

ETHICAL RULES AND TEXAS LAW PRACTICE

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The information set forth in this outline should not be considered legal advice, because every fact pattern is unique. The information set forth herein is solely for purposes of discussion and to guide practitioners in their thinking regarding the issues addressed herein. Nonlawyers are advised to consult an attorney before undertaking mergers and acquisitions.

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ETHICAL PROBLEMS IN ESTATE PLANNING
FOR THE FAMILY BUSINESS

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ATTACHMENTS:

- Sample Letters
- *Texas Disciplinary Rules of Professional Conduct*
- Bourland, Wall & Wenzel – *Estate Planning Section Quality Control Procedure Checklist: Estate Planning Fact Sheet*
 - Client Inquiry Letters*
 - Engagement Letter*
 - Engagement Follow-up Letter*
 - Draft Documents Transmission Letters*
 - Document Transmission/Project Termination Letter*
 - File Summary Sheet*

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I. INTRODUCTION/TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT

To be sure, a lawyer practicing in the areas of estate planning and family business planning must be well versed in the laws of taxation, property, and trusts. However, the prudent estate and family business planning lawyer cannot stop there; in addition, he must have a thorough understanding of the rules regulating lawyer conduct.

Rules regulating lawyer conduct arise from several different sources including i) common law (i.e. tort law, fiduciary law, agency law), ii) criminal law, and iii) the rules of evidence. This presentation, however, focuses on the regulation of lawyer conduct under the Texas Disciplinary Rules of Professional Conduct (“TDRPC”). In particular, this presentation discusses certain rules (“Rules”) of the TDRPC that will likely affect the estate and family business planning lawyer. This presentation does not discuss all of the Rules contained in the TDRPC, nor does it address every provision of a particular Rule. Accordingly, a lawyer should refer to the actual text of the TDRPC, including the comments, for more comprehensive guidance. [Note: Occasional references are made to parallel rules contained in the American Bar Association Model Rules of Professional Conduct. The ABA Model Rules are the blueprint for the TDRPC; however there are some important differences between them. The ABA recently conducted a comprehensive review of the Model Rules. As a result of this review process, a series of amendments to the ABA Model Rules were adopted by the ABA in February 2002. Because the TDRPC are based on the ABA Model Rules, it is likely that many of the amendments recently adopted by the ABA will be considered for the TDRPC.]

The TDRPC are found at Title 2, Subtitle G, Appendix A, Article X, Section 9 of the Government Code and became effective as of January 1, 1990.

The violation of a Rule may subject a lawyer to disciplinary action. In addition, although the Preamble to the TDRPC expressly states that the violation of a Rule does not give rise to a private cause of action against a lawyer or create a presumption that a lawyer has breached a legal duty to a client, a court may try to look to the TDRPC for guidance in determining whether a lawyer has committed malpractice or otherwise breached a legal duty.

II. DUTY OF COMMUNICATION/RULE 1.03

Rule 1.03 imposes a duty of communication on a lawyer. The purpose of the Rule is to ensure that a client has sufficient information to make intelligent decisions regarding the representation. A lawyer’s duty of communication under Rule 1.03 has three basic elements: i) to keep the client reasonably informed about the status of the representation by volunteering information; ii) to promptly comply with reasonable client requests for information regarding the representation; and iii) to reasonably explain the legal matter so that the client can make informed decisions regarding the representation.

1. The standard of compliance with all three duties is reasonableness; the lawyer must make a reasonable effort to communicate with clients so that they may be able to actively participate in their representation and make informed decisions. The question of whether a lawyer has acted reasonably is ordinarily a question of fact. ROBERT P. SCHUWERK & JOHN F. SUTTON, JR., A GUIDE TO THE TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT 54 (1990).
2. A lawyer should keep in mind four basic principles underlying the communication

requirements. SCHUWERK at 57-59.

