



Estate Planning Traps

RISK MANAGEMENT HANDOUTS OF
LAWYERS MUTUAL

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DISCLAIMER: *This document is written for general information only. It presents some considerations that might be helpful in your practice. It is not intended as legal advice or opinion. It is not intended to establish a standard of care for the practice of law. There is no guarantee that following these guidelines will eliminate mistakes. Law offices have different needs and requirements. Individual cases demand individual treatment. Due diligence, reasonableness and discretion are always necessary. Sound risk management is encouraged in all aspects of practice.*

INTRODUCTION

The headline for an ABA Journal article says it all: “Where There’s a Will, There’s a Way to Make Mistakes.”¹ Not only is the number of possible errors great, but so is the extent of possible damages. Although malpractice claims regarding estate planning accounted for only about 5% of the claims filed with Lawyers Mutual each year, the amount of exposure is often high - and steadily increasing.

Some of the reasons for this rise in the cost of malpractice claims include: (1) the increasing legal complexity of estate planning (from intricate tax laws to laws interpreting estate planning documents, real estate and elder law); (2) the growing wealth of middle class clients

whose needs are no longer served by a simple will; and (3) a disproportionate number of conflict of interest issues.²

This publication addresses some of the malpractice traps waiting to snarl estate planning attorneys. A common thread throughout the claims asserted against attorneys is poor communication and misunderstandings with clients. Much of this can be avoided by spending sufficient time with clients to ensure that they are well-informed, understand their options, and feel that you have listened and provided valuable assistance to them regarding their estate planning goals.

FAILURE TO CLARIFY SCOPE OF REPRESENTATION

WRITTEN RETAINERS AND JOINT REPRESENTATION LETTERS

Many of the claims filed against estate planning lawyers involve misunderstanding about what the lawyer was hired to do and poor communication between the client and lawyer. Are you being retained “just” to draft a will? Can you draft a will without reviewing all the client’s assets and giving advice about such matters as the proper designation of beneficiaries? Are you giving estate planning advice? Are you providing tax analysis? If drafting a trust, are you also assisting the client with the

work to be done to fund the trust? Have you agreed to assist your client in filing any tax returns?

If you are representing a couple, have you discussed the scope and ramifications of such joint representation? Are your clients aware that you could be subpoenaed by one party, over the objections of the other party, to testify in future litigation? Have you discussed what you can do if the parties separate and ask you individually to change their estate planning documents? (See RPC Opinion #229 for guidance.) Are there factors that could increase the chances of conflict, such as second marriages or difficult children? Review Rule 1.7 of our Rules of Professional

¹ Debra Baer, *Where There’s a Will, There’s a Way...to Make Mistakes*, ABA Journal, May 1998.

² Anne E. Thar, Vice President and General Counsel, Ill. St. Bar. Assoc. Mut. Ins. Co., *Shifting Exposures and Trends in Selected Specialty Areas: Trust and Estate Pitfalls in Small to Midsized Firms*, Presentation, ABA National Legal Malpractice Conference, Fall, 1998.

Conduct regarding Conflict of Interest with Current Clients and consider this rule every time you agree to represent a couple.

As any lawyer knows, the best way to avoid such issues is to have a full discussion with your clients about what you are being retained to do. You should set forth in detail the scope of your representation in a written retainer agreement which is signed before you begin any work. Carefully consider all the work you might need to do in determining your fee so that you will not be tempted to be less than thorough in order to “break even.” If you are representing a couple, prepare a standard joint representation letter for them to sign as is required by RPC 1.7(b)(4).

See Lawyers’ Mutual publication “Attorney-Client Agreements” for examples of a general estate planning engagement letter and a letter specifically for jointly represented spouses. This publication is available on Lawyers’ Mutual website, www.lawyersmutualinc.com.

PROTECTING CLIENT

It is also imperative that you meet in person and alone with any client to determine whether he or she is being unduly influenced by any individual. If you have a specific concern, you might ask another lawyer or staff to be present and summarize the meeting in a memo to the file, or you could videotape such a meeting. If you have questions about a client’s mental capacity, it might be wise to request a doctor’s opinion before proceeding to make drastic changes to a client’s estate planning documents.

