

**DANGER, WILL ROBINSON! ETHICAL AND
CONFLICT OF INTEREST
CONSIDERATIONS IN ESTATE PLANNING**



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I. Introduction

“Danger, Will Robinson!” was a catchphrase from the 1960’s American television series *Lost in Space*. The B9 Robot would warn the young Will Robinson of impending danger, when he was oblivious to the obvious threat. Urban Dictionary says that “Danger, Will Robinson is used now as a catchphrase to warn someone that s/he is about to do something *really stupid* and/or *downright dangerous*.”¹ Unfortunately, this describes the way many estate planners practice. Estate planning lawyers often seem to be oblivious to the dangers of potential conflicts. They cling to statements like “Model Rules of Professional Conduct were drafted for litigators!” and “This is the way we’ve always done it!”

In the estate planning context, lawyers face a myriad of legal and ethical issues which can create the potential for conflicts of interest and professional liability. Most attorneys are diligent, conscientious, and carry out their duties with good intentions. The liability visited upon these good folks is rarely the result of intentional bad acts. Rather, it is often due to unclear communications, lack of documentation, or a failure to recognize that the situation presents a potential for conflict of interest.

These materials will focus on four areas in which potential for conflicts of interest arise frequently in the estate planning practice (or at least areas in which well meaning lawyers can be accused of having a conflict of interest even though one may not exist):

1. Lawyers naming themselves as fiduciaries in documents they prepare.
2. Lawyers preparing documents which appoint corporate fiduciaries that their firms represent or work with on other matters.
3. Lawyers preparing documents which make gifts to charities with which the lawyer or the firm have a significant relationship.
4. Lawyers representing multiple generations of the same family in their estate planning.

It is my intent is to highlight commonly encountered issues for the purpose of discussion and consideration. I do not suggest, nor do I contend, that these materials, or the authorities cited herein, are minimum standards of care or required standards of practice. The concepts discussed in the following pages should be analyzed in light of this fact.

¹ *Urban Dictionary, Danger Will Robinson!*,
<[http://www.urbandictionary.com/define.php?term=Danger%2C%20Will%20Robinson!](http://www.urbandictionary.com/define.php?term=Danger%2C%20Will%20Robinson!>)>

II. Gifts to Lawyers

Before addressing the more nuanced issues above, I will start with a discussion of an issue which most would agree is an easy one- *gifts to lawyers*. The issue of whether an attorney may draft a will in which he or she is named as a beneficiary is not a new or novel question. As explained by Honorable Judge Lauren C. Laughlin in the Estate of Virginia Murphy, Case 06-6744ES-4 (Fla. Cir. Ct. August 1, 2008), the prohibition on the scrivener of a will inheriting under it dates back to Roman law. Murphy, at 7 (*citing* Dig. 48.15 supplement to the *lex cornelia* ordered in edict by Emperor Claudius).

In Florida, the Rules Regulating the Florida Bar have followed this historic proscription:

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 person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to client.

Rule 4-1.8(c) of the Rules Regulating the Florida Bar.

On its face, Rule 4-1.8 prohibits a lawyer from preparing a will, trust, or other written instrument making a substantial testamentary or inter vivos gift to the lawyer or the lawyer's family except in the limited circumstance when the recipient of the gift is related to the client.² Given the nature of the confidential relationship between a lawyer and a client, Rule 4-1.8(c) serves the important purpose of protecting the client from potential overreaching and impropriety by the lawyer by prohibiting the lawyer from preparing the instrument making the gift.³

Until this past legislative session, the violation of this Rule did not, however, render the gift to the lawyer void as a matter of law. As a consequence, a lawyer could violate this Rule and, under certain circumstances, still be entitled to retain the gift or bequest from his or her client even though the lawyer is subject to discipline. Courts in Florida refused to declare a gift in violation of the ethical rule void as a matter of law. In Agee v. Brown, 73 So. 3d 882 (Fla. 4th DCA 2011), the 4th DCA reversed the trial court which had found that a gift to a drafting lawyer under a will was void as a matter of law because it violated Rule 4-1.8 and public policy. The Agee court held that the trial court had improperly "incorporated Rule 4-1.8(c) of the Rules Regulating The Florida Bar into the statutory framework of the probate code." Id. at 886. The court found that this interpretation was erroneous as "[i]t is a well-established tenet of statutory construction that courts are not at liberty to add words to the statute that were not placed there by the Legislature." Id. The court noted that the "best way to protect the public from unethical

² Rule 4-1.8 does not attempt to define related other than to say the lawyer and client must be related "by blood or marriage". See R. Regulating Fla. Bar 4.1-8(c), comment "Gifts to Lawyers".

³ There have been a number of reported decisions wherein lawyers have been sanctioned for violating this Rule. *See, e.g., The Florida Bar v. Poe*, 786 So. 2d 1164 (Fla. 2001)(wherein a lawyer was disbarred for preparing a will that included a \$15,000 bequest to the lawyer and named the lawyer as personal representative of the estate); The Florida Bar v. Anderson, 638 So. 2d 29 (Fla. 1994)(wherein an attorney with a perfect disciplinary record received a 91 day suspension for drafting numerous wills for the same client over a period of years which contained bequests for the attorney or his wife).

attorneys in the drafting of wills . . . is entirely within the province of the Florida Legislature.” *Id.* at 887.⁴

It was against this backdrop that the Florida Legislature passed Florida Statute § 732.806. Under Florida Statutes § 732.806, effective October 1, 2013, a gift to a lawyer, or certain persons related to, or affiliated with, the lawyer, is void if the lawyer prepared the instrument making the gift, or solicited the gift, unless the lawyer or recipient of the gift is related to the client. The statute recognizes the inherent conflict of interest in a lawyer preparing a document under which they or members of their family receive a bequest.

The new legislation renders any part of a written instrument which makes a gift to a lawyer, or a person related to the lawyer, void if the lawyer prepared or supervised the execution of the written instrument, or solicited the gift, unless the lawyer or other recipient of the gift is related to the person making the gift. The new section makes the gift *void* rather than *voidable*. The statute makes an exception for the typical situation in which the lawyer prepares a document for a family member or other related person.

The new statute prevents unnecessary litigation over whether the client intended to make the gift to the lawyer taking the case out of a contested evidentiary proceeding after the decedent’s death. The statute does not prevent a lawyer from inheriting from a client. Indeed, a client is free to draft a will or other instrument making a gift to the lawyer or the lawyer’s family. The statute merely prevents the lawyer or persons related to the lawyer from preparing the document making the gift. In such circumstances, the client should be advised to go to an independent lawyer to have the instrument making the gift prepared. This tracks the recommendation in the Comment to Rule 4-1.8(c). The new section reads as follows:

732.806 Gifts to lawyers and other disqualified persons.—

(1) Any part of a written instrument which makes a gift to a lawyer or a person related to the lawyer is void if the lawyer prepared or supervised the execution of the written instrument, or solicited the gift, unless the lawyer or other recipient of the gift is related to the person making the gift.

(2) This section is not applicable to a provision in a written instrument appointing a lawyer, or a person related to the lawyer, as a fiduciary.

(3) A provision in a written instrument purporting to waive the application of this section is unenforceable.

(4) If property distributed in kind, or a security interest in that property, is acquired by a purchaser or lender for value from a person who has received a gift in violation of this

⁴ The *Agee* decision is particularly interesting because the lawyer in that case was the one contesting the last will of the decedent in the hopes of reinstating a bequest to the lawyer and his wife under a prior will of his former client (and friend). *Id.* at 884. The beneficiaries successfully convinced the trial court to dismiss the will contest on the basis that the lawyer lacked standing to contest the validity of the last will because the gift to the lawyer and his wife violated the ethical rule. *Id.* at 885. The 4th DCA reversed. *Id.* at 887. On remand, the personal representative and beneficiaries will be forced to defend the validity of the decedent’s last will against a challenge *by the lawyer*. *Id.*

section, the purchaser or lender takes title free of any claims arising under this section and incurs no personal liability by reason of this section, whether or not the gift is void under this section.

(5) In all actions brought under this section, the court must award taxable costs as in chancery actions, including attorney fees. When awarding taxable costs and attorney fees under this section, the court may direct payment from a party's interest in the estate or trust, or enter a judgment that may be satisfied from other property of the party, or both. Attorney fees and costs may not be awarded against a party who, in good faith, initiates an action under this section to declare a gift void.

(6) If a part of a written instrument is invalid by reason of this section, the invalid part is severable and may not affect any other part of the written instrument which can be given effect, including a term that makes an alternate or substitute gift. In the case of a power of appointment, this section does not affect the power to appoint in favor of persons other than the lawyer or a person related to the lawyer.

(7) For purposes of this section:

(a) A lawyer is deemed to have prepared, or supervised the execution of, a written instrument if the preparation, or supervision of the execution, of the written instrument was performed by an employee or lawyer employed by the same firm as the lawyer.

(b) A person is "related" to an individual if, at the time the lawyer prepared or supervised the execution of the written instrument or solicited the gift, the person is:

1. A spouse of the individual;
2. A lineal ascendant or descendant of the individual;
3. A sibling of the individual;
4. A relative of the individual or of the individual's spouse with whom the lawyer maintains a close, familial relationship;
5. A spouse of a person described in subparagraph 2., subparagraph 3., or subparagraph 4.; or
6. A person who cohabitates with the individual.

(c) The term "written instrument" includes, but is not limited to, a will, a trust, a deed, a document exercising a power of appointment, or a beneficiary designation under a life insurance contract or any other contractual arrangement that creates an ownership interest or permits the naming of a beneficiary.

(d) The term "gift" includes an inter vivos gift, a testamentary transfer of real or personal property or any interest therein, and the power to make such a transfer regardless of whether the gift is outright or in trust; regardless of when the transfer is to

take effect; and regardless of whether the power is held in a fiduciary or nonfiduciary capacity.

(8) The rights and remedies granted in this section are in addition to any other rights or remedies a person may have at law or in equity.

III. Fiduciary Appointments

A. Drafting Lawyer Named as Fiduciary

Fiduciary appointments are treated much different than client gifts under the law. Indeed, the new gifts to lawyers statute makes it absolutely clear that it has no application to the appointment of a fiduciary. See Fla. Stat. 732.806(2). The Comments to Rule 4-1.8(c) of the Florida Rules of Professional Conduct specifically recognize that:

“This rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as personal representative of the client’s estate or to another potentially lucrative position.”

Id.

