whether and to what extent representing a fiduciary may create duties that the lawyer may owe to beneficiaries, even if they are not the clients. References are made to the *ACTEC Commentaries on the Model Rules of Professional Conduct*, promulgated by the American College of Trust and Estates Counsel Foundation (the "Commentaries").

2. CHECKLIST FOR USE OF ENGAGEMENT LETTERS (Form Attached)

B. GENERAL ENGAGEMENT LETTERS IN TRUST AND ESTATE REPRESENTATION

As a general proposition, the lawyer's duties to his or her client are much the same, whether the lawyer represents a fiduciary, a beneficiary or anyone else. A lawyer must represent the client competently (MRPC § 1.1), diligently (MRPC § 1.3), and free of conflicts (MRPC § 1.7-1.9). The commentary on ABA Model Rules of Professional Conduct § 1.1 states that the estate planning lawyer "is generally entitled to rely upon information supplied by the client, unless the circumstances indicate that the information should be verified." (Commentaries 1 at 15)

1. Representation of Spouses

Representation of spouses presents potential problems regarding confidential information and conflicts of interest in the estate planning context. There are three basic approaches to representation of spouses:

1.1 Joint arrangement where lawyer shares all information in his or her possession with both spouses, unless and until an event occurs which affects that representation;

1.2 Concurrent separate representation, where the lawyer holds all information he or she receives from either spouse in confidence. This approach is full of potential pitfalls and there is significant controversy whether this approach is viable in the estate planning context. Extreme caution is advised in proceeding with this approach and written documentation for use of this approach is recommended; and

1.3 Independent and separate representation of spouses, where different lawyers represent the respective spouses.

2. Representation of Multiple Generations of the Same Family

2.1. In connection with representing multiple generations of the same family in the estate planning context, potential problems regarding confidential information and conflicts of interest exist. It is important that if representation of multiple generations of the same family will take place, that an engagement letter defines the initial scope of that representation and should the scope of representation change in the course of representation, the scope of representation should be documented in writing. For example, a lawyer might be representing members of the first generation jointly as to each other in connection of the disposition of the family business, concurrently and separately as to each other in connection with other estate planning matters.

2.2. First, it is necessary to identify the client. Are the clients first generation, husband and/or wife; second generation, husband and/or wife; both

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

2.3. Second, the attorney must consider any conflicts of interest. What conflicts of interest exist or may exist among multiple clients, and how do these conflicts affect the multiple representation? In answering this question, the following items should be considered:

(a) Are there any past, present or likely future events that might -indicate a conflict of interest between or among the parties (e. g., previous marriages, divorces, prenuptial agreements, property /settlements, domicile issues, non-marriage relationships, special needs children or other family members, charitable motives, asset distribution plans)? How do the parties want the lawyer to respond if the lawyer acquires knowledge that the plan of one client would adversely affect the interests of another client; knowledge that one client's expectations or understanding of another client's intentions are not correct; or knowledge that possible future actions by one client would adversely affect the interests of another client?

(b) An attorney should differentiate the distinction between an "active" client and a "dormant" client and communicate the distinction with the fiduciary.

(c) Should a conflict arise in the administration of the probate or trust estate, the conflict should be identified with the parties conflicted and reduced to writing. If a waiver is required, it should also be reduced to writing. It is imperative to identify conflicts of interest at the earliest possible date and obtain written waivers of conflict where and when necessary after proper identification of the issues. In addition, facts presented may lead to the conclusion that the conflict is irreconcilable and disclosure and consent may not remove it. *Haynes v. First National State Bank of New Jersey, 432A.2d 890 (N.J. 1981)*.

(d) The Commentary on MRPC 1.7, noting the generally non-adversarial nature of representation of clients in the trusts and estates practice, carefully endorses representation of multiple clients in appropriate circumstances:

> 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 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, may 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. (Commentaries)

3. Representation of Multiple Parties in a Business Context

New clients or existing clients, often engage counsel for the creation of a new entity. If that entity is created for existing clients, this poses an immediate conflict of interest with the organizers as individuals, because the entity itself is a new client. It is important for the lawyer to constantly be aware of who the client is, and in this respect, to be careful to document the relationship as it may change from time to time.

In each case, the engagement letter should define and limit the scope of representation. As change occurs, amendments to the initial engagement letter should be delivered to all of the parties in interest and consents to the continued representation are strongly recommended. It is important again to identify the client and make it clear if the lawyer will be representing the business entity, or the individual constituents of the business, or both. An engagement letter should describe the potential conflicts of interest resulting from the lawyer's representation of the entity or the lawyer's representation of the constituents individually. Further, the letter should describe the possibility of a future prohibition on the lawyer's representation of either the entity or the constituents, if a conflict arises, depending upon the identity of the initial client.

4. Estate Planning Lawyer Serving as Fiduciary

There are a number of ethical issues in a lawyer serving as a fiduciary for his client, including full disclosure to and discussing with the client of the alternative possibilities for fiduciary appointment, the relative cost effectiveness of each of the alternatives, the possible elimination of normal bonding requirements, and the possible

exclusion of exculpatory language in the documents, which could have an effect on the standard of care to which the fiduciary will be held for liability purposes. Care should be taken with these subjects since the fiduciary will have been the drafter of the document. All of these ethical issues should be disclosed and discussed with the client and if possible, the lawyer should avoid serving as the client's fiduciary.

4.1. Issues a Lawyer Should Consider Before Accepting the Representation are the following:

(a) Does the lawyer's professional liability policy include or exclude lawyers serving as personal representative? Trustee? Guardian or conservator? Attorney-in-fact?

(b) Does the lawyer have adequate staff to permit the lawyer to perform the fiduciary services efficiently and cost effectively?

(c) Does the lawyer or his or her law firm have a policy regarding lawyers serving as fiduciary? (encourage, discourage, prohibit)?

4.2. An engagement letter or separate letter prior to the execution of the estate planning documents in this situation should include the following:

(a) Fact that the client independently selected lawyer as fiduciary;

(b) Disclosure of all possible conflicts of interest;

(c) Advantages and disadvantages of the attorney serving as the fiduciary;

(d) Fees to be paid to lawyer as fiduciary and attorney's law firm for legal services;

(e) Explanation of language and options available with respect to standard of care exculpatory language; and

(f) Explanation of bonding requirements, including cost of bond and relationship to professional liability insurance.

Consideration should also be given to co-fiduciaries, whether such a selection is cost effective.

5. Representation of Executors and Trustees

When a lawyer is about to undertake representation of a personal representative, or trustee, an engagement letter should be prepared setting forth the representation of the personal representative or a trustee.

Prior to that representation, the attorney should consider whether he or she has an impermissible conflict of interest, such as a client relationship with a party who is expected to have a claim against the estate. Further, if the attorney has, or has had, a client relationship with a beneficiary, devisee, heir or creditor of the estate that the lawyer believes will not adversely affect the intended representation, the lawyer must make disclosure and seek the informed consent of the former, present and proposed clients in accordance with the ethical rules.

Under MRPC § 1.7(b), the lawyer may represent the personal representative and members of the family if:

i. The lawyer reasonably believes he or she will be able to provide competent and diligent representation to each affected client;

ii. The representation is not prohibited by law;

iii. The presentation 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

iv. Each affected client gives informed consent in writing.

The Commentaries note that the lawyer may be required to withdraw as counsel for the Executor or the family members, or both, if a serious conflict arises (Commentaries).