DOCUMENTING CLIENT’S INTENT AND GOALS

Clients don’t always follow our advice and in the estate planning arena, the consequences can be significant. There are the clients who insist that they want “to do things simply” and don’t want to do anything to save on inheritance taxes. On the other hand, there are the clients for whom avoiding taxes is their primary goal. How prepared will you be to face the disgruntled heirs who lost most of their inheritance to taxes or who have extremely limited access to funds restricted for tax reasons? The best defense is to document in detail the discussions you have had with the client, the information and advice you gave, the decisions made by the client, his or her reasons, and your discussions about the ramifications of the client’s decisions. It is recommended that you have the client sign such a letter acknowledging agreement with what you have stated. You won’t regret the time you took to write such a letter when those angry heirs show up in your office accusing you of failing to effectuate the intent of the deceased client.

Remember: the dead can’t talk - and they can’t come back to testify at malpractice trials either.³

³ *Id.* at 3.

CLOSING LETTER

Besides a written retainer and letters detailing the client's decisions, it is also helpful to send a closing letter to clients when you have completed your work for them. Remind

the clients of work they may still need to do - changing beneficiaries, re-titling accounts into a trust, or re-titling real estate. Clearly state that these tasks are the client's responsibility unless he or she contacts you to do the work.

INFORMATION IS A TWO WAY STREET

GATHER COMPLETE INFORMATION FROM CLIENT

Many problems can be avoided if time is taken to get complete information from the client, if the appropriate questions are asked, and if understandable information is provided. Clients often don't recall exactly how a deed is titled or who they named as beneficiaries of their retirement accounts or life insurance; they think there is no need to mention the sibling they don't like or the child they had at sixteen and never saw; or they forget about the timeshare in Florida they purchased while on vacation or their interest in a family limited partnership.

One way to insure that you have gathered all the information you need is to send a form to clients before your initial meeting with them. Make sure it asks for all necessary information about the client's assets and family. Request that the clients include information regarding the value of each asset. You don't want to make the mistake one lawyer made in assuming that a client had minimal assets because he met her at a trailer rented by a family member and she said she only had "a little savings" - only to discover after death that her estate, for which no tax planning was done, was worth \$7 million.

GET DOCUMENTS

In addition, insist on seeing documents such as deeds, beneficiary designations, and documents showing ownership of accounts. You don't want to assume that the beach house in Myrtle Beach is solely owned by your client and then discover at her death that an ex-husband still owns an interest in it - or that the real estate you transfer to a trust was already conveyed to another trust several years earlier. If you don't do a title search on any such real estate, you should at least protect yourself by drafting a disclaimer that your firm cannot insure a valid transfer unless the client provides a current title policy and copies of any agreements regarding the real estate.⁴

GIVE SUFFICIENT INFORMATION AND ADVICE TO CLIENT

Besides obtaining the necessary information to effectuate the client's goals, a lawyer must determine whether the client understands the consequences of his or her decision. Does the client want the term "children" to include adopted children and/or stepchildren? If so, does that include adopted grandchildren and step-grandchildren? Sometimes in order to truly understand

⁴ *Id.* at 5.

what the client wants, a lawyer must ask difficult questions, such as “how’s your marriage?” “do you like your stepchildren?” or “how will your children react if you leave the bulk of your estate to charity?” Answers to these questions may even show clients that perhaps they want something different than they initially thought.

Sometimes it is necessary to warn clients about the problems inherent in a distribution plan they think they want, or the problems in naming a certain individual as executor or trustee. Estate planning lawyers are hired not only to draft documents, but also to advise clients. Don’t hesitate to give suggestions about better approaches to distributing assets, or caution clients about the powers they are giving family members, or suggest that if they want to leave property to their parents, that they do so in a special needs trust.

ENHANCING THE CLIENT’S UNDERSTANDING

In the past, clients had pensions and most of their assets passed through probate. Today, the opposite is often true - the assets passing through beneficiary designations or trusts are significantly greater than probate assets for most clients. Make sure a client understands the difference between probate and non-probate assets and how each will be distributed at the client’s death. Emphasize that only certain assets will be controlled by a will. It is helpful to develop a flow chart that visually shows clients how their probate and non-probate assets will be distributed - what passes through the will and what passes through beneficiary designations. You can also provide assistance to clients by giving them sample language regarding how to designate beneficiaries on retirement and life insurance forms, especially for a minor’s trust or a revocable trust.