- a. The communication must be truthful.
 - b. Explanations given by the lawyer should be in terms that the client can understand. Further, Comment 5 encourages lawyers to make a reasonable attempt to communicate directly with clients who are minors or mentally disabled, in addition to consulting with the client's representative.
 - c. The lawyer must give comprehensive advice concerning all possible options - including the potential risks associated with each option.
 - d. The lawyer's duty to communicate does not end with a judgment, but also includes informing a client about appeal matters, including the client's right to appeal and the relative advantages and disadvantages of an appeal.
3. Additional communication duties include advising clients of the risks and benefits of all possible courses of action, informing clients of their rights, advising as to the legal and practical points of a matter, and promptly notifying clients as to why the lawyer cannot provide diligent representation (if applicable), as well as notifying clients of any changes in the lawyer's address, phone number, etc. ABA/BNA LAWYER'S MANUAL ON PROFESSIONAL CONDUCT 31:501 (1984).
 4. ABA Model Rule 1.4 is the ABA counterpart to Rule 1.03 of the TDRPC.

III. DUTY OF CONFIDENTIALITY/RULE 1.05

Rule 1.05 imposes a duty of confidentiality on a lawyer. Subject to certain exceptions and limitations, this Rule generally prohibits a lawyer from knowingly disclosing or using "confidential information" of a client or former client. The purposes of the Rule are i) to encourage people to seek professional legal counsel for their legal problems and questions by providing assurance that communications with their legal counsel will be kept in strict confidence and ii) to promote the free exchange of information between the client and the lawyer so that the lawyer is equipped with all of the information necessary to provide effective representation.

1. Confidential information is broadly defined to include: i) "privileged information" - client information protected by the lawyer-client privilege under Rule 503 of the Texas Rules of Evidence, Rule 503 of the Texas Rules of Criminal Evidence, and Rule 501 of the Federal Rules of Evidence and ii) "unprivileged information" - all other client information (other than privileged information) acquired by the lawyer during the course of, or by reason of, the representation.
2. Like most rules, Rule 1.05 contains several exceptions whereby a lawyer may (discretionary disclosures) or even must (mandatory disclosures) disclose confidential client information. In particular, a lawyer may disclose confidential information: i) if the client (or former client) consents after consultation; ii) if the lawyer reasonably believes that disclosure is necessary to comply with the law or a court order; iii) to enforce a claim by the lawyer against the client (i.e. claim for attorney's fees for legal services rendered); iv) to establish a defense to a malpractice claim asserted by the client; and v) to prevent the client from committing a crime or fraud. Furthermore, a lawyer must disclose

confidential information if such confidential information clearly establishes that a client is likely to engage in criminal/fraudulent conduct that will likely kill or inflict substantial bodily harm on another. [NOTE: See Rule 1.05 and the accompanying Comment for additional discretionary and mandatory disclosures]. In the event a lawyer decides to disclose confidential information adverse to the client, the lawyer should only disclose such information as is necessary to accomplish the purpose of the disclosure.

3. ABA Model Rule 1.6 is the ABA counterpart to Texas Rule 1.05.

IV. DUTY OF LOYALTY

The TDRPC impose a duty of loyalty on a lawyer in that it generally prohibits a lawyer from representing conflicting interests. Rules 1.06-1.13 of the TDRPC address various situations involving conflicting interests.

A. Rule 1.06 Conflict Of Interest: General Rule

Rule 1.06 is the general conflict of interest rule. It establishes three (3) basic types of conflict situations. First, a conflict exists if the lawyer undertakes to represent opposing parties to the same litigation. Second, a conflict exists if the representation of a client (or prospective client) involves a substantially related matter in which that client's (or prospective client's) interests are materially and directly adverse to the interests of another client of the lawyer. Third, a conflict exists if the representation of a client (or prospective client) reasonably appears to be or become adversely limited by the lawyer's responsibilities to another client or to a third party, or by the lawyer's own interests. A representation involving the first type of conflict described above is never permissible. However a representation involving either the second or third type of conflict described above is permissible but only if 1) the lawyer reasonably believes that the representation of each client (or prospective client) will not be materially affected AND 2) each affected or potentially affected client (or prospective client) consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved.