There are many good reasons why a client may wish to appoint their attorney as a fiduciary. Many commentators have pointed out that often the lawyer who drafts the will or trust is the one best-suited to serve as personal representative or trustee because of their training in issue spotting and analysis, substantive law, communication, conflict resolution, and legal ethics. *See generally* ABA Formal Op. 02-426 (May 31, 2002); Edward D. Spurgeon & Mary Jane Ciccarello, *The Lawyer in Other Fiduciary Roles: Policy and Ethical Considerations*, 62 *Fordham L. Rev.* 1357, 1378-79 (1994).

However, this does not mean that a lawyer may *solicit* such appointments with impunity. **The comments to Rule 4-1.8 caution that a lawyer who prepares a document appointing the lawyer or another lawyer in the firm as a fiduciary is subject to the general conflict of interest provisions in Rule 4-1.7 “when there is a significant risk that the lawyer’s interest in obtaining the appointment will materially limit the lawyers independent professional judgment in advising the client concerning the choice of a personal representative or other fiduciary.” Id. The comment provides that in “obtaining the client’s *informed consent* to the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer’s financial interest in the appointment, as well as the availability of alternative candidates for the position.”**

"Informed consent", as defined in the Preamble to the Rules Regulating the Florida Bar, “denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.” R. Regulating Fla. Bar Preamble “Terminology”. The Comments to the Preamble go on to explain that the:

communication necessary to obtain such consent will vary according to the rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.

R. Regulating Fla. Bar Preamble, Comment "Informed Consent".

So what should be discussed with and disclosed to a client when the client has requested that the drafting lawyer serve in a fiduciary role? There are a number of sources of good guidance. The American College of Trusts and Estates Counsel ("ACTEC") has promulgated Commentaries to the Model Rules of Professional Conduct which contain an extensive discussion concerning the appointment of the lawyer as a fiduciary. *See ACTEC Commentaries on the Model Rules of Professional Conduct, ACTEC Commentary on MRPC 1.7* (ACTEC Foundation 4th ed. 2006). The ACTEC Commentaries provide that "a lawyer should be free to prepare a document that appoints the lawyer to a fiduciary office so long as the client is properly informed, the appointment does not violate the conflict of interest rule of MRPC 1.7, and the appointment is not the product of undue influence or improper solicitation by the lawyer."

The Commentaries note that:

"a client is properly informed if the client is provided with information regarding the role and duties of the fiduciary, the ability of a lay person to serve as fiduciary with legal and other professional assistance, and the comparative costs of appointing the lawyer or another person or institution as fiduciary."

Id.

The American Bar Association has issued a Formal Opinion on this issue as well. The ABA opines that:

One of a lawyer's important responsibilities in providing estate planning for his client is to help her select an appropriate personal representative to administer her estate and a trustee to manage any trust established by the will. The lawyer is required by Rule 1.4(b) to discuss frankly with the client her options in selecting an individual to serve as fiduciary. This discussion should cover information reasonably adequate to permit the client to understand the tasks to be performed by the fiduciary; the fiduciary's desired skills; the kinds of individuals or entities likely to serve most effectively, such as professionals, corporate fiduciaries, and family members; and the benefits and detriments of using each, including relative costs. When exploring the options with his client, the lawyer may disclose his own availability to serve as a fiduciary. The lawyer must not, however, allow his potential self interest to interfere with his exercise of independent professional judgment in recommending to the client the best choices for fiduciaries. When there is a significant risk that the lawyer's independent professional judgment in advising the client in the selection of a fiduciary will be materially limited because of the potential amount of the fiduciary compensation or other factors, the lawyer must obtain the client's informed consent and confirm it in writing. When the client is considering appointment of the lawyer as a fiduciary, the lawyer must inform the client that the lawyer will receive compensation for serving as fiduciary, whether the amount is subject to statutory limits or court approval, and how the compensation will be calculated and approved. The lawyer also should inform the client what skills the lawyer will bring to the job as well as what skills and services the lawyer expects to pay others to provide, including management of investments, custody of assets, bookkeeping, and accounting. The lawyer should learn from the client what she expects of him as fiduciary and explain any limitations imposed by law on a fiduciary to help the client make an informed decision. One reason for selecting the lawyer as fiduciary is his capacity to handle the legal services that will be required from time to time. The lawyer should discuss with the client the fact that the lawyer, acting as fiduciary, may select himself or his firm to serve as the lawyer for the trust or estate, with the result that additional fees may be received by the lawyer.

ABA Formal Op. 02-426 (May 31, 2002).

Because of the potential for overreaching, some states have enacted statutory safeguards to ensure that the decision by the client to select the lawyer as fiduciary is an informed one. In California, a drafting lawyer who is unrelated to the client is subject to removal unless (1) an independent attorney certifies on a statutory form that the appointment was not the product of fraud or undue influence before the document is executed or (2) the court finds that it is consistent with the settlor's intent that the trustee continue to serve and that the appointment was not the product of fraud or undue influence. Cal. Prob. Code § 15642(b)(6). The California

statutes also limit the amount of compensation that the attorney can receive. California Probate Code § 10804 specifically provides that “a personal representative who is an attorney shall be entitled to receive the personal representative's compensation as provided in this part, *but shall not receive compensation for services as the attorney for the personal representative unless the court specifically approves the right to the compensation in advance and finds that the arrangement is to the advantage, benefit, and best interests of the decedent's estate.*”

New York has followed a similar approach requiring the client sign an affidavit acknowledging the alternatives for the appointment of an executor and the nature and extent of the compensation that the lawyer may be entitled to receive. The failure to obtain the affidavit reduces the amount of the executor commissions payable to the lawyer by one-half. *See* NY Surr. Ct. P. R. § 2307-a.

Some have argued that our Florida Statutes already permit the lack of disclosures made to the client to be considered in setting a fee for a lawyer who serves in the dual roles of personal representative and attorney for the personal representative. *See* John Arthur Jones and Rohan Kelley, *Fees and Other Expenses of Administration, PRACTICE UNDER FLORIDA PROBATE CODE* §15.52 (Fla. Bar CLE 2010). The Florida Statutes allow the Court to consider the fees paid to the personal representative in other capacities in setting a reasonable fee. “Any fees and compensation paid to a person who is the same as, associated with, or employed by, the personal representative shall be taken into consideration in determining the personal representative’s compensation.” Fla. Stat. § 733.612(19). ABA Opinion 02-426 discussed above provides that the fiduciary compensation that a lawyer and his firm receive for time and labor is relevant in determining what amount of fees is ethically permissible and reasonable under Model Rule 1.5(a). A lawyer who charges excessive compensation as a fiduciary could be found guilty of a bar violation. In Florida Bar v. Della-Donna, 583 So. 2d 307, 309 (Fla. 1989), a lawyer was disbarred for 5 years for charging excessive fiduciary fees and engaging in conflict of interest transactions in various fiduciary capacities as personal representative and trustee.

There have been a number of cases and ethics opinions wherein lawyers have been criticized for soliciting or routinely preparing documents appointing themselves as fiduciaries. Michigan Eth. Op. RI-291 (1997) draws a distinction between accepting an appointment if asked independently by the client and suggesting or soliciting the appointment by the lawyer. The Michigan Bar indicated that solicitation of a fiduciary appointment is akin to solicitation of legal work which is clearly a violation of the bar rules. In State v. Gulbankian, 196 N.W.2d 733 (Wis. 1972), lawyers were disciplined for consistently drafting wills which named themselves or their relatives as fiduciaries. In that case, the lawyers filed 135 wills, which they had drafted, for probate in their local county over a period of 14 years. Only one will of those wills failed to name a member of the lawyer’s family to some fiduciary capacity. The Gulbankian court found that there sheer number of wills was sufficient to raise an inference that the attorneys had solicited their appointments. The court held that “an attorney cannot solicit either directly or by any indirect means a request or direction of a testator that he or a member of his firm be named executor or be employed as an attorney to probate the estate” nor can the attorney “use a will form which provides for a designation of an attorney for the probate of the estate or executor for submission to the testator on the theory it is properly a part of a standard form of a will; no such form of suggestion may be used.” The court noted that an attorney, merely because he drafts a will, “has no preferential claim to probate it.”

New York Eth. Op. 481 (1977) cautions that a lawyer may prepare a will in which the lawyer is appointed as fiduciary only if there has been a longstanding relationship between the lawyer and client and the suggestion that the lawyer serve as fiduciary originates with the client.

As set forth above, there is no, per se, statutory or ethical prohibition in Florida on lawyers preparing documents appointing themselves as fiduciaries. However, it is important to document the nature of the disclosure which was made to the client to avoid allegations of overreaching and improper conduct. Former EC 5-6 of The Florida Bar Code of Professional Responsibility provided: "**A lawyer should not consciously influence a client to name him as executor, trustee, or lawyer in an instrument. In those cases, where a client wishes to name his lawyer as such, care should be taken by the lawyer to avoid even the appearance of impropriety**".

The confidential nature of testamentary planning makes the importance of documenting the disclosures made to the client particularly important. As noted by the Honorable Circuit Judge Lauren Laughlin in Estate of Virginia Murphy, Case 06-6744ES-4 (Fla. Cir. Ct. August 1, 2008):

The nature of the attorney-client relationship in matters testamentary is a particularly circumspect matter for the courts. The decisions that go into the drafting of a testamentary instrument are inherently private. Because the testator will not be available to correct any errors that the attorney may have made when the will is offered for probate, a client is especially dependent upon an attorney's advice and professional skill when they consult an attorney to have a will drawn. A client's dependence upon, and trust in, an attorney's skills, disinterested advice, and ethical conduct exceeds the trust and confidence found in most fiduciary relationships. Seldom is the client's dependence upon, and trust in, his attorney greater than when, contemplating his own mortality, he seeks the attorney's advice, guidance and drafting skill in the preparation of a will to dispose of his estate after death. These consultations are among the most private to take place between an attorney and his client. 'The client is dealing with his innermost thoughts and feelings, which he may not wish to share with his spouse, children and other next of kin'.

Murphy, at 8 (quoting Kirschbaum v. Dillon, 567 N.E. 2d 1291, 1296 (Ohio 1991)).