FAILURE TO DRAFT WHAT THE CLIENT WANTS

A well-drafted will clearly states the testator’s intent, provides that the assets are distributed to the intended beneficiaries, considers potential tax consequences, properly appoints all necessary persons, does not include language errors, and is properly executed in accordance with the requirements of N.C. Gen. Stat. Chapter 31. Some common drafting problems include:

- Not reviewing an entire document: Once you have drafted a will or trust, review the entire document to make sure a specific provision you have included for your client is not inconsistent with the standard language you regularly include.
- Using imprecise terms: Lawyers err when they use imprecise terms to identify a class of beneficiaries or when they use more than one term to mean the same thing. “Children,” “issue,” “descendants,” and “heirs” all have different meanings and should not be intermingled in the same will unless that is the intent of the client. The phrase “I leave to my children....., but if I have no issue.....” is unclear since the first phrase gives to the first generation only, and the second phrase provides for all generations.

Adding a definitions section to a will and being consistent with terms will help avoid such ambiguity. Also, make sure you do not generically name a charity such as “the Land Conservancy,” but rather specify not only the precise name, but also whether it is the national, state or local chapter.

- Not discussing contingencies: It is incumbent on lawyers to discuss back up beneficiaries and what will happen if all the named beneficiaries predecease the client. Although our statutes provide for what happens in such situations (N. C. Gen. Stat. Chapter 29), this may not be what some clients want. Clients also need to understand the consequences of specifically designating an asset to go to an individual versus stating a percentage of the estate. Clients tend to think in terms of specific assets and don’t consider that they may not own that asset at their death, or that its value may have changed significantly resulting in unintended and disproportionate distributions.

CARELESS DRAFTING

What's a semicolon worth? How about \$8 million. That was the result when a court was asked to interpret Martha Cone's estate planning documents to determine the allocation of estate taxes between individual beneficiaries and a charitable foundation.⁵ Among other things, the court looked at the fact that there was a semicolon after each general bequest (except one), but a period at the end of the last bequest before the paragraph disposing of the residuary estate. The court held that this punctuation, along with the language and circumstances of execution, supported the position that Mrs. Cone intended for the distribution to the foundation to be a separate bequest and not a part of the residuary estate, resulting in \$8 million less to the residuary heirs.

The lesson from the Cone case is obvious - lawyers must carefully and diligently review every sentence, every line, and the format and punctuation of every section of all estate planning documents. It is tempting to skip reviewing standard form paragraphs or to assume that the computer has taken care of spelling or grammar for us. There is no substitute for your own careful review.

Some other drafting pitfalls include:

- Omitting provisions in a client's old will that the client may wish to retain but did not mention to you when you drafted a new will using your standard form.
- Neglecting to consider the possibility that your clients may move to another state. If the clients have second homes in other states or know where they might retire, review the laws in those states, especially regarding the proper execution of a will, who can be a witness, and the number of witnesses needed.

- Neglecting to consider the needs of unmarried couples for special provisions such as directing that each other has the authority to make funeral arrangements, that they jointly and equally own certain property, and that they acknowledge their intent not to leave property to family members.
- Failing to conform nonprobate documents to the client's will and estate plan and failing to coordinate the tax implications of the will with nonprobate documents.
- Failing to consider the ramifications of certain drafting, such as the problems with leaving personal property to minors, leaving real estate to numerous married individuals, and the differences between leaving real estate to the estate to sell versus leaving it directly to heirs.

Estate planning is particularly fertile ground for substantive malpractice claims due to the number and complexity of legal issues which a lawyer needs to know - state and federal taxes, laws regarding wills and trusts, Medicaid and other elder law issues, and probate and estate administration. One wrong word or phrase can disinherit an intended beneficiary or require expensive litigation to interpret a will. One small omission and an estate can be exposed to thousands of dollars in unnecessary taxes. The constant changes in inheritance taxes on the federal level in the last ten years has been difficult enough for estate planning lawyers. The fluctuating tax exemption level has required many changes in will and trust documents and the uncertainty of what will happen in 2010 has necessitated that greater thought and flexibility be given to how to adequately plan for clients.

⁵ *Central Carolina Bank & Trust Co. v. Wright*, 124 N.C. App. 477, 478 S.E.2d 33 (1996).