The engagement letter should define the proposed client relationship, which is as the personal representative or trustee in a fiduciary capacity, and not representation of the heirs or beneficiaries. The engagement letter should set forth the scope of the engagement, the identification of the client, when the engagement will be terminated, the procedure for fees and billing, and the procedure for retention, delivery, retrieval and destruction of the files. The engagement letter should also include specifics regarding the administration of the estate or trust, including the various filing deadlines and other specific requirements of the estate or trust administration and should further explain who will be responsible for preparation of the estate and inheritance tax returns and the fiduciary income tax returns for the estate.

In some engagements, the information provided in the preceding paragraph are not always included in the initial engagement letter, but are provided for in a subsequent "duties and responsibilities" letter, modifications to the initial engagement letter, and "closing" letter to the client, should the attorney desire to keep the initial engagement letter in a more concise form. Regardless, written documentation for the file is recommended.

6. Fiduciary Litigation

The engagement letter should be prepared when a lawyer is about to undertake general representation of a personal representative, or trustee in connection with litigation

involving the estate or trust. This letter is appropriate when the lawyer is representing the fiduciary in the fiduciary's representative capacity or when the lawyer is representing the fiduciary personally. The lawyer should make clear which form of representation is being undertaken, specifying the conditions of the representation, including the extent, if any, to which reimbursement of the lawyer's fees might be sought from assets of the estate or trust. When representing a fiduciary who is also a beneficiary, great care should be taken in the billing statements to differentiate the role of the attorney and the scope of representation, as for the benefit of the fiduciary and not for the fiduciary as a beneficiary.

7. Dealing with the Potential for Diminished Capacity

It is increasingly common, with longer life expectancy, for clients to experience a period of diminished capacity due to physical or mental disabilities. MRPC § 1.14 addresses a client with diminished capacity. That rule provides that when a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client/lawyer relationship with the client. However, under MRPC § 1.14(b), when the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian. Under § 1.14(c), information relating to the representation of a client with diminished capacity is protected by MRPC § 1.6. Under that provision, the lawyer is impliedly authorized to reveal information about the client, but only to the extent necessary to protect the client's interests.

A properly drafted engagement letter might contemplate the possibility of future diminished capacity and express the manner in which the lawyer might provide legal services in that eventuality. It might also address steps that the client might want taken to protect the client's interests and assure the client's intentions are honored. Finally, the engagement letter might authorize the lawyer to communicate with others if the lawyer becomes concerned regarding the client's capacity.

In regard to "dormant" representation, MRPC § 1.4 requires that the lawyer keep the client reasonably informed about the status of the client's matter and explain the matter to the extent reasonably necessary for the client to make informed decisions.

Once an estate plan has been put in place, what is the lawyer's continuing obligation to the client? As a practical matter, it is generally understood that the client is likely to regard the "job" as done but to have some expectation that there may be a need for updates to the plan in the future.

The Commentary on MRPC § 1.4 makes the following suggestion:

> The execution of estate planning documents and the completion of related matters, such as changes in beneficiary designations and the transfer of assets to the trustee of a trust, normally ends the period during which the estate planning lawyer actively represents and estate planning client. At that time, unless the representation is terminated by the lawyer of client, the representation becomes dormant, awaiting activation by the client. At the client's request, the lawyer may retain the original documents executed by the client. See ACTEC Commentary on MRPC § 1.7 (Conflict of Interest: Current Clients). Although the lawyer remains bound to the client by some obligations, including the duty of confidentiality, the lawyer's responsibilities are diminished by the completion of the active phase of the representation. As a service, the lawyer may communicate periodically with the client regarding the desirability of reviewing his or her estate planning documents. Similarly, the lawyer may send the client an individual letter or a form letter, pamphlet, or brochure regarding changes in the law that might affect the client. In the absence of an agreement to the contrary, a lawyer is not obligated to send a reminder to a client whose representation is dormant or to advise the client of the effect that changes in the law or the client's circumstances might have on the client's legal affairs. (Commentaries)

8. Withdrawing or Termination of Representation

MRPC § 1.16 addresses how an attorney may withdraw or terminate his representation of a client.

Upon completion of the particular estate planning project that a lawyer may be working on for a particular client, the lawyer should consider writing a termination letter to the client. If no termination letter is written, the client may think that the lawyer is still engaged and has a duty to inform him of various tax law changes, and how those changes might affect that individual's estate plan. A termination letter advises the client that the representation is terminated and the client has the duty to inform the attorney if the client's circumstances have changed and if further services are needed. A termination letter should also address the disposition of the file and a destruction date for the file. In addition, it is recommended that you define the client as a "dormant" client and explain what this means for the attorney-client relationship and its future.

9. Limitation regarding the Use of Engagement Letters and Checklists

It is important to remember that engagement letters do not replace an attorney's own independent judgment. Engagement letters are designed to address issues that affect all attorneys and no single letter, form or checklist will cover all situations. The attorneys using materials with a general checklist should certainly understand its limitations in regard to the specific services that are to be provided for each attorney-client situation. Each attorney is challenged to address the situations of the specific attorney-client

relationship and modify the engagement letter to meet the specific situation presented in order to provide the requested services competently and ethically. In each engagement and the letters provided for such engagement should be modified as necessary to reflect the individual attorney's, and his or her firm's, style and practice for the law of the jurisdiction, in addition to understanding the client's capacity.

The relationship between the lawyer and the client creates opportunities for a long term relationship but must be reviewed from the professional conduct aspect throughout the engagement. The Rules of Professional Conduct of the state where the lawyer is licensed purport to dictate the limits on various practices and procedures and the ACTEC Commentaries will provide useful guidance to the trusts and estates lawyers who may not know how or whether to proceed on the basis of the rules alone.

CHECKLIST FOR USE OF ENGAGEMENT LETTERS

l. 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(ies) (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, unless previously known and represented and identity is not an issue.

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 and is there an understanding they will be reduced to writing?

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. In addition, if the written fee agreement provides for an hourly rate, it is recommended the rate for each person working on the file be identified.

(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.

(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 and 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 ABA Model Rule of Professional Conduct § 1.8 concerning conflicts of interest among current clients and ABA Model Rules of Professional Conduct § 1.9 concerning duties to former clients.)

(e) Consider requesting authorization from all of the clients to disclose to all interested parties the actions of any one of the clients constituting fraud, a breach of trust, a violation of the governing documents of any entity involved, or in contravention of a mutual estate plan.

(f) If appropriate, describe the possible conflict of interest if the lawyer is to receive an interest in any business as a part of the lawyer's fee.

(g) Consider whether each party should be advised to consult independent counsel before consenting to the joint representation.

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

(a) Describe the lawyer's duty of confidentiality and whether and to what extent confidential information will be shared with the various clients. Obtain the clients' consent to the sharing of information (or refusal to share) in this manner.

(b) Describe how electronic communications and the inclusion of non-clients in meetings can

compromise confidentiality and the attorney-client privilege.

(c) Consider describing how the diminished capacity or death of a client will affect the disclosure of confidential information.

6. EXPLAIN THE FEE OR THE BASIS FOR THE DETERMINATION OF THE FEE AND THE BILLING ARRANGEMENTS [INCLUDING THE MATERIAL REQUIRED UNDER ABA MODEL RULES OF PROFESSONAL CONDUCT § 1.5(b)].

(a) If a contingent fee is involved, obtain the client's consent in writing. ABA Model Rules of Professional Conduct § 1.5(c)

(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 ABA Model Rules 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 within the rules of state law and practice.

7. FIRM POLICIES OF WHICH CLIENTS SHOULD BE MADE AWARE.

(a) Retention, destruction and sharing of clients' files and original documents.