In the case of Rand v. Giller, 489 So. 2d 796 (Fla. 3d DCA 1986), the court grappled with the difficulties involved when a lawyer fails to confirm the nature of the discussion concerning the selection of a fiduciary in writing. In Rand v. Giller, a beneficiary and co-personal representative of an estate filed an action to remove a lawyer, Mr. Giller, who had prepared a will which nominated himself as personal representative. Mr. Giller had only known the decedent for a "few hours" at the time the will was prepared. Judge Nesbitt, writing for the court, noted that:

Giller testified that he attempted to discourage Mrs. Rosen from appointing him and his law firm as co-personal representative and trustee, but that she indicated a

desire that they serve in those capacities. There was no documentary or testimonial evidence to corroborate that fact. *For the benefit of the bar, we strongly suggest that attorneys establish procedures for such cases which allow for evidence, other than the self-serving testimony of the attorney involved, of the care taken to avoid the appearance of impropriety.*

Rand v. Giller, 489 So. 2d at 797, n. 2.⁵

Rule 4-1.8 provides that fiduciary appointments are subject to the conflict provisions of Rule 4-1.7. Rule 4-1.7 requires that waivers of conflicts be “confirmed in writing”. “Confirmed in writing” is a defined term in the Preamble to the Bar Rules. “Confirmed in writing, when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent.” R. Regulating Fla. Bar Preamble, “Terminology.”

Bruce Stone and Rohan Kelley have graciously allowed me to share proposed letters which make disclosures to the client concerning the appointment of a lawyer as a fiduciary. The letters are included in the appendix to these materials. Both letters contain the types of disclosures which have been discussed in these materials.

B. Attorney Conflicts and Liability in Recommending a Fiduciary

It is common for a drafting lawyer to be asked by a client for a suggestion as to who should serve as corporate fiduciary. When this issue arises, practitioners should consider the potential for allegations of conflict if the client ultimately selects a fiduciary which the lawyer or the lawyer’s firm represents on unrelated matters. **The ACTEC Commentaries to the Model Rules provide that a client should be informed “of any significant lawyer-client relationship that exists between the lawyer or the lawyer’s firm and a corporate fiduciary under consideration.”** ACTEC Commentary on MRPC 1.7, Appointment of Scrivener as Fiduciary. The Commentaries caution that:

The lawyer advising a client regarding the selection and appointment of a fiduciary should make full disclosure to the client of any benefits that the lawyer may receive as a result of the appointment. In particular, the lawyer should inform the client of any policies or practices known to the lawyer that the fiduciaries under consideration may follow with respect to the employment of the scrivener of an estate planning document as counsel for the fiduciary. The lawyer may also point out that a fiduciary has the right to choose any counsel it wishes. If there is a significant risk that the lawyer’s independent professional judgment in the selection of a fiduciary would be

⁵ The court in Rand v. Giller ultimately concluded that the lawyer did not receive a “substantial benefit” by virtue of the appointment and that the beneficiary could not therefore state a claim for removal on the basis of undue influence. The court cited a line of cases which makes it clear that, because any compensation paid is for actual work performed and liability incurred, there is no substantial benefit to serving as a fiduciary. *Id.* at 797 citing Zinnser v. Gregory, 77 So.2d 611, 613-14 (Fla.1955) and Allen v. Estate of Dutton, 394 So.2d 132, 134 (Fla. 5th DCA 1980).

materially limited by the lawyer's self interest or any other factor, the lawyer must obtain the client's informed consent, confirmed in writing.

ACTEC Commentary on MRPC 1.7, Selection of Fiduciaries.

In Gunster, Yoakley & Stewart, P.A. v. McAdam, 965 So. 2d 182 (Fla. 4th DCA 2007), two beneficiaries sued the law firm alleging that a lawyer in the firm wrongfully procured a corporate fiduciary's appointment and "caused the estate administration to be more expensive" by suggesting a client of the firm to serve as a fiduciary. The beneficiaries sought damages for "all avoidable probate expenses" as well as disgorgement of fees paid for estate planning.

Bruce Stone's proposed engagement letter, which is included in the appendix to these materials, contains sample disclosures to the client regarding the fact that the lawyer represents various corporate fiduciaries on other matters and that those institutions refer work to the firm:

Our firm works with various banks, trust companies, and other financial institutions. Sometimes we may represent those institutions as clients, either in a fiduciary capacity such as when they serve as personal representatives or trustees, or directly such as when defending them in litigation matters. Those institutions may refer potential clients to our firm, and we may recommend their services to our clients. If you ask us to recommend a financial institution for your estate planning arrangements, it is possible that we may have separate attorney-client relationships with the institution or institutions we recommend. If you name a corporate fiduciary to serve as your personal representative or trustee, it is represent it in performing its duties (assuming that there are no conflicts of interest). You acknowledge that the decision whether to use a corporate fiduciary and the selection of a particular institution is your responsibility, even if you ask us for advice and recommendations.

Florida law does not fix compensation for personal representatives or trustees, although statutory guidelines are given for fees for personal representatives. You are free to negotiate the amounts that will be paid as compensation to your personal representative or trustee, and do not have to agree that fees (including termination fees) will be paid to a corporate fiduciary based on its standard fee schedule.

C. Can the Lawyer Include a Provision in a Document Requiring that the Lawyer's Firm Be Retained as Counsel?

The ACTEC Commentaries generally caution against preparing a document which directs the fiduciary to retain the drafting lawyer's firm as counsel:

The ethical propriety of a lawyer drawing a document that directs a fiduciary to retain the lawyer as his or her counsel involves essentially the same issues as does the appointment of the scrivener as fiduciary. However, although the appointment of a named fiduciary is generally necessary and desirable, it is usually unnecessary to designate any particular lawyer to

serve as counsel to the fiduciary or to direct the fiduciary to retain a particular lawyer. Before drawing a document in which a fiduciary is directed to retain the scrivener or a member of his firm (see MRPC 1.8(k)) as counsel, the scrivener should advise the client that it is neither necessary nor customary to include such a direction in a will or trust. A client who wishes to include such a direction in a document should be advised as to whether or not such a direction is binding on the fiduciary under the governing law. In most states such a direction is usually not binding on a fiduciary, who is generally free to select and retain counsel of his or her own choice without regard to such a direction.

ACTEC Commentary on MRPC 1.7, Designation of Scrivener as Attorney for the Fiduciary.

In Florida, such provisions are not enforceable. *See* Pallot v. Friedlander, 83 So. 2d 853 (Fla. 1955). In Pallot, the Florida Supreme court held that a fiduciary is entitled to select their own counsel. *Id.* at 854. The court reasoned that: “an attorney and client relationship is one of the closest and most personal and fiduciary in character that exists. The client relies upon the attorney and places confidence in him. To require her to select one who she does not know or one in whom she may not have confidence . . . would be tantamount to denying her the free exercise of her own judgment and confidence at the outset of the administration and could well lead to friction from the beginning.” *Id.* The Court stated that the selection of counsel “cannot be dictated to or selected by a decedent in a will.” The Court referred to such language as “persuasive only”. *Id.*

D. Drafting Considerations

As indicated above, there are many good reasons why a client may choose to appoint a lawyer as fiduciary, including, among other things, their knowledge and experience in the area as well as the familiarity with the client’s wishes and affairs. Likewise, a client may choose to appoint a corporate fiduciary with whom the lawyer has a long-standing relationship. To avoid arguments of conflict of interest, the typical boilerplate provisions in the document should be reviewed to determine whether they are appropriate. Standard clauses in a will or trust can sometimes raise questions.

For example, many wills and trusts contain exculpatory provisions. Florida Statutes § 736.1011 provides that an exculpatory provision is unenforceable to the extent that it was inserted into the trust instrument as a result of an abuse by the trustee of a fiduciary or confidential relationship with the settlor. An exculpatory term drafted or caused to be drafted by the trustee is invalid as an abuse of fiduciary or confidential relationship unless the clause is fair under the circumstances and the term’s existence and contents were adequately communicated directly to the settlor or the independent attorney of the settlor. Fla. Stat. §736.1011(2); see also Fla. Stat. § 733.620 (addressing exculpatory provisions in wills in an identical way). In Petty v. Privette, 818 S.W.2d 743 (Tenn. Ct. App. 1989), the court held that a scrivener could only rely on exculpatory provisions in a will which named him as executor if he rebutted the presumption that the inclusion of the exculpatory clause in the will resulted from undue influence. *See also* Fred Hutchinson Cancer Research Center v. Holman, 732 P.2d 974, 980 (Wash. 1987)(The

scrivener of a will “is precluded from reliance on the clause to limit his own liability when the testator did not receive independent advice as to its meaning and effect.”). It is also important to consider the impact of Rule 4-1.8(h) which provides that “a lawyer shall not make an agreement prospectively limiting the lawyer’s liability to a client for malpractice unless permitted by law and the client is independently representing in making the agreement.” The ACTEC Commentaries provides that: “[u]nder some circumstances and at the client's request, a lawyer may properly include an exculpatory provision in a document drafted by the lawyer for the client that appoints the lawyer to a fiduciary office ... The lawyer ordinarily should not include an exculpatory clause without the informed consent of an unrelated client.”

Other clauses to consider include boilerplate compensation provisions, waivers of the prudent investor rule, and removal provisions. In some cases, beneficiaries have argued that as part of the “conflict”, the lawyer allowed a corporate fiduciary client to self deal by investing in institutional products, to be compensated at standard fee schedules, and to be locked into the fiduciary position by not providing a mechanism for removal and replacement.

IV. Gifts to Charities

Another common scenario which presents potential conflict of interest considerations is the issue of a lawyer preparing a will or trust which makes a gift to a charity with which the lawyer has an affiliation. For example, many estate planning lawyers serve on the boards or as officers of local charities. It is generally not improper for a lawyer to prepare an instrument which makes a gift to a charity with which the lawyer is the affiliated. However, there are a number of conflict of interest and undue influence issues which come into play.

One of the leading ethics opinions which is cited frequently in this area is Oregon Ethics Opinion 525 (1989). The opinion addresses two separate issues: (a) whether the lawyer who represents a charitable organization and sits on its board may draft a will in which the charity is designated as a beneficiary if the lawyer discloses his or her representation of the charity to the testator; and (b) whether the lawyer may prepare a document for the client making a lifetime gift to that charity.

Under the facts of the ethics opinion, the lawyer represented the charity on a continuing basis and was also a member of its board of directors. The lawyer’s client asked the lawyer to assist him in making a sizable gift to the charity. The client also asked the lawyer to prepare a will in which the charity would be a named beneficiary. The opinion answered the following questions: (a) may the attorney represent both the charity and the donor in the charitable gift transaction? (No); (b) may the attorney represent only the donor in the charitable gift transaction? (Yes, qualified); and (c) may the attorney prepare the donor's will naming the charity as a beneficiary? (Yes, qualified)

The opinion cited to Oregon’s Model Rules of Professional Conduct, Rule 1.7, which is similar to Florida Rule 4-1.7:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a current conflict of interest. A current conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client;

(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;

(3) the lawyer is related to another lawyer, as parent, child, sibling, spouse or domestic partner, in a matter adverse to a person whom the lawyer knows is represented by the other lawyer in the same matter.