CHANGES IN LAW

In order to provide competent representation to clients, an estate planning lawyer must be knowledgeable about a wide variety of issues on both the state and federal level and apply that knowledge not only to matters involving present clients, but also past clients who might need changes to their existing estate planning documents in light of changes in the law. The IRS is constantly issuing rulings and regulations, Congress changes the Internal Revenue Code during most sessions, and the same occurs in our state legislature and Dept. of Revenue. In just the last six years alone, the N. C. General Assembly replaced the right to dissent statutes with an elective share procedure, N. C. Gen. Stat. § 30 3.1 *et seq.*; enacted a major revision of our trust statutes, N. C. Gen. Stat. Chapter 36C; permitted transfer on death designations for securities for the first time, N. C. Gen. Stat. § 41 40 *et seq.*; changed our notary public statutes, N. C. Gen. Stat. Chapter 10B; and is continuously making changes to our Medicaid statutes and regulations.

It is hard as a private practice attorney to find time to keep up with all these changes and to put aside client work

to do so. Of course, there are seminars and information from bar organizations. However, sometimes there is no alternative but to just say “stop” and set aside time. Schedule time on a regular basis to review new changes. Block it out on your calendar and don’t let other matters push it aside unless you reschedule to another time. Take time to discover what are the best sources for new information, mark them on your computer, keep articles to review in a file you can find, create a system or list of what you need to review - and then you will be ready to dig in during your “learning appointment” with yourself. Besides just updating yourself, you also will need to spend time thinking about how these changes effect your practice and what you might need to do differently. It is important to work with your staff and set up a system to quickly review what you have done for your past clients and be able to contact them when a new law may require changes to their estate planning. With the uncertainty of what Congress will do in 2010 regarding inheritance taxes, it is now even more imperative to begin that list of clients to contact.

FAILURE TO REVISE FORMS WHEN LAWS CHANGE

Practitioners not only have to keep up with and learn new law, they must use that knowledge and carefully consider what changes need to be made to their office forms and procedures. For example:

- Have you reviewed and changed all your office forms that require notary signatures so that they are consistent with the statutory changes to N. C. Gen. Stat. Chapter 10C? Have you educated your office staff about how to now properly notarize documents?
- Have you changed all your trust documents to be consistent with the substantial changes brought about by the 2005 enactment of N. C. Gen. Stat. Chapter 36C? Have you reviewed and revised all documents which might contain references to the old statutes, such as wills and powers of attorney?
- Have you reviewed the issues raised by the Health Insurance Portability & Accountability Act of 2003 (HIPAA)⁶ and determined how best to revise your existing forms or create new ones? Do you think adding HIPAA provisions to your standard Health

⁶ 45 C. F. R. §§ 160 and 164.

Care Power of Attorney and Power of Attorney forms is sufficient or do you believe there is a need for a separate HIPAA form so that an agent can have access to medical records even if the client is competent?⁷ Do you think HIPAA requires a separate form regardless of capacity issues? Have you added language that a client's health care agent is also specifically designated as the personal representative under HIPAA? Have you also reviewed your trust

documents which included provisions that doctors' opinions are required for incapacity determination and added HIPAA language which would enable a trustee to obtain such medical information - or omitted the requirement of doctor certification?

Being informed about changes in the law is only the first step. Putting those changes into effect in your practice, whether through changing documents or how you execute them, is a necessary and crucial second step.

TAX CONSEQUENCES OF ESTATE PLANNING

As discussed above, estate planning attorneys need to decide what the scope of their estate planning practice will be, what they feel knowledgeable and comfortable doing, and what they will not do - and stick to it. But regardless of where you draw the line, a certain knowledge of the tax implications of estate planning is essential. You cannot even "just draft a simple will" without advising a client about whether his or her estate will be subject to taxes, whether there is a need to consider Medicaid issues, or how retirement funds will be taxed and distributed.

Reviewing all estate documents to determine the tax implications is essential. If taxes will be owed, it must be determined which sources will be used to pay them. For example, a will that provides for all estate taxes to be paid out of the probate assets when there are substantial nonprobate assets, may end up leaving the will beneficiaries with much less than the client intended. If that is not the client's desired result, then include provisions setting forth how the taxes are to be apportioned so that the beneficiaries who are supposed to pay taxes actually do so, and in the proportions the client desires.