1. Though adverse interests are often defined as any interest not identical to that of a particular client, in evaluating interests in estate planning, the general consensus has been to recognize that interests may be dissimilar without being adverse. "Conflicts in estate planning goals between husband and wife do not per se create either a material potential for conflict or true adversity between them. Conflicts in rights or obligations will create a material potential for conflict or true adversity." *Report of the Special Study Committee on Professional Responsibility: Comments and Recommendations on the Lawyer's Duties in Representing Husband and Wife*, 28 REAL PROP., PROB., & TR. J. 765, 772 (1994).
2. Comment 15 to Rule 1.06 contemplates conflicts occurring in estate planning and estate administration:

"Conflict questions may also arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the

circumstances, a conflict of interest may arise. In estate administration it may be unclear whether the client is the fiduciary or is the estate or trust, including its beneficiaries. The lawyer should make clear the relationship to the parties involved.”

3. Comment 13 recognizes that conflicts of interest in the non-litigation context (i.e. estate planning and family business planning) may be difficult to assess. Relevant factors to consider include: a) the length and intimacy of the lawyer-client relationships involved, b) the functions being performed by the lawyer, c) the likelihood that a conflict will actually arise, and d) the probable harm to the client or clients involved if the conflict actually arises. The question is often one of proximity and degree.
4. Comment 6 states that the representation of one client is “directly adverse” to the representation of another client if the lawyer’s independent judgment on behalf of a client or the lawyer’s ability or willingness to consider, recommend or carry out a course of action will be or is reasonably likely to be adversely affected by the lawyer’s representation of, or responsibilities to, the other client. The dual representation also is directly adverse if the lawyer reasonably appears to be called upon to espouse adverse positions in the same matter or a related matter. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not constitute the representation of directly adverse interests. However, common sense may deem such dual representation inadvisable depending upon the extent of competition between the clients.
5. Although not required by Rule 1.06, a prudent lawyer will make sure that a conflict disclosure and a client’s consent to the representation are reduced to writing and signed by each of the clients (or prospective clients). *See Rule 1.06/Comment 8.*
6. A conflict that prevents a lawyer from representing a person also prevents every other lawyer at the firm from doing so.
7. ABA Model Rule 1.7 is the ABA counterpart to Rule 1.06 of the TDRPC.

B. Rule 1.07 Conflict Of Interest: Intermediary

1. Generally
Rule 1.07 of the TDRPC addresses the situation where a lawyer will be acting as an intermediary. A lawyer acts as an intermediary if the lawyer represents two or more parties with potentially conflict interests. *Rule 1.07(d)*. While this definition is somewhat vague, generally speaking, Rule 1.07 governs a situation in which the lawyer represents multiple clients in the same matter where such clients have common goals and interests that outweigh their potential conflicting interests. The role of the lawyer is to develop these common goals and interests on a mutually advantageous basis—with the end result being that everybody “wins”. Examples of this type of common representation include: assisting

multiple persons in the formation of a business enterprise, or performing estate planning for a husband and wife.

2. Role of the Lawyer-Intermediary

In acting as an intermediary, the lawyer assumes a special role. Rather than acting in partisan manner, advocating for the interests of a particular person to the detriment of others, the role of the lawyer-intermediary is to promote the interests of all of the clients—with the goal of achieving a resolution that benefits everyone. At the beginning of the intermediation, each client should be advised of the lawyer’s special role in the intermediation.

3. Intermediation Requirements

A lawyer may not undertake an intermediary representation unless all of the following conditions are satisfied:

- (1) the lawyer consults with each client concerning the implications of the common representation, including the advantages and risks involved, and the effect on the attorney-client privileges;
- (2) the lawyer obtains each client’s written consent to the common representation; and
- (3) the lawyer reasonably believes that:
 - (a) the matter can be resolved without the necessity of contested litigation on terms compatible with the clients’ best interests,
 - (b) each client will be able to make adequately informed decisions in the matter,
 - (c) there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful, and
 - (d) the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients. *Rule 1.07(a)*.

4. Evaluating the Propriety of Intermediation

In evaluating whether a particular legal matter is appropriate for a common representation, a lawyer should remember the following: A lawyer may never represent opposing parties to the same litigation. *Rule 1.06(a)*. In addition, a lawyer cannot undertake a common representation if contested litigation between the parties is reasonably expected or if contentious negotiations are contemplated. *See Rule 1.07/Comment 4*. If definite antagonism already exists between parties, the lawyer should strongly consider declining intermediation because the possibility that the parties’ interests can be adjusted by intermediation is not very good. *See Rule 1.07/Comment 4*. Finally, as discussed below in more detail, the lawyer needs to consider the impact the common representation will have on confidentiality of information and the attorney client privilege. *See Rule 1.07/Comment 5*. If the lawyer concludes that Rule 1.07 prohibits him from

acting as an intermediary in a legal matter, then all of the lawyers in the same firm would also be disqualified. *Rule 1.07(e)*.