(b) Notwithstanding the existence of a current 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 obligate the lawyer to contend for something on behalf of one client that the lawyer has a duty to oppose on behalf of another client; and

(4) each affected client gives informed consent, confirmed in writing.

The opinion concluded that because of the potential for differing interests or positions between charity and donor concerning the terms of the transaction, representation of both charity and donor in a transaction making a gift would constitute a prohibited, nonwaivable conflict of interest under Oregon RPC 1.7(a)(1) and (b)(3). The opinion compared such a transaction to that in which the lawyer undertakes simultaneously to represent both sides of a buyer-seller, lender-borrower, or similar transaction.

The Oregon Bar concluded, however, that lawyer could proceed with preparing the documents necessary to make the gift if the lawyer only represented the donor even though the lawyer continued to represent the charity in other matters and to serve on its board. The opinion noted that “when, as here, there is a significant risk that Lawyer's representation of Donor would be materially limited by Lawyer's obligations to Charity, the representation is permissible with the informed consent of all clients, confirmed in writing.” The opinion notes that the same rules would apply to the lawyer's efforts to draft the donor's will if the charity is to be a beneficiary. The opinion concluded that, in both instances, there is a significant risk, that the lawyer's representation of the donor would be materially limited by lawyer's obligations to the charity. As a consequence, the Oregon Bar found that, under the circumstances, the lawyer would have to obtain “informed consent, confirmed in writing” pursuant to Rule 1.7(b) from both the donor and the charity before undertaking the work.

In Maryland State Bar Association Ethics Opinion 2003-09, the bar was requested to opine on whether an attorney who chairs his church's legacy committee could prepare, on a pro bono basis, wills for parishioners in which the parishioners bequeath property to the church. The facts of the opinion were a bit peculiar in that the lawyer would be chairing a church committee that “promotes legacy giving from its parishioners (i.e., bequests in wills, charitable trusts, charitable annuities, etc.)” As chair, the lawyer was expected to “explain the program to parishioners.”

Like Oregon, the Maryland Bar concluded that the lawyer's role on the church's legacy committee implicated Rule 1.7(b). The Maryland Bar noted that under Rule 1.7(b), in order to represent fellow parishioners, the lawyer would have to reasonably believe that his representation of such parishioners would not be "adversely affected" by his responsibilities to his church or his own interests before obtaining a parishioner's consent to such representation. However, in the Maryland opinion, the lawyer was actually being put in the position of talking to parishioners about making a gift to the church. The Maryland Bar concluded that it was unethical to proceed with the representation under such circumstances:

"It is the consensus of the Committee, which correlates to the hypothetical "disinterested attorney" referred to in the comments to Rule 1.7, that such a belief would not be reasonable, and that consequently, you cannot simultaneously serve as a member of the Legacy Committee and represent parishioners in connection with their estate planning when they may contemplate a gift or bequest to the church. The Committee's opinion in this regard is based upon Rule 2.1 which provides that "(i)n representing a client, a lawyer shall exercise independent professional judgment and render candid advice." Similarly, Rule 5.4C provides that "(a) lawyer shall not permit a person who recommends the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services." The Committee believes that your laudable interest in advancing your church's interests would inevitably compromise your independent professional judgment in advising practitioners regarding whether their own interests will be served by such giving in general or by bequests to your church in particular, as issues regarding the nature, magnitude, and timing of parishioners' giving might be affected by considerations relating to your church's financial needs. The Committee also has reservations regarding whether parishioners would be sophisticated enough to weigh the risks involved in order to knowingly consent to your representation. Consequently, it is the Committee's opinion that the conflict posed by virtue of your membership on the Legacy Committee will not be able to be addressed by the consultation and consent requirements of Rule 1.7(b)(2) and (c) (and/or Rule 2.2) and that to advise parishioners as you propose, you would have to resign from the Legacy Committee."

A similar issue was presented in Washington State Bar Association Ethics Opinion 1568 (1994). The lawyer in that case inquired whether a law firm can enter into a business arrangement with a charitable organization to represent church members wishing to make charitable donations to the church. The charity wanted to recommend the firm to members who asked for recommendations for an attorney to prepare the documents for donating to the church. The charity would pay for the prospective donor to have the attorney review the documents. In addition, the law firm could be asked to do legal work on general charity matters unrelated to the giving department. The Washington Bar was of the opinion that the proposed arrangement for representation was impermissible on three grounds:

1) It would be a conflict of interest under RPC 1.7(b) if the firm represents the charity on general matters because under the plan, the lawyer's duty to the client/donor competes with the lawyer's duty to the church.

2) It would violate RPC 1.7(b)(2) because the plan does not allow for consultation and full disclosure to the client; and

3) The communication between the client/donor and the lawyer would be violated under RPC 1.4(b).

In addition to these ethical issues, gifts to the charities with which the lawyer is affiliated implicate issues of undue influence. As explained above in the discussion in In re Estate of Murphy, a will or trust procured by the undue influence of a lawyer is void. Under Florida law, a presumption of undue influence will arise when three elements are present: (1) the existence of a confidential or fiduciary relationship between the decedent and the procurer of a will; (2) the active participation of the procurer in the planning and drafting of the will; and (3) the realization by the procurer of a substantial benefit under the provisions of the will. In Re Estate of Carpenter, 253 So.2d 697 (Fla.1971); Allen v. Dutton, 394 So.2d 132 (5th DCA 1981) In Re Estate of Nelson, 232 So.2d 222 (Fla. 1st DCA 1970).

Generally, the drafting attorney will almost always satisfy the first two prongs of this analysis: "fiduciary or confidential relationship" and "active procurement". *See, e.g. Allen*, 394 So. 2d at 134-35. The issue will be whether a gift to a charity selected by the lawyer meets the test of "substantial benefit".

In Allen, the lawyer was not only named as the personal representative and trustee under the will but had "absolute discretion to distribute the bulk of [the decedent's] estate" to charities selected by the lawyer. The court held that under those circumstances the lawyer had "sufficient collateral benefits" to make him a substantial beneficiary of the will. *Id.* 134-35. *See also In Re Estate of Nelson*, 232 So.2d 222 (Fla. 1st DCA 1970) (finding that the presumption of undue influence was raised where the attorneys were named as personal representatives and trustees and had "unlimited discretion to distribute the income or corpus thereof for such religious, educational, scientific, charitable, or literary purposes as they shall see fit.").

In re Estate of Edel, 700 N.Y.S.2d 664 (Sur. Ct. 1999), a gift under the will was attacked on undue influence grounds where the law firm represented the charity and the lawyer's partner served on the charity's board. The issue presented was whether a presumption of undue influence arose when an attorney prepares a will that leaves the bulk of the testator's estate to a charity that the attorney represents in its legal matters and also serves as chairman of the charity's board of directors. The decedent's estranged son and granddaughter contested a gift of \$250,000 and the residue of the estate to a hospital. They claimed that the attorney and the CEO of the hospital utilized "fraud and undue influence" to induce the gift.

The decedent had executed a will drafted by the lawyer in 1980 under which nothing was left to the hospital charity (although it did leave 40% to another hospital which was ultimately acquired by the charity named in the last will). In 1985, the lawyer became a member of the hospital board of directors, and later that year the hospital was named a 30% residuary legatee

under the decedent's new will. As time went on, and the lawyer's relationship with the decedent increased and the lawyer was ultimately appointed chairman of the board of the hospital, the percentage of the residue passing to the hospital increased to 100% of the residue.

The will contestants argued that the lawyer's relationship with the charity created a conflict of interest which required written consent by the client. However, the court refused to find that this presented a conflict as a matter of law. The court was "not convinced that an attorney draftsman who serves without pay on the board of directors of a charitable organization has a conflict of interest simply because the attorney's client names the charity in her will." The court noted that "such a holding would serve to discourage attorneys from serving on the boards of charitable and civic organizations."

Further, the court declined to apply cases which hold that a gift to the lawyer or lawyer's family are presumed to be void on undue influence grounds. The court held that the presumption of undue influence was not applicable to a situation where the lawyer is not the direct recipient of the gift. Notwithstanding the fact that the beneficiaries could not raise the presumption, the court held that the beneficiaries were entitled to a trial on whether the lawyer and the charity had engaged in undue influence noting that the beneficiaries raised a number of issues which warranted serious inquiry by the trier of fact.

The bottom line is that attorneys who render charitable planning advice must be mindful that charitable gift planning is governed by the same conflict of interest considerations as other areas of law practice.

V. Multigenerational Planning

It is fairly common for an estate and trust lawyer to represent multiple family members and multiple generations of the same family. This practice raises a number of issues which are worthy of consideration when a lawyer evaluates the ethical issues involved in an existing matter or a potential new matter. Among other things, what are an attorney's ethical obligations if a client requests that he or she prepare a will or codicil that substantially diminishes the share of a family member who is also a client?

This issue was addressed in Chase v. Bowen, 771 So. 2d 1181 (Fla. 5th DCA 2000). In Chase, a daughter sued her mother's lawyer for legal malpractice because he revised her mother's will omitting the daughter as a beneficiary. The lawyer represented the testator (mother), the daughter, and the alleged undue influencers on unrelated matters. The essence of the daughter's malpractice claim against the lawyer was that he committed a breach of professional ethics when he represented multiple family members continuously and over a period of time, including the time when he drafted amendments to the decedent's trust and will, which disinherited the daughter and replaced her with other beneficiaries (also his clients), and that he did not recuse himself or obtain the daughter's consent, after disclosure to her of his adverse representation. The daughter's contention was that if the lawyer had consulted with the daughter and obtained her consent to represent her mother, or if he had refused to represent the mother and sent her to another lawyer with no conflict of interest, she might have had a chance to inquire as to the reasons for her mother's change of mind and ascertain whether the change was the product

of undue influence. Due to his failure to comply with the ethical rule quoted above, the daughter claimed that she lost that opportunity. *Id.* at 1184.