As our world becomes more global, it is becoming even more important to ascertain if your client or spouse is a U.S. citizen so that if their assets are above the exemption amount, you can prepare a qualified domestic trust and make use of the marital deduction.

Some attorneys neglect to include a specific bequest of tangible personal property in their client's will, even when the beneficiary of the personal property and the residuary estate are the same. Without such a provision, the receipt or use of such personal property may be considered a distribution of income (up to amount of estate's distributable net income) and would need to be included on the beneficiary's tax returns.

Despite the important need to consider tax savings, don't concentrate on it at the expense of a client's other needs. Does the young couple in front of you really need a credit shelter trust at this time - or is their primary goal to have unlimited use of assets to raise their young children? Does your client really want to establish a QTIP trust and have his children waiting around for their very young stepmom to die so they can inherit?

⁷ See Reni Gertner, *Estate Planners Must Review Documents Due to HIPAA Privacy Regulations*, Law. Wkly. USA, Oct. 25, 2004, for a discussion of these questions.

FAILURE TO REALIZE OR MEET DEADLINES

Many of the estate planning claims filed with Lawyers Mutual involve missed tax deadlines. Some specific traps to be aware of include:

- Failing to fully utilize the tax exemption amounts for both spouses by equalizing their ownership of assets and creating tax savings trusts *before* the death of the first spouse.
- Failing to realize that the filing of an extension of time for completion of the federal estate tax return (Form 706) does not extend the time in which the taxes must be paid.
- Failing to elect to claim a deduction for a QTIP interest on Schedule M of the federal estate tax return.
- Failing to utilize the special use valuation election which permits “current” use values rather than “highest and best” use or not utilizing the alternate valuation method which permits property to be valued as of six months after the decedent’s death, rather than using date of death values, on the federal estate tax return.
- Failing to know the rules regarding deferral of the federal estate taxes on a closely held business and how to elect such a deferral.
- Failing to understand how to take certain administration expenses as deductions on either the estate tax return or the fiduciary tax return, and not knowing which method is best for a particular estate.
- Failing to know what the requirements are in order for a trust to be a valid S Corporation shareholder.

KNOW YOUR LIMITS

You’re going through your unpaid bills and worrying about how to pay all of them, when you get a call from a potential client who is only in town for a few days and wants to set up a special needs trust for his mother who is going into a nursing home. He is ready to come in and pay you a retainer today. You have never done such a trust, but it sure would help pay those bills that are due.

Yes, it is hard to say “No, I can’t do that” when bills are mounting or it is something you would like to do but don’t have the time to devote to learning it when the client has a deadline. But, if you don’t decline representation which is beyond your knowledge, you are inviting not only a malpractice claim, but also possibly violating your

professional ethics. Rule 1.1 of the North Carolina Rules of Professional Conduct prohibits a lawyer from handling a “legal matter which the lawyer knows or should know he or she is not competent to handle without associating with a lawyer who is competent to handle the matter.” Furthermore, if you handle the case yourself and do work usually done by experts in the field, you could be held to an “expert” standard of care rather than the standard of care of a general practitioner.⁸

Put the following advice⁹ where you look at it anytime you are asked to do something for which you should say NO:

⁸ Larry Bodine, *Estate Planners Are Sued in Increasing Numbers*, 95 Law. Wkly. USA 1097, (Dec. 2000).

- You cannot be all things to all people. Make a list of the areas in which you feel competent and stick to those areas.
- Don't deviate from your areas of competency as favors to friends, relatives, or long time-clients.
- Watch out for the curve ball unexpectedly leading you down an unfamiliar path. Duck and withdraw or associate an expert.
- When in doubt, call an expert.