(b) Advise whether you and your firm carry professional liability insurance.

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. ALWAYS.

(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 as soon as possible.

(e) Calendar the file with staff to make sure written engagement letters are received during the initial representation, if not, then follow up with emails and letters requesting compliance until a signed engagement letter is received and documented in the firm's electronic file system.

NOTE: Specific assistance for the preparation of this checklist came from use of the materials from the American College of Trust and Estate Counsel (ACTEC), Engagement Letters: A Guide for Practitioners, Third Edition 2017, with minor modifications. This is an excellent resource for practitioners and is a thorough and comprehensive guide for using engagement letters.

Privacy Policy Notice

_____, endeavors to adhere to the highest ethical standards with regard to the Code of Professional Conduct in protecting our clients' privacy. Pursuant to a new federal law, attorneys, like other professionals who advise clients on personal financial matters, may be required to inform their clients of their policies regarding privacy of client information. While the application of this federal law to attorneys remains uncertain, _____, is providing this Notice as if such requirement is applicable. Attorneys have been and continue to be bound by professional standards of confidentiality that are even more stringent than those required by this new law. Therefore, we will continue to protect your right to privacy in the future just as we always have in the past.

In the course of providing our clients with legal advice, we receive significant personal financial information. As a client of _____, you should know that all information that we receive from you is held in confidence and is not released to people outside the firm, except as agreed to by you or as required under applicable law.

File Retention Policy

We retain records relating to professional services that we provide so that we are better able to assist you with your professional needs and, in some cases, to comply with professional guidelines. In order to protect your nonpublic personal information, we maintain physical, electronic, and procedural safeguards that comply with applicable professional standards.

In the course of providing you with legal representation, we create a client file, which may be physical, electronic, or both. This file belongs to you, and you may make a written request to obtain it. After all personal property and original documents have been returned to you, the file is retained according to appropriate professional guidelines and eventually destroyed without further notification to you.

SAMPLE ENGAGEMENT LETTER

***, 2018

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Re: Representation

Dear ***:

We are pleased to confirm the engagement of INSERT NAME OF LAW FIRM HERE to represent you in connection with INSERT SCOPE OF REPRESENTATION HERE and any other matters that you refer to us and that we accept. Consistent with our firm's practice and in the interest of all the parties, we are providing this letter to set forth the details of our relationship in this matter.

As you are aware, the INSERT SCOPE OF REPRESENTATION HERE and decisions made during the INSERT SCOPE OF REPRESENTATION HERE may be subjective at times and the results may be unpredictable by their nature. It is not possible to warrant a successful result or represent that a particular result may be obtained within a given time framework for every decision made during the INSERT SCOPE OF REPRESENTATION HERE. We appreciate your awareness of and patience with the unpredictability for such decisions. You acknowledge that we have not made any representations promises, warranties or guarantees to you, express or implied, regarding the outcome of decisions made during the trust administration.

Our charges for services are based primarily on the time actually spent by us on your affairs. There is a different hourly billing rate charged by each attorney, depending on that attorney's experience and years of practice. My billing rate is $_____ per hour and that of my paralegal, who will be working with me on this matter, is $_____ per hour. Our hourly rates are adjusted periodically.

You also will be charged for various costs and out-of-pocket expenses when incurred by us during our representation of you. Enclosed is a list of various items that will be charged if incurred during our representation. Unless special arrangements are made, third-party invoices for fees and expenses exceeding $_____ will be forwarded to you for direct payment.

Itemized statements for services rendered and costs incurred will be provided on a regular basis and are due and payable upon receipt. In addition, our Privacy Policy Notice and File Retention Policy are enclosed.

Prior to sending you this letter we conducted a conflict of interest review. As of this date, it does not appear that a conflict of interest exists relating to our representation of you in this matter. If any conflict of interest arises or is brought to our attention during our representation of you, we may be required to withdraw our representation and you may need to obtain new counsel. Although we do not believe that there is any conflict of interest involved in our representation of you in this matter, we are bringing this to your attention now due to the nature of conflicts of interests and the various ways in which they may arise.

If any dispute should arise regarding our representation of you, we want to settle it quickly and fairly. We will try to do so through discussion. If we are unsuccessful, then we both agree to resolve any dispute arising between us by prompt, confidential and binding arbitration pursuant to the rules of the American Arbitration Association. The arbitration will be held in _____, Nebraska. The decision of a sole arbitrator will be binding.

You are at liberty to terminate our representation at any time. Likewise, we shall have a right to withdraw as legal counsel for you at any time in the event of the failure to cooperate, failure to pay, or for other valid reasons in accordance with the applicable Rules of Professional Conduct. Upon termination or withdrawal, you remain liable for any accrued fees and costs as of the date of termination.

If at any time you have any questions regarding the fees or costs incurred in this matter, or any other matters relating to our representation, please do not hesitate to contact us. We appreciate the opportunity to be of service to you and look forward to working with you on this matter. Please indicate your acceptance of this agreement by executing and returning the enclosed copy of this letter to us at your earliest convenience.

Sincerely,

NAME OF ATTORNEY HERE
NAME OF FIRM HERE

CONSENT

I have read the foregoing letter and understand its contents. I consent to having you represent me on the terms and conditions set forth. I authorize you to disclose to my advisors any information regarding the representation that you receive from me or any other source. THIS CONTRACT CONTAINS AN ARBITRATION PROVISION WHICH MAY BE ENFORCED BY THE PARTIES.

Accepted by:_____ Date:_____
***

Accepted by:_____ Date:_____
***

Please send billing statements as provided below:

By Mail to the Address Above: ☐
By Mail to an Alternate Address: ☐ Alternate Address: _____
By Email Address: ☐ Email Address: _____
___/___/enclosures
***
***

SAMPLE DUTIES AND RESPONSIBILITIES LETTER TO PERSONAL REPRESENTATIVE

DATE

NAME OF PERSONAL REPRESENTATIVE
ADDRESS
ADDRESS

RE: Estate of _____, Deceased

Dear NAME OF PERSONAL REPRESENTATIVE:

For your guidance and reference, the following is a summary of the procedure in the administration of a probate estate in INSERT STATE HERE. Please review it carefully.

To assist in the smooth, efficient and timely administration and closing of the estate, please do the following:

1. Immediately open a checking account in the name of the estate. We will give you a copy of your letters of authority as personal representative as soon as we receive it from the Court, which generally must be delivered to the bank before they will open your account. The bank will also require a tax identification number for the estate account. We will apply for the tax identification number and advise you and the bank when the number is assigned.

2. To open the estate account, you may write a check on the decedent's individually-owned checking account to transfer its funds to the estate account. If there was no individually-owned checking account, please transfer at least $100.00 from any joint account available, or from your personal funds to the estate account and make this "loan". It will be repaid from funds.

3. It is essential before the estate can be closed that a complete accounting of the cash receipts payable in to and out of the estate account be compiled, filed with the Court and a copy delivered to each of the heirs. For this purpose, the ideal method of bookkeeping is to deposit everything, except memorial monies, into the estate account and pay everything by check from the estate account. Our firm will prepare the final report directly from the information provided on the bank statements and canceled checks. Please carefully identify on the deposit slips the source of each deposit and carefully mark each check to identify the reason for payment.

4. It is not necessary that you maintain any extensive bookkeeping records for the estate if you do the above. It takes less time and is more accurate for us to work directly with the bank statements in making up the report. On some occasions clients request the bank to mail the bank statements directly to our office. We will copy them, update and balance the estate accounting to date, and forward it to you immediately, or if you receive the statements, please provide us with a copy as soon as possible.