The majority of the *Chase* court held that if a lawyer prepares the wills of various members of a family, he or she assumes no obligation to oppose any changes to the wills. Further, the lawyer is not precluded from assisting in the redrafting of the wills. *Id.* at 1182-83. The court stated that: **“It is our view that a lawyer who prepares a will owes no duty to any previous beneficiary, even a beneficiary he may be representing in another matter, to oppose the testator or testatrix in changing his or her will and, therefore, that assisting in that change is not a conflict of interest.”** Thus, the *Chase* court concluded that the lawyer breached no duty to the daughter.

The dissent in *Chase* argued that a lawyer has a conflict of interest in preparing a will which disinherits another current client. In a well articulated dissent, Judge Sharp opined as follows:

It is clear that an attorney should not represent two different clients (without disclosure and consent), who have adverse interests in the same transaction or series of transactions, all of which involve the same clients. Nor can an attorney, after representing a client, assume the representation of a different client in a later matter that is adverse to the first client's interest, again without consultation and consent. As alleged in this case, when [the lawyer] redrafted [the mother's] trust and will, he represented not only [the mother] and [the daughter], but also the [alleged undue influencers], the new beneficiaries . . . [i]t appears [the lawyer's] actions may have created a conflict of interest and a violation of this ethical rule.

The Professional Ethics of The Florida Bar Op 95-4 (May 30, 1997), approved by the Board of Governors in May of 1997, supports the conclusion that a breach of professional ethics occurred in this case. That opinion deals with a hypothetical husband and wife, who consult an attorney to draft their wills and do joint estate planning. Later the husband comes to the attorney seeking his advice on whether or not his wife would have the right to elect against his will, if she survived him, because he had executed a codicil leaving a substantial disposition to his mistress (unknown to his wife). This puts the lawyer in an ethical dilemma because he owes a duty of confidentiality to the husband, and yet he owes a duty of communication to the wife and a duty of loyalty—not to take steps to adversely affect her interest without her knowledge and consent.

The opinion concludes that the duty of confidentiality takes precedence, and the lawyer can not disclose the information to the wife. Further, the Committee concludes, the lawyer must withdraw from the representation of *both* the husband and the wife. In so doing, the lawyer should inform the wife that a conflict of interest has arisen that precludes the lawyer from continuing to represent her, and he could also say both the husband and wife should retain separate counsel. The Committee recognized that a sudden withdrawal by a lawyer almost certainly would raise suspicions on the part of the wife, which might alert her to the substance of the husband's adverse confidence. This appears to be more stringent

than other states' views, which would allow the lawyer, in his discretion to make the disclosure to the wife, but which consistent with the Florida opinion, would still require the lawyer to withdraw from representing either one.

Although this Florida opinion concerns a joint representation case, it is not clear in the instant case that [the lawyer] was not representing [the mother and daughter] jointly in their estate planning. But even if the representation in this case was not joint, the opinion would be applicable to require [the lawyer] to withdraw from representing [the mother], although it might not require [the lawyer] to tell [the daughter] a conflict of interest had arisen and that he could no longer represent either of them.

I believe enough facts have been alleged generally that [the daughter] might be able to state a cause of action against [the lawyer] for interference with her inheritance, caused and achieved by his breach of fiduciary duty owed to her as a client while representing the interests of [the mother] and the [alleged undue influencers], which were adverse to hers.

Id. at 1185.

Courts in other jurisdictions that have addressed this issue have sided with the majority in Chase. In Mali v. De Forest & Duer, 553 N.Y.S.2d 391, 392 (N.Y. App. Div. 1990), the court held that attorneys have no obligation to disclose to beneficiaries, who are also their current clients, any legal advice they may have given to the testator. The plaintiff in Mali argued that the attorney breached his fiduciary duty by failing to disclose recommendations the attorney made to the testator because it deprived him of the opportunity to discuss the issues with the testator. Id.

In dismissing this argument, the court held that attorneys have no obligation to inform the beneficiaries of advice they might have given to the testator regarding the estate plan. Id. The court reasoned that instead, under the rules of professional responsibility, they are required to preserve the testator's confidences and secrets. Id. Therefore, the court held that although the attorney was a long time legal advisor to the entire family and represented the beneficiary in other matters, the parties' relationship vis-à-vis the testator's will does not change. Id.

Similarly, in Thompson v. Deloitte & Touche, L.L.P., 902 S.W.2d 13, 16 (Tex. Ct. App. 1995) the court held that accountants have no duty to inform a beneficiary, who is also a former client, that the testator has changed his will. Again, the court found that they instead have a fiduciary duty to the testator not to reveal his confidences. Id. The beneficiaries in Thompson alleged that the accountants had a duty to tell them that the testator intended to change or had changed his will. Id. The beneficiaries claimed that if given the opportunity, they could have prevented the testator from making the changes. Id. In rejecting this argument, the court held that there is no cause of action for lost opportunity to prevent someone from changing his or her will. Id.

The beneficiaries also claimed the accountants breached their fiduciary duty by assisting the testator in making the changes. Id. at 17. However, the court found that the testator "knew what he was doing, did what he wanted to do, and had a right to do what he did with his

property." Id. Moreover, the court noted the accountants were following the testator's directions. Id. Therefore, despite the fact that the beneficiaries were current clients, the court found that the accountants did not injure the beneficiaries by helping the testator change his will or by keeping his confidences. Id. at 16-17.

Thus, under the current state of the law, an attorney may be able to prepare a will for a client that substantially reduces or eliminates a bequest to another client without breaching his or her fiduciary duties. Moreover, an attorney may have no fiduciary obligation to disclose client confidences to the beneficiaries of a will. However, as reflected by the position of the dissent in Chase, this continues to be a developing area where you should tread with caution.

The results of each of these cases might be different if the attorney actively misrepresents the contents of the testator's will to his or her client beneficiary. *See e.g.*, Hotz v. Minyard, 403 S.E.2d 634, 637 (S.C. 1991). In Hotz, the court held that while an attorney has no duty to disclose the existence of a second will against the testator's wishes, he does owe a beneficiary client the duty to deal with them in good faith and not actively misrepresent the contents of the first will. Id. In Hotz, the beneficiary under the will was a long time client of the attorney. Id. The testator executed a will in the beneficiary's presence. Id. at 635. Shortly thereafter, the testator executed a codicil changing the contents of the will and instructed the lawyer not to inform the beneficiary. Id. at 636. The beneficiary later asked the lawyer for advice regarding the testator's will. Id. The lawyer actively represented to his client beneficiary that the first will had not been changed in any way. Id.

The court found that although the attorney represented the testator and not the beneficiary regarding the testator's will, the attorney did have an ongoing attorney-client relationship with the beneficiary and the beneficiary had a "special confidence in him." Id. at 637. Therefore, the court held that the attorney owed the beneficiary a fiduciary duty to deal with her in good faith and not actively misrepresent the contents of the first will. Id.

The American Bar Association weighed in on these issues in Formal Opinion 05-434 of the Standing Committee on Ethics and Professional Responsibility. The ABA committee came to the conclusion that under most circumstances, it is not a conflict of interest for a lawyer to prepare a will that disinherits a beneficiary whom the lawyer represents on other matters. The ABA noted that the "preparation of an instrument disinheriting a beneficiary ordinarily is a simple, straightforward, almost ministerial task, without call for the lawyer to consider alternative courses of action, and it is difficult to imagine a circumstance in which a responsibility of the lawyer to her other client (even a client who is a presumptive beneficiary of the testator's bounty) would pose a significant risk of limiting the lawyer's ability to discharge her professional obligations to the testator."

The ABA committee stated, however, that the issue becomes more complicated if the testator asks for the lawyer's advice as to whether the beneficiary should be disinherited, or if the lawyer initiates such advice. The ABA opined that by "advising the testator whether rather than how, to disinherit the beneficiary, the lawyer has raised the level of engagement from the purely ministerial to a situation in which the lawyer must exercise judgment and discretion on behalf of the testator" creating the potential for conflicts of interest. Further, the ABA committee noted that a lawyer may owe a duty to a beneficiary who has made an estate plan based upon a "shared

assumption” that the testator has a particular plan in place. In these instances, the ABA concluded that there may be a risk that the lawyer’s responsibilities to the testator will be materially limited by his or her responsibilities to the beneficiaries.

Of course, there is no bright line rule governing the representation of multiple family members. You should analyze each set of circumstances independently to determine if the representation is proper. Depending on the circumstances, you may want to consider the following:

- Under Rule Regulating the Florida Bar 4-1.7(a), is the representation of one client “directly adverse” to another client? That is, is there a conflict as to the legal rights and duties of the client, not merely conflicting economic interests?
- Does a potential beneficiary named in a testamentary instrument have a legal right to the bequest, or is it merely an expectancy?
- Under Rule Regulating the Florida Bar 4-1.7(b), is there a significant risk that the representation of one client will be “materially limited” by the lawyer’s responsibility to another client? See also Florida Bar Ethics Opinion 87-1, which states that a lawyer may represent multiple parties having potential conflicts only if he reasonably believes the representation of any one of them will not be adversely affected by the lawyer’s responsibilities to the others, and if each client consents after consultation.
- Does the lawyer owe duties to prospective beneficiaries other than the duty to effect the testator’s intent? Is there a difference between advising the testator whether, rather than how, to disinherit a beneficiary?
- Is the lawyer limited by any shared assumptions in a family’s estate plan, or any contractual obligation as to the beneficiary?

Representation of multiple family members, although it may be common, is a delicate matter and should be undertaken with care. The lawyer should carefully craft the engagement letter and have a conflict waiver letter to ensure that the prospective clients have sufficient information to provide their “informed consent” to the joint representation. In addition, the lawyer would be well advised to use the initial writings to anticipate and address some of the issues that may arise during the course of the representation. A copy of the form ACTEC Engagement Letters for joint and separate representation of multiple family members are included the appendix to these materials.

VI. Conclusion

Many of the problems encountered by good lawyers can be avoided with properly directed effort, some clear communication and a few good writings. Hopefully, these materials will assist lawyers in their efforts to improve the services they provide to their clients.

The opinions and views in these materials are solely those of the author and are not necessarily the opinions, views, policies or procedures of the author’s law firm. It is not the author’s intent to imply that anything in these materials sets forth minimum standards of care or

required standards of practice. To the contrary, these materials are merely intended to provide a good lawyer with a well-documented file and to help avoid ethical violations and legal liability.