FAILURE TO CONSIDER DUTY TO OTHERS

Estate planning practitioners are particularly vulnerable to an increasing number of malpractice claims involving breach of fiduciary duty to non-clients who are intended beneficiaries of trusts and wills.¹⁰ Such parties are bringing and winning lawsuits based on tort theories, such as that the lawyer has assumed a relationship with the intended beneficiaries and public policy requires that the lawyer not harm these persons whose rights are foreseeable, or based on a third party beneficiary contractual theories of recovery.¹¹ Errors that have led to liability for lawyers include failing to avoid or minimize tax consequences, failing to avoid needless litigation due to drafting problems, failing to refer to a specialist, failing to research, and failing to proofread.¹²

North Carolina has long recognized a cause of action by non-client third parties for attorney malpractice since *United Leasing Corp. v. Miller*, which set forth a balancing test to determine the possibility of malpractice.¹³ Applying that test, the Court of Appeals has held that an

attorney owed the sole heir of an estate the duty to use reasonable care in representing the estate and therefore, the heir had standing to sue the attorney in tort. *Jenkins v. Wheeler*.¹⁴ The heir had alleged that the attorney failed to advise the Administratrix to list a wrongful death action as an asset of the estate, refused to file the wrongful death action, and improperly represented conflicting interests, thereby breaching applicable standards of professional skill and ethics.

The strong admonishment in our ethics rules regarding competency and our case law supporting the right of heirs to bring claims against attorneys are just two more reasons for estate planning attorneys to be ever vigilant about the quality of their work and the nature of their relationship with clients.

⁹ Thar, *supra* at 2

¹⁰ Bodine, *supra*, at 1097. See also John R. Price, *Duties of Estate Planners to Nonclients: Identifying, Anticipating, and Avoiding the Problems*, 37 S. Tex. L. Rev. 1063 (1996); and Bradley E. S. Fogel, *Estate Planning Malpractice, Special Issues in Need of Special Care*, Probate and Property, July/August 2003.

¹¹ Bodine, *supra*.

¹² *Id.*

¹³ 45 N.C. App. 400, 263 S.E.2d 313, *disc. rev. denied*, 300 N.C. 374, 267 S.E.2d 685 (1980).

¹⁴ 69 N.C. App. 140, 316 S.E.2d 354 (N.C. Ct. App. 1984).

ENGAGEMENT LETTER: ESTATE PLANNING

[Date]

[Client Name]

[Client Address]

[Client Address]

Re: Engagement for Legal Services

File ID:

Dear [Client's Name]:

We are pleased that you have asked the firm to serve as your counsel. At the outset of any engagement, we believe it is appropriate to confirm in writing the nature of the engagement and the terms of our representation, and that is the purpose of this letter. If you have any questions about this letter or any of its provisions, do not hesitate to call. Otherwise, this letter and the enclosed Standard Terms of Representation will constitute the terms of our engagement. Again, we are pleased to have the opportunity to serve you.

Client(s). The two of you will be our only clients in this matter.

Scope of Engagement. Our representation will be limited to the specific matters described in this paragraph. You are engaging us to represent you both, and we agree to represent you both for the purpose of drafting new estate planning documents for each of you (hereinafter referred to as the “matter” or “engagement”). **[See below for estate administrations]

Nature of Relationship. Our objective is to provide high quality legal services to our clients at a fair and reasonable cost. The attorney-client relationship is one of mutual trust and confidence. If you have any questions at all concerning the terms of this engagement, our ongoing handling of this legal matter, or about any issue relating to a monthly statement that is unclear or appears to be unsatisfactory, we invite your inquiries.

Fees and Expenses. Our fees will be based primarily on the following hourly rates for attorneys and paralegals devoting time to this matter:

[Attorney Name]: Rate: \$ _____

[Paralegal Name]: Rate: \$ _____

General Waiver of Conflicts. As you may be aware, our law firm represents many other companies and individuals. This confirms your agreement that we may continue to represent or may undertake in the future to represent existing or new clients in any matter that is not substantially related to our work for you in this matter or any other matter for which you may subsequently engage our firm, even if the interests of such clients in those other matters may be directly or indirectly adverse to you. We agree, however, that your prospective consent to conflicting representation contained in the preceding sentence shall not apply in any instance where, as a result of our representation of you, we have obtained proprietary or other confidential information of a non-public nature, that, if known to such other client, could be used in any such other matter by such client to your material disadvantage. You should know that, in similar engagement letters with many of our other clients, we have asked for similar agreements to preserve our ability to represent you.

No Continuing Updating Obligation. Upon our submission to you of our final bill, this matter will be treated as completed. Of course, after your estate planning documents have been signed, we would be pleased to respond at any time thereafter to your request that we review your estate plan, and/or the then applicable estate tax provisions and other

relevant laws, for the purpose of determining whether we would suggest any changes. Indeed, we strongly recommend that you consult us, or some other lawyer of your choice, for that purpose at least once every three (3) years.