5. You may pay all bills for funeral expenses and medical services for the decedent as soon as funds are available for the payment of claims. However, you should check with us before paying filed claims. In the unlikely event the estate should become insolvent, if you pay one claim before paying all claims, you may be personally liable for the payment of any claims for which the estate does not have sufficient funds. All claims should be paid by checks drawn on the estate account. Please keep the bills and furnish them to us so we have the exact amount of the payments, since it may be necessary to obtain a formal release of claim form signed by claimants such as the funeral home, the hospital and the doctors.

6. If the decedent held any revolving charge accounts, destroy all credit cards immediately and notify each credit card company of your appointment as personal representative.

7. Notify decedent's post office to forward decedent's mail to your mailing address.

8. It is necessary that the date of death value for bank balances and investments be verified in writing as a record for the tax authorities, the County Attorney and the Internal Revenue Service. We will do this by letter to each bank or other institution holding deposits or credits of the decedent.

9. All checking accounts, savings accounts, and other bank items held jointly are the property of the surviving joint owner as of the death of decedent and may be withdrawn and retained personally by the survivor, unless the account was joint only for the convenience of the decedent to allow the other signatory to pay bills. In that case, the account should be closed and a check for its balance written to the estate account. In addition, joint accounts should not be distributed until the joint owner either makes arrangements for payment of his or her share of the administrative costs and taxes or pays these expenses, if required by the decedent's estate plan.

10. It is necessary that a complete inventory of the property of the decedent be filed with the Probate Court and a copy furnished to each of the heirs as soon as accurate information is available. Your job as personal representative is to get this information to us so we may prepare the inventory. We will review these items with you and tell you more specifically what information we need. We would appreciate receiving, as soon as you can assemble it, all documents relating to investments or real estate titles of the decedent, so we can accurately determine their nature of ownership.

11. If the estate includes real estate, an appraisal may be necessary. We will discuss this with you at the beginning of the estate. If an appraisal is required, we will need to make a decision on the hiring of an appraiser as soon as possible. The documents we need on real estate include all abstracts of title and copies of deeds or mortgages in the possession of the decedent.

12. If the decedent did business with any farm co-op, please let us know the name of the co-op as soon as possible so we may write them for verification of stock and patronage accounts and their value.

13. Please bring to our office for copying the originals of all stock certificates, bonds, co-op stock, and notes payable to the decedent. It will save us time and save the estate money if we can work from copies of these originals in determining ownership, rather than from a handwritten or typewritten list.

14. If the decedent owned, or was one of the owners, of a safe deposit box, the contents of the box should immediately be reviewed and listed in the presence of someone from the bank. There

should be a written list of the contents prepared at that time, and signed and verified by the person witnessing the inventory of the box. (This needs to be done regardless of whether the box was owned jointly). Following this inventory, we will discuss with you the ownership of the contents of the safe deposit box and how these items are to be reported on the estate inventory.

15. Some of the deadlines you should be aware of are as follows:

    a. All claims must be filed with the County Court within 60 days of the first claim day publication. This date will be shown on the published notice, of which you will receive a copy.

    b. State law requires that the inventory be filed within three months from the date of your appointment as personal representative. We therefore need the inventory information as soon as possible.

    c. The Federal Estate Tax Return, if any, is due nine months from the date of death of the decedent.

    d. The inheritance tax payable to *** County is due twelve months from the date of death of the decedent, although normally we will complete the inheritance tax procedure and pay the inheritance tax at the time the Federal Estate Tax Return is filed.

16. In the previous paragraph, we discuss that one of the deadlines is that claims must be filed with the Court within 60 days of the first claim day publication. Following your appointment as Personal Representative, you are required to give notice to all interested parties. You are required to publish in a legal newspaper of the notice of your appointment to creditors. This notice is published once a week for three weeks in a local newspaper. Our firm assists you as the Personal Representative in the completion of this task. Interested parties include the legal heirs, devisees named in the Will and all known or reasonably known potential creditors. The publication of your appointment and the creditors' date will be provided to creditors. If the creditor should have been reasonably known, then more than publication is required. Written notice to the reasonably known creditors is required, providing them with a copy of the published notice and the deadlines. These creditors, since they are given notice, must file their claims against the estate within 60 days from the date of the first publication of your appointment. The failure to file a claim renders the claim barred with only a few exceptions. If notice is not given to a creditor that should have been reasonably known, they may have up to three years to commence an action against the estate for payment. Because of this provision, it is extremely important to provide me with a complete list of all creditors, or potential creditors, and to do a thorough search to be sure no other creditors exist. The mail of the decedent should be closely monitored to provide us with knowledge of who are creditors of the estate. In addition, you should do a thorough check as to what physicians, hospitals, clinics and medical service providers were involved with the decedent's care. The failure to do so may be a breach of your fiduciary duty to the beneficiaries and may delay the closing of the administration of the estate and, in certain occasions, requires a reopening and administration of the estate. In addition, if the creditors should have reasonably been known, and were not notified, then the Personal Representative may have individual liability for negligent services as the Personal Representative.

17. The income tax return of the decedent is due for the period from January 1 to the date of death on the following April 15. At your earliest convenience, please assemble all bank statements, 1099

forms, canceled checks and other information for delivery to the persons who will prepare the income tax return.

18. The estate is a new and separate taxpayer. It may elect any income tax fiscal year it chooses, and must file income tax returns. The decision on the fiscal year will be chosen later, and we will determine at a later date who will prepare the estate fiduciary income tax returns.

19. If an estate tax return must be filed, it will probably be approved by the Service Center or forwarded to the District Director in Omaha for a field audit within approximately six months of the date of filing. If it is forwarded for a field audit, this process may take many months, and it is important it be approached patiently. We will discuss this whole process with you in much more detail at a later date.

20. If the decedent held any real or personal property subject to a lease, this lease will continue according to its terms. Upon its expiration, it is your obligation to negotiate a continuing rental of the property or to prepare a termination of the lease. We can assist you with this.

21. It is your responsibility to review and maintain adequate casualty, theft, and other insurance on all buildings and personal property of the decedent, as well as adequate liability insurance where needed for such property and for any automobiles owned by the decedent. Please review the decedent's insurance coverage at the earliest possible date, after which we will be glad to go over it with you.

22. Due to recent changes in the law, as a precaution to claims of the Department of Health and Human Services (DHHS) in the estate, we must request a Certification of No Recoverable Amount from DHHS to ensure there are no medical assistance or Medicaid claims that must be paid. It is our understanding *** was never a recipient of services from DHHS and no claims exist for medical assistance under INSERT STATE STATUTE. Since there is no potential claim for Medicaid Estate Recovery, our firm will assist you with obtaining the necessary certification from DHHS.

23. You are entitled to reasonable compensation for your services as personal representative. However, by statute “reasonable compensation” is not defined and the amount for fees is therefore discretionary. Personal representative’s fees are often based on an hourly rate, an agreed upon fixed amount or on a percentage of the estate assets administered. Corporate fiduciaries customarily charge 2% of the gross estate assets for their fees. Non-corporate fiduciaries charge considerably less depending on the work required and the non-corporate fiduciary’s experience. We recommend you keep a detailed record of time spent in performance of your duties since your fee is subject to review by the estate beneficiaries and possibly a probate court if any dispute cannot be settled by mutual agreement of the parties. You may also renounce your right to all or any part of the compensation. Should you renounce your fees, it should be documented in writing. However, until you make this determination, I recommend you keep track of your time and expenses. Expenses should be itemized and are reimbursed separate from the fees. Without documentation of time and expenses it is possible you will not be paid for your services or expenses incurred for the benefit of the estate.