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APPENDIX

1. Rule 4-1.8 Conflicts of Interest; Prohibited and Other Transactions
2. Rohan Kelley's draft disclosure letter re selection of fiduciary
3. Bruce Stone's draft disclosure letter re selection of fiduciary
4. Bruce Stone's draft engagement letter with disclosures re corporate fiduciaries
5. ACTEC Form Engagement Letter for Joint Representation of Multiple Generations of the Same Family
6. ACTEC Form Engagement Letter for Separate Representation of Multiple Generations of the Same Family

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RULE 4-1.8 CONFLICT OF INTEREST; PROHIBITED AND OTHER TRANSACTIONS

* * *

(c) **Gifts to Lawyer or Lawyer's Family.** 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 subdivision, related persons include a spouse, child, grandchild, parent, grandparent, or other relative with whom the lawyer or the client maintains a close, familial relationship.

* * *

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

Comment

Gifts to lawyers

A lawyer may accept a gift from a client, if the transaction meets general standards of fairness and if the lawyer does not prepare the instrument bestowing the gift. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If a client offers the lawyer a more substantial gift, subdivision (c) does not prohibit the lawyer from accepting it, although such a gift may be voidable by the client under the doctrine of undue influence, which treats client gifts as presumptively fraudulent. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not suggest that a substantial gift be made to the lawyer or for the lawyer's benefit, except where the lawyer is related to the client as set forth in subdivision (c). If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, however, the client should have the detached advice that another lawyer can provide and the lawyer should advise the client to seek advice of independent counsel. Subdivision (c) recognizes an exception where the client is a relative of the donee or the gift is not substantial.

This rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as personal representative of the client's estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provision in rule 4-1.7 when there is a significant risk that the lawyer's interest in obtaining the appointment will materially limit the lawyer's independent professional judgment in advising the client concerning the choice of a personal representative or other fiduciary. In obtaining the client's informed consent to the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position. (Emphasis added.)

* * *

Imputation of prohibitions

Under subdivision (k), a prohibition on conduct by an individual lawyer in subdivisions (a) through (i) also applies to all lawyers associated in a firm with the personally prohibited lawyer. For example, 1 lawyer in a firm may not enter into a business transaction with a client of another member of the firm without complying with subdivision (a), even if the first lawyer is not personally involved in the representation of the client.

THE KELLEY LAW FIRM P.L.

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October 21, 2008

[Click here and type recipient's address]

Re: [Click here and type the reference]

[Click here and type the salutation]:

I am enclosing a draft of your Will for your review.

I am writing you this letter because we have discussed whether you wish to designate me in your Last Will and Testament as the personal representative (or alternate or co-personal representative) of your estate. (The statutory term is "personal representative. The term in more common usage is "executor" and that is the term I will use here.)

Every estate is required to have an executor. Florida law provides certain limitations on who may serve as executor of your estate. The persons who may serve are:

- A. any resident of Florida (whether or not related to you); or
- B. any close relative (not required to be a resident of Florida); or
- C. any bank with an office in Florida which has a trust department.

I qualify in the "A" category. In our firm, the policy is that we may not suggest to our clients that they appoint one of us as their executor. However, if the client asks, as you have, we are usually willing to serve.

There are two preconditions to that willingness. The first is that you have fully considered others who might serve in this capacity. The second is that you must completely understand all the implications of that appointment, including the cost to your estate. The reason for these requirements is that we do not wish it to appear to your beneficiaries (or any one else), that we took advantage of your confidence in us to suggest or persuade you to appoint one of us to a position where our compensation may be increased, or where we may be sure that our law firm will be retained to handle the probate of your estate. Also, at that time you will not be available to explain your decision. If you have any question about any part of this letter or if any part is not clear to you, please let me know so we can discuss that matter specifically.

In your particular case, we have discussed &*****[discuss who could serve and why the client(s) decided those persons were not appropriate]

We have also discussed that if you have an appropriate person you would like to designate as executor, but that person is not a resident of Florida or a close relative and, as stated above, could not qualify for appointment, that you have the alternative of shifting the major part

PRACTICE LIMITED TO:
WILLS TRUSTS ESTATES AND
ESTATE AND TRUST LITIGATION

LAWYERS

WILLIAM J. KELLEY
(1906 - 1977)
ROHAN KELLEY † *
SHANE KELLEY † * *
THOMAS K. TOYOR A
ELISA F. LUCCINI *

† Board Certified Will, Trusts and
Estate Lawyer

* Fellow, American College of Trust
and Estate Counsel

* LL.M. Master of Laws in Taxation

A LL.M. Master of Laws in Estate
Planning

&*****CLIENTNAME

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of your estate administration to a trust administration through the use of a Revocable Living Trust, rather than using a Will as your preferred vehicle. In that instance, it is possible to circumvent the limitation on use of a non-resident (assuming most of your assets are funded into your Revocable Living Trust during your lifetime) and designate a non-resident as trustee of the trust. However, you have indicated that there is no non-resident that you wish to appoint in that capacity.

Just as every estate is required to have an executor, every executor is required to employ an attorney to perform legal services in the probate, prepare certain tax returns, and generally counsel and advise the executor in administering your estate. One of the first and most important decisions made by your executor is the selection of the attorney to be hired to handle the estate legal work. A different executor may or may not decide to hire this law firm to do the legal work. If I am appointed as your executor, I would certainly intend to hire my law firm to do the legal work.

The most significant estate expenses are generally: estate taxes (but only if your estate exceeds \$2,000,000 in value), income taxes, payment of your debts, executor's commissions, and attorney's fees. It is the executor's commissions and attorney's fees I would like to discuss, in that order.

Florida Statute §733.617 specifies the manner in which fees for executors will be calculated. (The statute refers to "commissions" which has the same meaning as fees.) I am enclosing a copy of this statute for your information. This statute provides that your executor will be paid an ordinary fee based upon the value of your estate. There is also a provision for fees for extraordinary services discussed in subsection (3) of the statute.

It is possible to eliminate the executor's fees. For example, if you choose a relative or a designated beneficiary as your executor, often times that person will agree to charge no fee. On the other side of that issue is the fact that such person is probably not knowledgeable regarding the duties and responsibilities that will be required, and since he or she will serve for free, he or she may not be as conscientious as would otherwise be the case. The administration of most estates is not a trivial task. An unknowledgeable, absent, or inattentive executor may have the result of costing the estate more in attorney's fees since the attorney must expend substantially more time in educating and closely supervising the executor.

You have indicated the value of your assets which will be probated to be approximately \$&*****. Using the schedule contained in Florida Statute §733.617, that would provide for an ordinary executor's fee of approximately \$&*****. If the value of your probate estate is greater or less than the mentioned amount, the fee would increase or decrease using a &*****3% factor. For example, if your estate were \$100,000 larger, the executor's fee would be \$3,000 greater. Similarly, if your estate were \$100,000 smaller, the fee would be reduced by \$3,000.

If I am designated as executor I will be entitled to a separate fee for my attorney's services. Therefore, it is this firm's policy is to charge a reduced fee of &***** for serving as executor where we also receive a full attorney's fee as contemplated by the statute. This means

&*****CLIENTNAME

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that the total expense is less than selecting an executor who would charge the full fee provided by law, but more than if a family member served and charged no fee. In your circumstances, our executor's fee would be approximately \$&*****, in addition to the attorney's fee. If extraordinary services are required, the additional fee is determined at that time, either by agreement or acquiescence of your beneficiaries or by the judge.

On the matter of attorney's fees, I am enclosing a copy of Florida Statute §733.6171 which describes a reasonable rate for attorney's fees in probate administration and a copy of the brochure entitled "Estate and Trust Administration -- Our Services and Fees" These describe the regular charges our firm makes for this service.

You should notice in your Will in the Article discussing the appointment of the personal representative, I have included language that describes our understanding of the fee to be charged for that service. I will receive a fee for legal services according to the schedule of attorney's fees shown in the copy of the statute enclosed with this letter.

Regardless of whom you select to be your executor, all or substantially all of the executor's fees and attorney's fees will be tax deductible in some form to your estate or its beneficiaries.

If you are left with any question regarding executor's fees or attorney's fees, I would be pleased to discuss it with you at any time. We do not consider such discussions "awkward" but encourage them so that you are entirely comfortable with and fully understand these matters. (If anyone is uncomfortable in discussing with me their charges for services, I am immediately suspicious that I am being overcharged. I assume that you feel the same.)

Furthermore, when the time comes to probate your estate, your beneficiaries will feel more comfortable knowing that you fully understood how the attorney's fees and executor's fees will be charged. Unfortunately, at the time this is required, you will not be available to tell the beneficiaries that you understood fully and agreed. To that end, and to avoid later misunderstanding with your beneficiaries, I have provided a place below for you to sign indicating that you received and considered the information provided in this letter. I have enclosed a stamped return envelope for you to use in returning the signed copy. If you have questions, you may hold this form and we will discuss it at our next conference.

We are very pleased that you have selected us as your attorneys and that you have shown the exceptional degree of confidence by designating me as the executor of your will. It is a duty I take very seriously and an honor I sincerely appreciate

If upon further reflection, you would like to designate a different executor, you need only give me a call and I will change the provision as you wish.

&*****CLIENTNAME

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Sincerely,

Rohan Kelley

RK:

Enclosures:

- (1) Copy of Florida Statutes §§733.617 and 733.6161.
- (2) Copy of brochure entitled, Estate and Trust Administration - Our Fees and Services.

CLIENT'S ACKNOWLEDGMENT OF UNDERSTANDING

I have reviewed the foregoing letter explaining the fees to be charged by you or your law firm, and I have reviewed the enclosures. I wish to acknowledge that I clearly understand those matters and it is my intention that you should serve as the personal representative of my estate and that you would retain your law firm as attorney for the estate. You would charge an attorney's fee in the amount described in the statute, and you would charge a fee for serving as personal representative in an amount equal to &*****.

Signed on April _____, 2008

&****client

&*****client

Sample Disclosure Letter for Appointment
Of Attorney as Personal Representative and Trustee

October 1, 2006

Re: Will and Revocable Trust Agreement

Dear _____:

This letter will confirm that you have instructed me to revise your will and your revocable trust agreement to change the provisions governing appointment of your personal representatives (under your will) and the succession of trustees (under your revocable trust agreement).

Currently Existing Documents

Presently, under your existing documents before making these changes, your children A and B would serve as the personal representatives under your will upon your death. If one of them failed or ceased to serve, the other one of them would serve alone. If both of them failed or ceased to serve, Corporate Fiduciary would serve alone.