5. Confidentiality/Attorney-Client Privilege

In an intermediation, there are no secrets. All information obtained by the lawyer from whatever source (third parties, one of the clients, the lawyer's own investigations, etc.) that would help the clients make informed decisions regarding the common legal matter should be disclosed to each of the clients. Moreover, in the event litigation subsequently arises between the clients concerning the common legal matter, the attorney-client privilege will likely not protect any of the communications between the lawyer and any of the clients concerning such legal matter. Before undertaking the common representation, each of the clients should be advised of the effect that the common representation will have concerning confidentiality and the attorney-privilege.

6. Ongoing Consultation

In carrying-out the intermediation, the lawyer must regularly consult with each of the clients regarding the decisions to be made and the considerations relevant in making them so that each client can make adequately informed decisions. *Rule 1.07(b)*. However, because the lawyer is not advocating for a particular client, each of the clients will have to assume a more active role in the decision making process.

7. Termination of Intermediation

A lawyer must withdraw as an intermediary if any of the clients requests or if any of the requirements for serving as an intermediary cease to exist. The withdrawal must be a complete withdrawal, meaning that the lawyer cannot represent any of the clients in the legal matter subject to the intermediation. *Rule 1.07(c)*. Furthermore, arguably the lawyer's continued representation of some of the clients would be improper even with the consent of all of the clients involved in the intermediation. The break-down of the intermediation can be disastrous for everyone (i.e. the lawyer and the clients) because the situation has probably deteriorated to the point where each of the clients will need to obtain separate legal counsel and the lawyer who served as the intermediary may face complaints from one or more of the common clients.

8. See Sample Consent Letter to Common Representation in the Formation of an Entity and Sample Consent Letter to Common Representation of Husband and Wife.

9. ABA Model Rule 1.7 is the ABA Counterpart to Rule 1.07 of the TDRPC.

C. Rule 1.09 Conflict Of Interest: Former Client

1. Generally

Rule 1.09 of the TDRPC sets forth certain circumstances in which a lawyer is prohibited from undertaking a representation against a former client. Rule 1.09 recognizes that even after the attorney-client relationship is terminated, the lawyer still owes certain duties to the former client. Thus, under Rule 1.09, a lawyer may not undertake a representation adverse to a former client without the prior consent of the former client if:

- A. such representation questions the validity of the lawyer's services or work product for the former client;
- B. Such representation in reasonable probability will involve a violation of Rule 1.05 of the TDRPC (i.e. Confidentiality of Information); or
- C. Such representation is the same or a substantially related matter. *Rule 1.09(a)*

Each of these situations is described in more detail below.

2. Questioning Validity of Work for Former Client

The first limitation prohibits a lawyer from challenging the work which the lawyer previously performed on behalf of a former client. The classic example involves a lawyer seeking to overturn a will which the lawyer previously prepared for the former client.

3. Violation of Confidentiality Obligations

The second limitation prohibits a lawyer from undertaking a representation adverse to a former client if, in carrying-out such representation, there is reasonable probability that the lawyer would make an unauthorized disclosure of, or an improper use of, confidential information of the former client to the disadvantage of the former client—such confidential information having been obtained by the lawyer in the course of the representation of the former client.

4. Same Matter and Substantially Related Matters

The third limitation has two aspects—"same matter" and "substantially related matters". The "same matter" aspect prohibits a lawyer from switching sides in the middle of battle (i.e. lawyer initially representing the plaintiff in a legal dispute and then subsequently representing the defendant in the same legal dispute).

Note: This limitation, to some extent, overlaps the first two limitations—Questioning Validity of Work for Former Client and Violation of Confidentiality Obligations.

Neither Rule 1.07, nor its Comments, define the term "substantially related matter"—however, the Comments indicate that it involves a situation where a lawyer could have acquired confidential information concerning the former client that could be used by the lawyer to the disadvantage of the former client or the advantage of the current client.