The matters described in Paragraphs 1 through 23 above outline your specific duties as a Personal Representative. As a Personal Representative, you are also a fiduciary charged with the general duties

and responsibilities similar to a trustee, which include, but are not limited to, the following duties which are summarized:

1. **Duty to Administer Trust (NUTC 801):** Upon acceptance of a trusteeship, the trustee shall administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with the Nebraska Uniform Trust Code. The primary duty of a trustee is to follow the terms and purposes of the trust and to do so in good faith.

2. **Duty of Loyalty (NUTC 802):** A trustee shall administer the trust solely in the interests of the beneficiaries. The duty of loyalty is perhaps the most fundamental duty of the trustee. A trustee owes a duty of loyalty to the beneficiaries, a principle which is sometimes expressed as the obligation of the trustee not to place the trustee's own interests over those of the beneficiaries.

3. **Impartiality (NUTC 803):** If a trust has two or more beneficiaries, the trustee shall act impartially in investing, managing and distributing the trust property, giving due regard to the beneficiaries' respective interests. The differing beneficial interest for which the trusts must act impartially include those of the current beneficiaries versus those of beneficiaries holding interests in the remainder; and among those currently eligible to receive distributions.

4. **Prudent Administration (NUTC 804):** A trustee shall administer the trust as a prudent person would, by considering the purposes, terms, distributional requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution. A prudent person is defined as a trustee whose exercise of trust powers is reasonable and equitable in view of the interests of income and principal beneficiaries, or both and in accordance with the standards of care provided for trustees in the Uniform Prudent Investor Act.

5. **Costs of Administration (NUTC 805):** In administering the trust, the trustee may incur only costs that are reasonable in relation to the trust property, the purposes of the trust, and the skills of the trustee. The duty not to incur unreasonable costs applies when a trustee decides whether and how to delegate to agents, as well as to other aspects of trust administration. In deciding whether and how to delegate, the trustee must be alert to balancing projected benefits against the likely costs.

6. **Delegation by Trustee (NUTC 807):** A trustee may delegate investment and management functions that a prudent trustee of comparable skills could properly delegate under the circumstances. The trustee shall exercise reasonable care, skill, and caution in: (1) Selecting an agent; (2) Establishing the scope and terms of the delegation, consistent with the purposes and terms of the trust; and (3) Periodically reviewing the agent's actions in order to monitor the agent's performance and compliance with the terms of the delegation.

7. **Control and Protection of Trust (NUTC 809):** A trustee shall take reasonable steps to take control of and protect the trust property. A trustee shall take possession of, and keep in the trustee's custody, the trust property (without commingling with the trustee's own property), and manage it in accordance with the trust. The trustee shall preserve and protect the trust property against loss, dissipation and diminution; and in order to accomplish this, to enter into proper contracts, incur debts and make expenditures where necessary and proper, and to prosecute and defend suits and proceedings in proper cases.

8. **Recordkeeping and Identification of Trust Property (NUTC 810):** A trustee shall keep adequate records of the administration of the trust and shall keep trust property separate from the trustee's own property. A trustee must keep and render a full and accurate record and accounting

of the trusteeship to the beneficiaries. A trustee may invest as a whole the property of two or more separate trusts provided the trustee maintains clear records indicating respective interests and the trusts contain substantially similar provisions.

9. **Enforcement and Defense of Claims (NUTC 811):** A trustee shall take reasonable steps to enforce claims of the trust and to defend claims against the trust.

10. **Duty to Inform and Report (NUTC 813):** A trustee shall keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests. Unless unreasonable under the circumstances, a trustee shall promptly respond to a beneficiary's request for information related to the administration of the trust. A trustee shall send to the distributees or permissible distributees of trust income or principal, and to other qualified or nonqualified beneficiaries who request it, at least annually and at the termination of the trust, a report of the trust property, liabilities, receipts and disbursements, including the source and amount of the trustee's compensation, a listing of the trust assets, and, if feasible, their respective market values. Upon a vacancy in a trusteeship, unless a co-trustee remains in office, a report must be sent to the qualified beneficiaries by the former trustee.

11. **Specific Powers of Trustee (NUTC 816):** A trustee is conferred with specific powers subject to alteration in the terms of the trust. These powers include, but are not limited to, the following: (1) collect trust property and accept or reject additions to the trust property from a settlor or any other person; (2) acquire or sell property, for cash or on credit, at public or private sale; (3) exchange, partition or otherwise change the character of trust property; (4) deposit trust money in an account in a regulated financial-service institution; (5) borrow money, including from the trustee, with or without security, and mortgage or pledge trust property for a period within or extending beyond the duration of the trust; (6) continue the business or other enterprise and take any action that may be taken by shareholders, members, or property owners, including merging, dissolving, or otherwise changing the form of business organization or contributing additional capital; (7) with respect to stocks or other securities, exercise the rights of an absolute owner; (8) with respect to an interest in real property, construct, or make ordinary or extraordinary repairs; (9) enter into a lease for any purpose for a period extending beyond the duration of the trust; (10) grant an option involving a sale, lease, or other disposition of trust property or acquire an option for the acquisition of property including an option exercisable beyond the duration of the trust, and exercise an option so acquired; (11) insure the property of the trust against damage or loss and insure the trustee, the trustee's agents, and beneficiaries against liability arising from the administration of the trust.

12. **Distribution Upon Termination (NUTC 817):** Upon termination or partial termination of a trust, the trustee may send to the beneficiaries a proposal for distribution. The right of any beneficiary to object to the proposed distribution terminates if the beneficiary does not notify the trustee of an objection within thirty days after the proposal was sent but only if the proposal informed the beneficiary of the right to object and of the time allowed for objection. Upon the occurrence of an event terminating or partially terminating a trust, the trustee shall proceed expeditiously to distribute the trust property to the persons entitled to it, subject to the right of the trustee to retain a reasonable reserve for the payment of debts, expenses and taxes.

Please note as the Personal Representative you are held to these high standards regardless of the fact you are not a professional fiduciary. These standards are important and if not met could subject you to liability exposure. When you have concerns about any matter in the administration of the estate we request you contact us immediately for assistance.

This is only a partial list of administrative matters you must consider. Other matters will arise and should be brought to our attention immediately. Should you have any questions regarding your duties, or any other estate administration matters, please do not hesitate to contact us.

Sincerely,

NAME OF ATTORNEY HERE
NAME OF FIRM HERE

_____/***

SAMPLE DUTIES AND RESPONSIBILITIES LETTER TO TRUSTEE

Date

NAME OF TRUSTEE
ADDRESS
ADDRESS

RE: ADMINISTRATION OF THE (NAME OF TRUST)

Dear NAME OF TRUSTEE:

For your guidance and reference, the following is a summary of the procedure in the administration of a trust estate in INSERT STATE HERE. Please review it carefully.

To assist in the smooth, efficient and timely administration and termination of the trust, please do the following:

1. Please open a new trust checking account in the name of the *** Irrevocable Trust. If there is already an existing account titled in the name of the trust, please change the signature card to designate you as the Trustee and provide your name and mailing address. The bank will also require a new tax identification number for the trust operating account. We will apply for the tax identification number and provide you with a Form W-9 and a Certification of Trust document evidencing your authority to act on behalf of the trust for delivery to the financial institutions holding trust assets.