Daughter A and Corporate Fiduciary would serve as successor trustees under your revocable trust during your lifetime if you became incapacitated, and after your death during the period of administration of your estate. If Daughter A stopped serving (and did not appoint a successor to herself), Son B could appoint a successor trustee to Daughter A (and he could appoint himself as a trustee if he wanted to). Daughter A can remove Corporate Fiduciary at any time. If she is unable to do so, Son B can remove Corporate Fiduciary at any time. However, a corporate trustee is required to serve at all times.

When the distributions are made from your revocable trust after your death to the separate trusts for your children, the trustees of your revocable trust will stop serving, and the trustees under the separate trusts for your children would take over each child's inheritance. For example, the trustees of your revocable trust would distribute Daughter A's share of the trust assets to the trustees of her dynasty trust (Daughter A and Corporate Fiduciary). The same thing would happen for Son B's share (Son B and Corporate Fiduciary are the trustees of Son B's dynasty trust).

The Revised Documents

Under the revised will, I and Corporate Fiduciary will serve as your personal representatives. If I fail or cease to serve, Corporate Fiduciary will be your sole personal representative.

Under the revised revocable trust, I and Corporate Fiduciary will serve as your successor trustees when you stop serving. If I fail or cease to serve, Corporate Fiduciary will be your sole trustee. A corporate trustee is required at all times after you have stopped serving. I have the right to remove Corporate Fiduciary as trustee, but I must replace it with another corporate trustee.

Under the revised trust, I and Corporate Fiduciary (as the nominated successor trustees) will have the authority to retain a board certified medical doctor to determine your capacity. Under the currently existing trust, that authority is given to your children. If the doctor determines that you are no longer legally capable of managing your own affairs, I and Corporate Fiduciary would step in as your successor trustees. You would still have the ability to challenge any such determination by taking it to court, and of course, if we had wrongly believed you to be incompetent, you would be free to terminate our employment and service as your trustees.

As your personal representatives and trustees, both I and Corporate Fiduciary will be entitled to reasonable compensation for our services. In my case, I would be entitled to receive reasonable compensation for my services as personal representative and trustee in addition to reasonable compensation for my or my firm's separate professional services for legal work. Florida law gives a percentage fee guideline for personal representatives in probate estates, but the guideline is not mandatory, and your personal representatives could be paid for their services on some other basis (such as a fixed fee, or a reduced percentage, or based on time spent). For trustees, Florida law provides only that they are entitled to reasonable compensation. Generally speaking, when you have two or more personal representatives and trustees, the amount of fees paid to them is greater than if you had only one personal representative and trustee. The guideline for personal representative fees in the Florida Statutes generally limits the total compensation for all personal representatives combined at twice the amount that one personal representative would receive, but again, the statute is only a guideline.

The persons bearing the impact of the payment of personal representative and trustee fees (in your case, the trusts for your children) will have the opportunity to object to the amount of all fees and to have the court determine the amount of compensation.

Your existing trust prior to these revisions provided that an individual Trustee will be liable only for actions or failures to act that are made in bad faith, whereas a corporate Trustee will be liable for its actions or failures to act that are negligent or that breach its fiduciary duty. Thus individual Trustees are held to a less strict standard of liability than a corporate Trustee. The reason for this difference is that the individuals you have named as your Trustees are not in the business of serving as Trustees. On the other hand, a corporate Trustee is in the regular business of serving as a trustee and therefore should be held to ordinary negligence standards in determining whether it should be liable for the consequences of its actions and omissions. You want to encourage your individual Trustees to serve by requiring only that they act in good faith by paying proper attention to the purposes of the trust and your best interests and the interests of your beneficiaries. As noted above, this provision has been in your trust instrument for a long time before you decided to ask me to serve as a successor Trustee. It was not inserted or included to protect me specifically, but will apply to all individuals who ever serve as your Trustee.

You are always free to change the designation of who will serve as your personal representatives and successor trustees, as well as the standard of conduct and liability to which they are held. It is not necessary that you name me as a personal representative or trustee. You are free to name anyone or more of your family members as personal representatives even if they are not Florida residents (but for those relatives who aren't Florida residents, only relatives within a certain degree of relationship, such as your children and grandchildren, and your siblings and their descendants). You are free to name anyone who is a resident of Florida as a personal representative even if not related to you. There are no restrictions under Florida law on who you can name as trustees of your revocable trust.

If you are still in agreement with the appointment of me as a personal representative and successor trustee together with Corporate Fiduciary, instead of having your children serve, I would appreciate you signing a copy of this letter so that I may place it in our files.

Sincerely yours,

Bruce Stone

I have read the preceding letter, and I am signing my name below to express my understanding and agreement

Signed by me on _____

Witnessed by:

Client's Name

TERMS OF ENGAGEMENT
FOR ESTATE PLANNING SERVICES
FOR CLIENTS' NAMES

We appreciate your decision to retain our law firm for your estate planning. This document contains important information about the relationship between you and our firm. Our work will be limited strictly to legal services, unless otherwise described in the letter that accompanies this document. You are not relying on us for business, investment, accounting, or valuation decisions, or to investigate the character or credit of other persons or firms (such as insurance companies or investment advisers), unless otherwise specified in the letter.

Our Duty to Preserve Your Confidential Information

Estate planning is a personal matter that requires you to disclose sensitive information about your family relationships and financial matters, and it may involve difficult questions. You agree to provide us with all information needed to perform our services. You will be responsible for making decisions on matters not involving legal determinations. We urge you to make a complete disclosure of your financial matters and your wishes concerning your estate. Failure to do so could make it impossible for us to give proper advice to you. We will not be responsible for consequences caused by your failure to disclose essential information to us.

The ethics rules require us to keep information that you disclose to us confidential and not to disclose it to persons outside our firm without your permission. The lawyer primarily responsible for your work may disclose information to other persons in our firm as needed to do your work, on a "need to know" basis, but we will not make unnecessary disclosures. At least two of our lawyers will be aware of the provisions of your estate planning documents, because of our policy to have documents reviewed by a second attorney for quality control purposes.

If persons outside our firm work with us with your permission (such as your accountant, a bank trust officer, a financial planner, an insurance agent, or another law firm), you agree that we can disclose information to them that they need to fulfill their role in your estate planning. Unless you instruct otherwise, you agree that we can disclose information to them that in our judgment we think is necessary for your best interests.

Our Duty To Share Information With Each of You

We will represent both of you jointly in your estate planning. We owe duties to each of you, and each of you has an obligation to disclose to us all information that is relevant to

both spouses' estate planning. You agree that among us (the two of you and our firm), there will be no confidentiality of communications or information, unless and until one of you instructs us otherwise. If one of you discloses information to us that is relevant to the other spouse's estate planning, we can disclose that information to the other spouse if we think it is necessary to fulfill our duties to the other spouse in your estate planning.

Either of you can terminate your permission for us to disclose information to the other spouse at any time, if you give us clear directions not to disclose. However, if you do terminate that permission, we must then decide if a conflict of interest has arisen that prevents us from adequately representing the other spouse. We will make that decision in our sole professional judgment. If we believe that we cannot adequately represent the other spouse without the disclosure, we will notify each of you separately in writing that a conflict of interest has arisen that prevents us from representing either one of you in your estate planning. We could not represent either one of you in your estate planning after that without the consent of both of you. Even if you revoke our permission to disclose information, you should be aware that if there is ever litigation between the two of you, we could be compelled to testify about information we obtained from you or about advice that we gave to you in your estate planning.

If this agreement concerning confidentiality is not acceptable to you, you must advise us immediately so that other arrangements can be made.

If You Become Disabled

The ethics rules that govern us state that if you become unable to make adequately considered decisions, whether because of mental disability or other reasons, we may attempt to continue a normal attorney-client relationship with you as much as is possible. Those rules also state that we are authorized to seek the appointment of a guardian or to take other actions to protect your interests if we reasonably believe that to be necessary.

You can designate other persons to act on your behalf under a durable power of attorney and to make decisions for you concerning your estate planning, such as making gifts of your assets and signing trust agreements on your behalf. If you authorize someone to act on your behalf, and if we believe their authority is broad enough to allow them to instruct us on your estate planning, you agree that we can continue to do estate planning work for you by dealing with them, and that we can rely on instructions from them. You agree that we can communicate with them and disclose information they need to make informed decisions on your behalf, including information that is protected by the attorney-client privilege. However, if we believe that they do not have the authority to act on your behalf, or if we believe they are not acting in your best interests, we reserve the right to refuse to act on their

instructions and instead to take whatever action that we reasonably believe is necessary to protect your interests.

After Your Death

We cannot disclose confidential information about your estate planning after your death, but there are some important exceptions. For example, your personal representative can permit us to disclose information, or we can be required to disclose information to parties in litigation (including the contents of our files such as correspondence and records of conversations with you) if there is a will or trust contest. Even if we are not required to disclose information, you consent and authorize us to make limited disclosures about your estate planning after your death (if there is no personal representative for your estate), if we believe in our professional judgment that such limited disclosures will help to prevent or resolve disputes over your estate planning. You waive the attorney-client privilege to this limited extent.

How We Charge for Our Services

[Material omitted]

Costs and Expenses

[Material omitted]

How We Will Bill You

[Material omitted]

Conflicts with Other Clients

Sometimes we are asked to represent a client who has interests that are adverse to another client who we represent in other unrelated matters. Just as you may wish to hire other law firms that compete with us, we want to be able to consider representing other persons who may be competitors in your business or occupation or who may have interests that are potentially adverse to yours – but only in matters that are unrelated to the work that we do for you. The ethics rules that govern us permit us to accept multiple representations if certain requirements are met.

While we represent you, we will not represent another client in matters that are directly adverse to your interests unless and until we have made full disclosure to you of all relevant facts, circumstances and implications. You agree that we can represent other clients

whose interests are adverse to yours if we confirm to you in good faith that the following conditions are met: (i) there is no substantial relationship between the other client's matter and our work for you, both now and in the past; (ii) our representation of the other client will not involve or disclose any confidential information we have received from you (with the use of screening measures, if appropriate); and (iii) the other client also consents to our representation of you. You will have the right to contest (but only if done in good faith) our statement to you that these conditions have been met. If you make a good faith objection to our statement, we will have the burden of proving that these conditions have been met.

Relationships with Financial Institutions

Our firm works with various banks, trust companies, and other financial institutions. Sometimes we may represent those institutions as clients, either in a fiduciary capacity such as when they serve as personal representatives or trustees, or directly such as when defending them in litigation matters. Those institutions may refer potential clients to our firm, and we may recommend their services to our clients. If you ask us to recommend a financial institution for your estate planning arrangements, it is possible that we may have separate attorney-client relationships with the institution or institutions we recommend. If you name a corporate fiduciary to serve as your personal representative or trustee, it is possible that the corporate fiduciary might retain our law firm in the future to represent it in performing its duties (assuming that there are no conflicts of interest). You acknowledge that the decision whether to use a corporate fiduciary and the selection of a particular institution is your responsibility, even if you ask us for advice and recommendations.