Joint Representation of Spouses. We have explained to you that each of you could choose to be represented by separate counsel who would advocate for his or her individual client’s interests. You have, however, requested and consented to our representation of both of you in connection with your estate plan. Based on our discussion, each of you understands the need for full disclosure and candor in our discussions with one another. Thus, any communication and information we receive from or about either of you that is relevant to your wills and your estate plan will not be kept confidential from the other.

In the interests of efficiency, you may choose to communicate with us primarily through one of you, in which event we will provide any necessary explanation of issues to that individual. Of course, we will respond at any time to any questions put to us by either of you. Our experience has been that it is unlikely, but not impossible, that a relatively serious difference of opinion or disagreement might arise between the two of you in the development of your estate plan, and in that event considerations of legal ethics might compel us to cease representing both of you. If that happens, we will promptly notify both of you that we cannot continue to represent either of you in connection with your estate plan or any other matter that is related to your estate plan.

If the foregoing and the enclosed Standard Terms of Representation accurately state the terms of our engagement, please sign the enclosed duplicate of this letter and return to me. If the foregoing and the enclosed Standard Terms of Representation do not accurately state the terms of our engagement, please let us know immediately, and do not proceed to use our firm on this particular matter until we have agreed upon the terms of engagement and another letter is delivered to you confirming those terms.

Once again, we are pleased to have this opportunity to work with you. Please call me if you have any questions or comments during the course of our representation.

Very truly yours,

By: _____
 Partner

Enclosures

The foregoing letter accurately states the terms of our engagement of [firm name] to represent us in connection with the matter described above.

 Client Name

 Date

 Client Name

 Date

Note: This is a sample form only and is written for the general purposes of facilitating clear expectations and avoiding misunderstandings between an attorney and client. It is not intended as legal advice or opinion and will not provide absolute protection against a malpractice action.

ENGAGEMENT LETTER: ALTERNATE CLAUSES - ESTATE ADMINISTRATION

Scope of Engagement. Our representation will be limited to the specific matters described in this paragraph. During the course of our representation, we will address such issues relating to the administration of the estate as you, the personal representative, may direct. Our services will include the following:

1. Initial estate administration matters so that the estate administration can be initiated, including probate of the will and qualification of you as personal representative;
2. Preparation of all court inventories and accountings;
3. Assistance and coordination in collection, appraising, administering, and distributing all estate assets;
4. Any matters relating to the interpretation of the provisions of the will and the resolution of the same;
5. Serving as counsel to the personal representative; and
6. Publication of notice to creditors and mailing to known creditors.

Of course, you may direct us to address other issues that may arise during the course of administration if that becomes necessary, and you may direct that some services listed above be handled by yourself or by others.

The estate's Inventory of Assets listing all of the estate's probate assets and their fair market values must be filed within three (3) months after you qualify as personal representative. The estate's Annual Accounting for the Estate will be due with the Clerk one (1) year from the date of your qualification as personal representative. Once the estate administration is complete, a Final Accounting must be filed with the Clerk prior to closing of the estate.

Investment Advice Clause. An important power you hold as personal representative is the power to invest the estate assets. You have wide discretion in the choice of investments, but in exercising that discretion, you have a duty to exercise "prudent judgment" in managing the estate assets. We are not investment advisors and cannot give an opinion regarding the choice of one investment over another, so I suggest that you discuss the estate's investment objectives with an investment advisor.

[SELECT AS APPROPRIATE FOR YOUR REPRESENTATION]

Option 1: **Tax Filing Requirements Where the Estate is Not Subject to Federal Estate Tax.** The tax aspects of estate administration will include preparing and filing various tax returns:

SELECT OPTION FOR PARAGRAPH A (depending on whether Decedent was survived by a spouse):

A. **Federal Estate Tax Return:** Since [Decedent's] taxable estate is less than the current federal exemption and he/she was not survived by a spouse, you will not need to file a federal estate tax return with the Internal Revenue Service, and no estate tax will be due.