2. If a new trust checking account needs to be opened, then you may write a check on the decedent's individually owned checking account to transfer its funds to the trust account. If there was no individually owned checking account, please transfer at least $100 from any joint account available, or from your personal funds to the trust account and make this "loan". It will be repaid from funds.

3. The *** Trust became irrevocable upon your ***(husband/wife/father/mother's) death. As the successor trustee, you are required to notify the qualified beneficiaries of the trust's existence, of the identity of the settlor, of the right to request a copy of the trust instrument, and the right to a trustee's report. "Qualified beneficiary" is defined as a beneficiary who, on the date the beneficiary's qualification is determined: (A) is a distributee or permissible distributee of trust income or principal; (B) would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in (A) terminated on that date; or (C) would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.

4. It is essential before the trust can be terminated that a complete accounting of the cash receipts payable in to and out of the trust account be compiled and a copy delivered to each of the trust beneficiaries. For this purpose, the ideal method of bookkeeping is to deposit everything, except memorial monies, into the trust account and pay everything by check from the trust account. Our firm will prepare the final report directly from the information provided on the bank statements and canceled checks. Please carefully identify on the deposit slips the source of each deposit and carefully mark each check to identify the reason for payment.

5. It is not necessary that you maintain any extensive bookkeeping records for the trust if you do the above. It takes less time and is more accurate for us to work directly with the bank statements in making up the report. On some occasions clients request the bank to mail the bank statements directly to our office. We will copy them, update and balance the accounting to date, and forward it to you immediately, or if you receive the statements, please provide us with a copy as soon as possible.

6. You may pay all bills for funeral expenses and medical services for the decedent as soon as funds are available. Please keep the bills and furnish them to us for our records.

7. If the decedent held any revolving charge accounts, destroy all credit cards immediately, notify each credit card company of the death, advise them you are serving as trustee and to send future correspondence to you.

8. Notify decedent's post office to forward decedent's mail to your mailing address.

9. It is necessary that the date of death value for bank balances and investments be verified in writing as a record for the tax authorities, the County Attorney and the Internal Revenue Service. We will do this by letter to each bank or other institution holding deposits or credits of the decedent.

10. All checking accounts, savings accounts, and other bank items held jointly are the property of the surviving joint owner as of the death of decedent and may be withdrawn and retained personally by the survivor, <u>unless</u> the account was joint only for the convenience of the decedent to allow the other signatory to pay bills. In that case, the account should be closed and a check for its balance written to the trust account. In addition, joint accounts should <u>not</u> be distributed until the joint owner either makes arrangements for payment of his or her share of the administrative costs and taxes or pays these expenses, if required by the decedent's estate plan.

11. Although you are serving as the Trustee, there are often assets of minimal value, that collectively are less than $50,000, that were individually owned by the decedent that need to be liquidated and transferred to the trust. These assets usually consist of utility deposit refunds upon the sale of the house, refunds from health insurance policy premiums, and any miscellaneous payment sent to you as the Personal Representative of the Estate. You may endorse these checks using a Small Estates Affidavit to be signed 30 days after the death of the decedent. This Affidavit provides you with the informal power of a Personal Representative without being formally appointed as the Personal Representative by the local probate court. The Affidavit is prepared for your signature and should be signed after the expiration of the 30 day time period.

12. It is necessary that a complete inventory of the property of the decedent be filed with the *** County Court and a copy furnished to each of the trust beneficiaries as soon as soon as accurate information is available. Your job as trustee is to get this information to us so we may prepare the inventory. We will review these items with you and tell you more specifically what

information we need. We would appreciate receiving, as soon as you can assemble it, all documents relating to investments or real estate titles of the decedent, so we can accurately determine their nature of ownership.

13. If the trust includes real estate, an appraisal may be necessary. If an appraisal is required, we will need to make a decision on the hiring of an appraiser as soon as possible. The documents we need on real estate include all abstracts of title and copies of deeds or mortgages in the possession of the decedent.

14. If the decedent did business with any farm co-op, please let us know the name of the co-op as soon as possible so we may write them for verification of stock and patronage accounts and their value.

15. Please bring to our office for copying the originals of all stock certificates, bonds, and notes payable to the decedent. It will save us time and save the trust money if we can work from copies of these originals in determining ownership, rather than from a handwritten or typewritten list.

16. If the decedent owned, or was one of the owners, of a safe deposit box, the contents of the box should immediately be reviewed and listed in the presence of someone from the bank. There should be a written list of the contents prepared at that time, and signed and verified by the person witnessing the inventory of the box. (This needs to be done regardless of whether the box was owned jointly). Following this inventory, we will discuss with you the ownership of the contents of the safe deposit box and how these items are to be reported on the estate inventory.

17. Some of the deadlines you should be aware of are as follows:

    a. Within 60 days after the trust became irrevocable, you are required to notify the qualified trust beneficiaries of the trust's existence, of the identity of the settlor, of the right to request a copy of the trust instrument, and of the right to a trustee's report. In addition, you are required to notify the qualified beneficiaries that you have accepted trusteeship, and of your name, address and telephone number.

    b. The Federal Estate Tax Return, if required, is due nine months from the date of death of the decedent.

    c. The inheritance tax payable to *** County is due twelve months from the date of death of the decedent, although normally we will complete the inheritance tax procedure and pay the inheritance tax at the time the Federal Estate Tax Return is filed.

18. The income tax return of the decedent is due for the period from January 1 to the date of death on the following April 15. At your earliest convenience, please assemble all bank statements, 1099 forms, canceled checks and other information for delivery to the persons who will prepare the income tax return.

19. The trust is a new and separate taxpayer and must file income tax returns. We will determine at a later date who will prepare the trust fiduciary income tax returns.

20. It is your responsibility to review and maintain adequate casualty, theft, and other insurance on all buildings and personal property of the decedent, as well as adequate liability insurance where needed for such property and for any automobiles owned by the decedent. Please review the

decedent's insurance coverage at the earliest possible date, after which we will be glad to go over it with you.

21. If the decedent held any real or personal property subject to a lease, this lease will continue according to its terms. Upon its expiration, it is your obligation to negotiate a continuing rental of the property or to prepare a termination of the lease. We can assist you with this.

22. Due to recent changes in the law, no assets can be distributed to the beneficiaries of the trust pending receipt of a letter from the Department of Health and Human Services (DHHS) waiving the statutory restriction on the transfer of trust property. It is our understanding *** was never a recipient of services from the Department of Health and Human Services and no claims exist for medical assistance under INSERT STATE STATUTE. Since there is no potential claim for Medicaid Estate Recovery, our firm will assist you with obtaining the necessary waiver from DHHS.

23. You are entitled to reasonable compensation for your services as trustee. However, by statute "reasonable compensation" is not defined and the amount for fees is therefore discretionary. Trustee's fees are often based on an hourly rate, an agreed upon fixed amount or on a percentage of the estate assets administered. Corporate fiduciaries customarily charge 2% of the gross estate assets for their fees. Non-corporate fiduciaries charge considerably less depending on the work required and the non-corporate fiduciary's experience. We recommend you keep a detailed record of time spent in performance of your duties since your fee is subject to review by the trust beneficiaries and possibly a probate court if any dispute cannot be settled by mutual agreement of the parties. You may also renounce your right to all or any part of the compensation. Should you renounce your fees, it should be documented in writing. However, until you make this determination, I recommend you keep track of your time and expenses. Expenses should be itemized and are reimbursed separate from the fees. Without documentation of time and expenses it is possible you will not be paid for your services or expenses incurred for the benefit of the Trust.