Florida law does not fix compensation for personal representatives or trustees, although statutory guidelines are given for fees for personal representatives. You are free to negotiate the amounts that will be paid as compensation to your personal representative or trustee, and do not have to agree that fees (including termination fees) will be paid to a corporate fiduciary based on its standard fee schedule.

Completion of Our Engagement

When you have executed the estate planning documents that we will prepare for you (such as a will, trust agreement, or related documents such as living will and health care surrogate designations), the attorney-client relationship between us will end unless both you and we have separately and expressly agreed in writing that it will continue. It may be necessary for you to take additional steps to implement and make best use of your estate planning documents after they have been signed. Failure to take those steps could result in your estate planning being incomplete or in some cases ineffective.

For example, if you execute a revocable trust agreement with the intention of avoiding probate of your assets when you die, but you fail to take additional steps to fund the trust during your lifetime by transferring legal ownership of your assets to the trustee, it will still be necessary to probate those assets when you die. If you create a partnership or limited

liability company with the objective of reducing the amount of estate taxes upon your death, but you either fail to create or to follow proper operating procedures for the entity during your lifetime, your estate may have to pay estate tax just as if the partnership or limited liability company had never been created. If you create an irrevocable trust and make gifts to it, it might be necessary for you to obtain a taxpayer identification number and to file gift tax and income tax returns, and it might be advisable for you to allocate generation-skipping tax exemption (or instead deliberately elect not to allocate generation-skipping tax exemption) on gift tax returns each year for that trust.

These types of matters involve actions on your part in the future, or by others acting on your behalf, after we have finished your estate planning documents and you have signed them. These types of services are not included in this engagement agreement, and we will not be responsible to assist or advise you in those ongoing matters after execution of your documents unless you and we have entered into a written engagement agreement for those additional services.

After we have finished our work for you, we recommend that you review your estate planning periodically, especially if there are important changes in your life (such as marriage, divorce, birth of new family members, death of a beneficiary, or significant changes in your financial net worth), or if there are changes in the law. After you have executed your estate planning documents, we will not have any responsibility to notify you of changes in the law or in your own circumstances that may affect your estate planning. On occasion we may send out general mailings or communications to our existing and past clients informing them of a change in the law for general informational purposes, but you understand and agree that we have no obligation to notify you of any such changes. You understand and agree that if we do send you such a communication, our attorney-client relationship with you will not resume unless and until you and we enter into a separate and new client engagement agreement.

We believe that it is in your best interests to lay out these rules that govern the termination of our attorney-client relationship in a clear and straightforward manner so that you will not mistakenly assume that we are monitoring such things as changes in the law on your behalf. Even though our attorney-client relationship will end when you have executed the estate planning documents we will prepare for you, we are always happy to continue to be of future service to our past clients. If you would like to engage us to provide additional services for you after the execution of your estate planning documents, or to revise your estate planning documents in the future, please discuss this with us so that you and we can have a clear agreement on the services we are to provide for you and so that a new client engagement agreement can be prepared.

When we finish your work, the attorney-client relationship between us will end unless you and we have expressly agreed to a continuation for other matters. Either you or we can terminate the attorney-client relationship before our work is finished, subject to ethical restraints.

Your Agreement With Us

Your agreement to our representation constitutes your acceptance of these terms and conditions. If any of them is unacceptable to you, please tell us now so that we can resolve any differences and proceed with a clear understanding of our relationship.

We accept the terms of this agreement.

Date: _____
Husband's Name _____

Date: _____
Wife's Name _____

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

[Date]

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

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

Subject: [Subject Matter of the Engagement]

Dear [First Generation] and [Second Generation]:

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

Scope of the Engagement

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

Identification of the Client

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

Previous Representation

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

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

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

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

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

A. Separate Representation

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

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

B. Joint Representation

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

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

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

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

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

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

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

Termination of the Engagement

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Fees and Billing

[ALTERNATIVE 1: *Flat Fee*]

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

[ALTERNATIVE 2: *Time-Based Billing*]

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

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

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

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

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

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

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

Effect of Disability

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

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

Retention, Delivery, Retrieval, and Destruction of the Files

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

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

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

Consent to the Terms of the Engagement

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

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

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

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

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

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

Sincerely,

[Lawyer]

Consent to the Representation and the Terms of the Engagement

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

Signed: _____, 20____

(Husband, First Generation)

Signed: _____, 20____

(Wife, First Generation)

Signed: _____, 20____

(Husband, Second Generation)

Signed: _____, 20____

(Wife, Second Generation)

*ENGAGEMENT LETTER FOR SEPARATE REPRESENTATION OF MULTIPLE GENERATIONS
OF THE SAME FAMILY*

DATE

[Father & Mother]
[]
[]

[Second Generation]
[]
[]

Re: Estate Planning

Dear [First Generation] and [Second Generation]:

As we discussed, I am currently representing [First Generation] in their estate planning. However, I have also been requested to represent [Second Generation] in their estate planning. If each member of the family consents to my representation of the other members of the family, I would be pleased to undertake the representation of [Second Generation]. In separate letters to [First Generation Husband and Wife] and [Second Generation Husband and Wife], I have addressed how each separate family unit chooses to be represented internally. The remainder of this letter will set forth the considerations involved in my representation of multiple members of your family from different generations.

In my representation of [First Generation], I have made certain not to disclose any details of their finances, estate plan, or estate planning documents to other members of the family. There is no reason why I cannot continue to represent [First Generation] and represent [Second Generation] at the same time, as long as everyone is aware of the potential problems regarding the preservation or sharing of confidential information and the resolution of conflicts of interest that may arise when I undertake to represent more than one unit of the family.

Duty of Confidentiality and Loyalty; Conflicts of Interest

As your attorney, I owe each of you a duty to preserve any confidential information you share with me unless you authorize me to disclose such information. Similarly, I owe each of you a duty to act solely in your best interests, without being influenced by the conflicting interests of other clients. If I represent two units of the same family, a potential conflict of interest may arise and effect my duties to the separate family units. For example, in advising each of you regarding your estate planning, I would ordinarily be obliged to make known to you any information that I believe might be important to you in making your estate planning decisions. This information, however, could include my knowledge of decisions affecting you made by other members of the family. Because I am under a duty to preserve the confidential information made known to me by the other family members, I cannot disclose this information to you unless the other family members consent. Also, I could not advise you that actions planned by other family members might be adverse to your own personal interests unless the other family members consent.

Each of you may have differing and conflicting interests and estate planning objectives. You may

have different views on how property should be distributed among various family members and other beneficiaries. In some situations it may be advisable to hold property in trust to take advantage of available tax benefits, which may result in a reduction of control or benefit for some of you. These are just a few general examples. Each situation is unique.

Because I represent [First Generation] and other entities in which they have an interest, and because the interests of [Second Generation] could potentially be affected by the estate planning decisions of [First Generation], it will be necessary for both [First Generation] and [Second Generation] to consent to my representation of [Second Generation]. This representation could take one of several forms.

Forms of Representation

With "joint representation," one lawyer represents both family units as a single client. In such representations, the lawyer cannot be an advocate for any one family unit, but would serve only to assist the entire family in developing a coordinated estate plan and would encourage the resolution of differences in an equitable manner and in the best interests of the family as a whole. The lawyer normally would meet with all interested family members at the same time, and relevant and material information shared by one family unit with the lawyer, although confidential as to all those outside the family, could not be kept from the other family unit. However, the lawyer would generally not disclose to the other family unit information made known to the lawyer outside the joint meeting that the lawyer does not believe is relevant and material to the development of the coordinated estate plan.

Although the product of joint representation would be a coordinated estate plan, it could also result in the disclosure of information that one family unit might prefer to remain confidential. It could also produce dissension if the family does not agree on a coordinated plan.

With "concurrent separate representation," one lawyer represents both family units, but the representation would be structured so that each family unit would have the same relationship with the lawyer as if each family unit were represented by separate counsel. In such a representation, each family unit would receive totally independent advice. The lawyer would meet separately with each family unit and would not discuss with one family unit what the other family unit has disclosed unless the disclosure were authorized in advance. Unless authorized to do so, the lawyer would not use any information obtained from one family unit in advising the other family unit in the development of its estate plan, even if the result is that the two plans are incompatible or the plan of one family unit is detrimental to the interests of the other family unit.

Choice of Separate Counsel

If I begin representation of all of you jointly or concurrently and separately, any one of you may change your mind and have separate counsel at any time. If [Second Generation] chooses to seek separate counsel, I intend to continue representing [First Generation]. If [First Generation] choose to seek separate counsel, I will withdraw from representing [Second Generation] unless [First Generation] consent to my representation of [Second Generation].

Termination of Representation

If I begin representation of all of you jointly or concurrently and separately, and a conflict arises during the course of representation that leads me to believe that my representation of either one of you would be adversely affected by my continued representation of the other of you, then I intend to continue representing [First Generation] and withdraw from representing [Second Generation].

Before I begin, each of you must consider all of the factors discussed in this letter and consent to the form of representation. I can represent both [First Generation] and [Second Generation] jointly or concurrently and separately. Alternatively, I can continue representing only [First Generation] and [Second Generation] can seek other counsel. It is important that you understand the differences in these forms of representation.

As we have discussed, it is my understanding that you would like me to represent [First Generation] and [Second Generation] concurrently and separately. Accordingly, I ask that you sign the statement which follows this letter to indicate your consent to my concurrent separate representation.

I am enclosing a return-address envelope for your convenience in returning a signed copy of this letter consenting to my concurrent separate representation. I have enclosed an extra copy of this letter for your records.

If you have any questions or concerns, please let me know. In addition, you may consult with another lawyer about the effect of signing this letter if you would like. I look forward to hearing from you.

Sincerely yours,

[Attorney]

Consent to "Concurrent Separate" Representation

The undersigned, [First Generation] and [Second Generation], have reviewed the foregoing letter concerning the various aspects of "joint" and "concurrent separate" representation, and elect to have [Attorney] represent the undersigned concurrently and separately as described above in connection with their estate planning.

Dated: _____

[First Generation]

[First Generation]

Dated: _____

[Second Generation]

[Second Generation]