OR

A. **Federal Estate Tax Return:** Since [Decedent's] taxable estate is less than the current federal exemption, you are not required to file a federal estate tax return with the Internal Revenue Service, and no estate tax will be due. However, I strongly recommend that you consider filing a federal estate tax return in order to preserve [Decedent's] unused estate tax exclusion. Under current law, to the extent that the [Decedent's] available federal estate tax exclusion is not used for his estate, the unused exclusion is "portable" and passes to the surviving spouse. In order to preserve the unused exclusion, an estate tax return must be filed by the Executor. The federal estate tax return is due nine (9) months after the date of death of [the Decedent]. A six (6) month extension is available if requested prior to

the due date of the return. Unless you direct our firm otherwise in writing, we are not responsible for preparing or filing the federal estate tax return to preserve portability of the unused exclusion. In any case, I recommend that you consult with a tax professional before making your decision about whether to file the return.

- B. **North Carolina Estate Tax Return:** You will file a NC estate tax certificate in the probate court. **Our firm will prepare this filing.**
- C. **Gift Tax Returns:** As personal representative of [Decedent's] estate, you must file a final gift tax return to evidence any gifts made by [Decedent] during the year prior to his/her death. **Please let me know if you are aware of any gifts in excess of \$13,000 per year that [Decedent] may have made in the year prior to [Decedent's] death.**
- D. **Income Tax Returns:** You are also responsible for filing [the Decedent's] final federal and state income tax returns covering the period [s]he lived during 2012, as well as the fiduciary returns for the estate (as discussed in the paragraph below).

You must file federal and state fiduciary income tax returns to report the income earned from the date of [the Decedent's] death until the estate assets are finally distributed to the beneficiaries. If all of the income received by the estate is distributed to the beneficiaries, the income received by each beneficiary will flow out of the estate and will be taxed to him. However, if no distributions are made during the tax year of the estate, the income will be taxed at the estate level. The fiduciary income tax returns are due within 3 ½ months after the end of the estate's taxable year. **Please confirm whether our firm will prepare the income tax filings on your behalf.**

OR

- Option 2: **Tax Filing Requirements Where the Estate is Subject to Federal Estate Tax.** If the estate is subject to federal estate tax, the federal estate tax return is due nine (9) months after the date of death of [the Decedent]. A six (6) month extension is available if requested prior to the due date of the return.

SELECT APPROPRIATE OPTION BASED ON FIRM'S PREPARATION AND FILING RESPONSIBILITY OF THE ESTATE'S FEDERAL TAX RETURN (only use if Option 2 above is selected):

- Option 1: **Not Responsible for Preparation or Filing of Federal Estate Tax Returns.** We are not responsible for preparing or filing estate tax returns and we are not responsible for any deadlines associated with the filing of such returns and the payment of any estate taxes. You should immediately retain a qualified tax professional to handle these matters.
- Option 2: **Not Responsible for Preparation of Federal Estate Tax Returns, but Responsible for Filing Federal Estate Tax Returns.** We are not responsible for preparation of estate tax returns but will file such tax returns if delivered to us properly completed in a reasonable time prior to the filing date with proper instructions to us from the tax preparer that include the required filing date and any other deadlines associated with the estate tax returns.
- Option 3: **Responsible for Preparation and Filing of Federal Estate Tax Returns.** We will prepare and file the estate tax return and will obtain any extensions necessary for filing.

Note: This is a sample form only and is written for the general purposes of facilitating clear expectations and avoiding misunderstandings between an attorney and client. It is not intended as legal advice or opinion and will not provide absolute protection against a malpractice action.

DIS-ENGAGEMENT LETTER: ESTATE PLANNING AND ESTATE ADMINISTRATION

[Date]

[Client Name]

[Client Address]

Re: Conclusion of Representation in Connection with _____ Matter
File ID:

Dear [Client's Name]:

It has been a pleasure representing you in connection with _____ matter. Our representation of you in this matter is now complete and we are closing this file, removing it from our active accounts, and returning all original records to you. We suggest that you keep all information relating to this matter in a secure place where it can be easily located. Our final statement for services rendered is enclosed.

The attorney-client relationship between us has ceased for this matter, and we have no further obligation to advise you of future legal developments in connection with this specific matter. We highly encourage you to have all estate matters reviewed and updated periodically.

We truly hope this matter has been completed to your satisfaction. Thank you for allowing us to represent you in this matter. If you have any further questions on this or any other issue, please do not hesitate to contact us.

Sincerely,

[Attorney's Name]

[Law Firm Name]

Enclosures