The matters described in Paragraphs 1 through 23 above outline your specific duties as a Trustee. As a Trustee, you are also a fiduciary charged with general duties and responsibilities which include, but are not limited to, the following duties which are summarized:

1. **Duty to Administer Trust (NUTC 801):** Upon acceptance of a trusteeship, the trustee shall administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with the Nebraska Uniform Trust Code. The primary duty of a trustee is to follow the terms and purposes of the trust and to do so in good faith.

2. **Duty of Loyalty (NUTC 802):** A trustee shall administer the trust solely in the interests of the beneficiaries. The duty of loyalty is perhaps the most fundamental duty of the trustee. A trustee owes a duty of loyalty to the beneficiaries, a principle which is sometimes expressed as the obligation of the trustee not to place the trustee's own interests over those of the beneficiaries.

3. **Impartiality (NUTC 803):** If a trust has two or more beneficiaries, the trustee shall act impartially in investing, managing and distributing the trust property, giving due regard to the beneficiaries' respective interests. The differing beneficial interest for which the trusts must act impartially include those of the current beneficiaries versus those of beneficiaries holding interests in the remainder; and among those currently eligible to receive distributions.

4. **Prudent Administration (NUTC 804):** A trustee shall administer the trust as a prudent person would, by considering the purposes, terms, distributional requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution. A prudent person is defined as a trustee whose exercise of trust powers is reasonable and equitable in view of the interests of income and principal beneficiaries, or both and in accordance with the standards of care provided for trustees in the Uniform Prudent Investor Act.

5. **Costs of Administration (NUTC 805):** In administering the trust, the trustee may incur only costs that are reasonable in relation to the trust property, the purposes of the trust, and the skills of the trustee. The duty not to incur unreasonable costs applies when a trustee decides whether and how to delegate to agents, as well as to other aspects of trust administration. In deciding whether and how to delegate, the trustee must be alert to balancing projected benefits against the likely costs.

6. **Delegation by Trustee (NUTC 807):** A trustee may delegate investment and management functions that a prudent trustee of comparable skills could properly delegate under the circumstances. The trustee shall exercise reasonable care, skill, and caution in: (1) Selecting an agent; (2) Establishing the scope and terms of the delegation, consistent with the purposes and terms of the trust; and (3) Periodically reviewing the agent's actions in order to monitor the agent's performance and compliance with the terms of the delegation.

7. **Control and Protection of Trust (NUTC 809):** A trustee shall take reasonable steps to take control of and protect the trust property. A trustee shall take possession of, and keep in the trustee's custody, the trust property (without commingling with the trustee's own property), and manage it in accordance with the trust. The trustee shall preserve and protect the trust property against loss, dissipation and diminution; and in order to accomplish this, to enter into proper contracts, incur debts and make expenditures where necessary and proper, and to prosecute and defend suits and proceedings in proper cases.

8. **Recordkeeping and Identification of Trust Property (NUTC 810):** A trustee shall keep adequate records of the administration of the trust and shall keep trust property separate from the trustee's own property. A trustee must keep and render a full and accurate record and accounting of the trusteeship to the beneficiaries. A trustee may invest as a whole the property of two or more separate trusts provided the trustee maintains clear records indicating respective interests and the trusts contain substantially similar provisions.

9. **Enforcement and Defense of Claims (NUTC 811):** A trustee shall take reasonable steps to enforce claims of the trust and to defend claims against the trust.

10. **Duty to Inform and Report (NUTC 813):** A trustee shall keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests. Unless unreasonable under the circumstances, a trustee shall promptly respond to a beneficiary's request for information related to the administration of the trust. A trustee shall send to the distributees or permissible distributees of trust income or principal, and to other qualified or nonqualified beneficiaries who request it, at least annually and at the termination of the trust, a report of the trust property, liabilities, receipts and disbursements, including the source and amount of the trustee's compensation, a listing of the trust assets, and, if feasible, their respective market values. Upon a vacancy in a trusteeship, unless a co-trustee remains in office, a report must be sent to the qualified beneficiaries by the former trustee.

11. **Specific Powers of Trustee (NUTC 816):** A trustee is conferred with specific powers subject to alteration in the terms of the trust. These powers include, but are not limited to, the following: (1) collect trust property and accept or reject additions to the trust property from a settlor or any other person; (2) acquire or sell property, for cash or on credit, at public or private sale; (3) exchange, partition or otherwise change the character of trust property; (4) deposit trust money in an account in a regulated financial-service institution; (5) borrow money, including from the trustee, with or without security, and mortgage or pledge trust property for a period within or extending beyond the duration of the trust; (6) continue the business or other enterprise and take any action that may be taken by shareholders, members, or property owners, including merging, dissolving, or otherwise changing the form of business organization or contributing additional capital; (7) with respect to stocks or other securities, exercise the rights of an absolute owner; (8) with respect to an interest in real property, construct, or make ordinary or extraordinary repairs; (9) enter into a lease for any purpose for a period extending beyond the duration of the trust; (10) grant an option involving a sale, lease, or other disposition of trust property or acquire an option for the acquisition of property including an option exercisable beyond the duration of the trust, and exercise an option so acquired; (11) insure the property of the trust against damage or loss and insure the trustee, the trustee's agents, and beneficiaries against liability arising from the administration of the trust.

12. **Distribution Upon Termination (NUTC 817):** Upon termination or partial termination of a trust, the trustee may send to the beneficiaries a proposal for distribution. The right of any beneficiary to object to the proposed distribution terminates if the beneficiary does not notify the trustee of an objection within thirty days after the proposal was sent but only if the proposal informed the beneficiary of the right to object and of the time allowed for objection. Upon the occurrence of an event terminating or partially terminating a trust, the trustee shall proceed expeditiously to distribute the trust property to the persons entitled to it, subject to the right of the trustee to retain a reasonable reserve for the payment of debts, expenses and taxes.

Please note as the Trustee you are held to these high standards regardless of the fact you are not a professional trustee. These standards are important and if not met could subject you to liability exposure. When you have concerns about any matter in the administration of the trust estate we request you contact us immediately for assistance.

This is only a partial list of trust administrative matters you must consider; other matters will arise and should be brought to our attention immediately. Should you have any questions regarding your duties as trustee, or any trust administration matters, please do not hesitate to contact us.

Sincerely,

NAME OF ATTORNEY HERE
NAME OF FIRM HERE

____/***
cc: ***, CPA

SAMPLE CLOSING LETTER FOR ESTATE PLANNING

DATE

NAME OF CLIENT
ADDRESS
ADDRESS

RE: Estate Planning – Closing letter

Dear NAME OF CLIENT:

Thank you for providing me with the opportunity to update and complete your estate planning. With the execution of your estate planning documents, your estate planning is concluded.

As part of your estate planning, you have selected the use of a revocable or living trust. This trust will provide you and your family with flexibility in the administration of your estate in the event of your disability or death. In addition, the power of attorney documents have the potential to save your family considerable expenses in court costs and attorney fees by avoiding the need to appoint a guardian-conservator should you become incapacitated.

Our firm assisted you in transferring certain assets to your trust. As you acquire additional assets in the future, please make certain the assets are either titled in your trust or made payable on death to your trust to avoid a probate proceeding and its administrative costs. If assets are not properly titled at death, then one of the advantages of using a trust has been diminished. Again, please contact our firm for assistance in determining how to take title when making additional investments or purchases.

In our conferences we discussed your potential exposure to death tax liabilities. As we discussed, the current estate tax level exemption is $11.2 million for deaths occurring in 2018. In review of your asset valuation, your estate is less than the current federal estate tax level exemption amount of $11.2 million and therefore not subject to federal estate tax. However, your assets are still subject to Nebraska inheritance tax, and upon (your death) (the death of the last spouse to die) an inheritance tax determination would be required in the *** County Court.

I have delivered to you your original Trust Agreement(s), Will(s), Durable Power of Attorney for Asset Management, Durable Power of Attorney for Health Care and HIPAA Medical Authorization documents. Please place these documents in a place of safekeeping such as a bank safety deposit box or fireproof safe. I recommend you keep copies of these same documents at home where they are accessible should you desire to review them. Should you desire a modification or cancellation of any of your documents, please contact me for assistance.

In the event any of the following events occur you should review the potential effect on your estate planning to determine whether your documents should be amended or revised:

1. Deterioration of your health; **OR**
2. Death or deterioration of the health of either spouse;
3. Marriage, divorce, deterioration of health or death of a child;
4. Death or incapacity of a fiduciary such as the successor trustee, personal representative,

guardian or attorney-in-fact (individuals nominated in the power of attorney documents);

4. Substantial increase or decrease of wealth; and
5. Change in federal law or state law regarding federal estate tax, inheritance tax, income tax or Medicare or Medicaid eligibility.

The above list of events is a suggested list to review your documents and is not inclusive of all events that may determine whether your trust, will or power of attorney documents should be amended or revised. Should you have any questions regarding the documents when you review them in the future, please contact me.

Last, but not least, liability insurance is a key component of your estate plan. Please review your liability insurance coverages to make sure you have adequate liability coverage in the event of an automobile accident. We recommend you have an umbrella liability coverage policy for the protection of your assets. The cost is actually minimal compared to the benefit provided.

We are closing our file, as we have completed all requested legal services in this matter. Upon closing this file, it is understood that you are considered a "dormant" client, since we have completed your estate planning. Except as provided above, **we recommend you contact us every three to five years to review your estate planning, since there are frequent changes in the law and in your life.**

As our current work has been completed, I am preparing to place the file in storage. We will retain the file until _____ at which time it will be disposed of without further notice to you, unless you contact us prior to this date to update your planning. Alternatively, if you wish to have your file at any time, please contact our office.

Again, thank you for bringing your legal work to our firm. We appreciate the opportunity to work for you.

Sincerely,

NAME OF ATTORNEY HERE
NAME OF FIRM HERE

_____/***
***.000
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SAMPLE CLOSING LETTER FOR TRUST ADMINISTRATION

DATE

NAME OF TRUSTEE
ADDRESS
ADDRESS

RE: NAME OF TRUST

Dear NAME OF TRUSTEE

I am enclosing a copy of the Order Determining and Assessing Inheritance Tax entered by the *** County Court on ***. Further enclosed is a copy of the County Treasurer's receipts evidencing payment of inheritance tax to *** County. Please file these documents in the "Pleadings" section of your trustee's binder.

Next enclosed are copies of receipts from the trust beneficiaries acknowledging delivery and receipt of their final distribution checks. In checking with the bank, we were advised the trust checking account has achieved a zero balance. At the end of our next billing cycle, you will receive a final statement from our firm detailing the fees and expenses for completing our work in the trust administration. All fees and expenses due to our firm are paid in full.

I would like to thank you for your work and diligence in administering the trust. You performed your duties in an exemplary manner. I know you were of great help to your father/mother during his/her lifetime as well.

As the work for the above matter has been completed, I am preparing to place the file in storage. We will retain the file until _____, at which time it will be disposed of without further notice to you. Alternatively, if you wish to have your file, please contact our office.

Thank you for bringing your legal work to our firm. We appreciate the opportunity to work for you and your family. Should you have any questions, please do not hesitate to contact me.

Sincerely,

NAME OF ATTORNEY HERE
NAME OF FIRM HERE

_____/**/enclosures
***.000
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30-2482. Proceedings for review of employment of agents and compensation of personal representatives and employees of estate.

(1) After notice to all interested persons or on petition of an interested person or on appropriate motion if administration is supervised, the propriety of employment of any person by a personal representative including any attorney, auditor, investment advisor, or other specialized agent or assistant, the reasonableness of the compensation of any person so employed, or the reasonableness of the compensation determined by the personal representative for his or her own services, may be reviewed by the court. Any person who has received excessive compensation from an estate for services rendered may be ordered to make appropriate refunds.

(2) Factors to be considered as guides in determining the reasonableness of a fee include the following:

(a) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the service properly;

(b) The likelihood, if apparent to the personal representative, that the acceptance of the particular employment will preclude the person employed from other employment;

(c) The fee customarily charged in the locality for similar services;

(d) The amount involved and the results obtained;

(e) The time limitations imposed by the personal representative or by the circumstances;

(f) The nature and length of the relationship between the personal representative and the person performing the services; and

(g) The experience, reputation, and ability of the person performing the services.

Source: Laws 1974, LB 354, § 160, UPC § 3-721; Laws 1980, LB 694, § 10.

Annotations

The factors in this section provide an indication of what facts the Legislature intended to be considered when determining a reasonable fee. In re Estate of Gsantner, 288 Neb. 222, 846 N.W.2d 646 (2014).

If a claim for attorney fees in a probate matter is brought under this section, the burden is on the party challenging the reasonableness of the fee to show excessive compensation. From the date of this opinion forward, all claims for attorney fees in probate matters shall be filed pursuant to this section and not pursuant to section 30-2486. In re Estate of Wagner, 253 Neb. 498, 571 N.W.2d 76 (1997).

When challenging attorney fees awarded from an estate for services rendered, the burden is on the challenger to show excessive compensation. In reviewing the award of attorney fees in cases arising under this section, the standard of review in the district court and appellate courts is for error appearing on the record. In re Estate of Nicholson, 241 Neb. 447, 488 N.W.2d 554 (1992).

The standard of review in both the district court and in the Supreme Court in cases arising under this statute is for error appearing on the record. In re Estate of Snyder, 217 Neb. 356, 348 N.W.2d 136 (1984).

30-3864. (UTC 708) Compensation of trustee.

(UTC 708) (a) If the terms of a trust do not specify the trustee's compensation, a trustee is entitled to compensation that is reasonable under the circumstances.

(b) If the terms of a trust specify the trustee's compensation, the trustee is entitled to be compensated as specified, but the court may allow more or less compensation if:

(1) the duties of the trustee are substantially different from those contemplated when the trust was created; or

(2) the compensation specified by the terms of the trust would be unreasonably low or high.

Source: Laws 2003, LB 130, § 64.

30-4012. Reimbursement and compensation of agent.

Unless the power of attorney otherwise provides, an agent is entitled to reimbursement of expenses reasonably incurred on behalf of the principal and to compensation that is reasonable under the circumstances.

Source: Laws 2012, LB1113, § 12.

§ 1.2. Scope of representation and allocation of authority between client and lawyer.

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

§ 1.4. Communications.

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

§ 1.5. Fees.

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or

(2) a contingent fee for representing a defendant in a criminal case.

(e) A division of a fee between lawyers who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;

(2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and

(3) the total fee is reasonable.

§ 1.6. Confidentiality of information.

(a) A lawyer shall not reveal information relating to the 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;

(6) to comply with other law or a court order; or

(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.

§ 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.

§ 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 aggregated 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.

(i) 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.

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

(k) 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.**

§ 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

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

§ 1.14. Client with diminished capacity.

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

§ 1.16. Declining or terminating representation.

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) the client 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;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.