5. Waiver of Conflict by Former Client
Rule 1.09 of is intended to protect the former client. The former client can always consent to the adverse representation. However, such consent will be effective only if the lawyer discloses all of the relevant circumstances to the former client, including the lawyer's past or intended role on behalf of each client. *See Rule 1.09/Comment 10.*
6. Disqualification Imputed to other Attorneys At Firm
If a lawyer is prohibited from undertaking a representation against a former client under Rule 1.09, then all of the other lawyers at that firm are also disqualified from undertaking such representation. *Rule 1.09(b)*
7. When Does Client Become A "Former Client"
In conducting a conflicts analysis, it is important for a lawyer to assess whether a person is current client or a former client because such assessment will ultimately determine which professional ethics rules govern the lawyer's conduct--the current client rules or the former client rules. Unfortunately, sometimes it is not easy to determine when a current client becomes a former client. Factors to consider include: the scope of the contemplated representation (ongoing and involving various legal matters or limited and involving a single legal matter, the length of the lawyer-client relationship, the period of time that has elapsed since the lawyer last performed work for the client, the existence of a termination letter from either the client or the lawyer, and the client's subsequent retention of another law firm for legal work).
8. Rule 1.9 of the ABA Model Rules is the ABA counterpart to Rule 1.09 of the TDRPC.

D. Rule 1.12 Organization As Client

Rule 1.12 deals with the representation of an organizational client (i.e. corporations, limited liability companies, limited partnerships, etc.). According to Rule 1.12, a lawyer employed by an organization represents "the entity" and not its constituents (i.e. shareholders, officers, employees, etc.). In the event the interests of the organization are adverse to the interests of a constituent, the lawyer for the organization may need to explain to the constituent that 1) an adversity of interests exists between the organization and the constituent, 2) the lawyer represents the organization, not the constituent, 3) the constituent should seek independent representation, and 4) the matters discussed between the constituent and lawyer may not be privileged insofar as the constituent is concerned.

1. Comment 3 to the Texas Rule states that any communication between the lawyer for the organization and the constituents of the organization, while acting within their "organizational capacity," is protected by the confidentiality rule (*Rule 1.05*).
2. ABA Model Rule 1.13 is the ABA counterpart to Rule 1.12 of the TDRPC.

E. Rule 1.15 Declining or Terminating Representation

1. Overview.

Rule 1.15 of the TDRPC is the primary rule governing the termination of the attorney-client relationship. In particular, this Rule sets forth situations under which the attorney must withdraw from the representation of a client and situations under which the attorney may withdraw from the representation of a client. Furthermore, Rule 1.15 sets forth the obligations of the attorney in connection with any termination of the attorney-client relationship. In addition to Rule 1.15, other Rules of the TDRPC either require or permit termination of the attorney-client relationship under specific circumstances. (*See Rule 1.01: Competent and Diligent Representation and Rule 1.07: Conflict of Interest/Intermediary.*)

2. Mandatory Withdrawal

Under Rule 1.15(a), a lawyer must withdraw from the representation of a client if any of the following conditions exist:

- (a) the representation will result in the violation of Rule 3.08 of the TDRPC (i.e. Lawyer as a Witness), other Rules of the TDRPC, or other applicable law;
- (b) the lawyer's physical, mental, or psychological condition materially impairs the lawyer's fitness to represent the client; or
- (c) the lawyer is discharged by the client, with or without good cause.¹

3. Permissive Withdrawal

Under Rule 1.15(b), a lawyer may withdraw from the representation of a client if any of the following conditions exist:

- (a) withdraw can be accomplished without material adverse effect on the interests of the client;
- (b) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes may be criminal or fraudulent;
- (c) the client has used the lawyer's services to perpetrate a crime or fraud;
- (d) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent or with which the lawyer has fundamental disagreement;

¹A client has the right to discharge a lawyer at any time, for any reason or no reason at all; the client will remain obligated to pay any legal fees earned prior to discharge (*see Rule 1.15 Comment 4*).

- (e) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services, including an obligation to pay the lawyer's fee as agreed, and has been given reasonable warning that the lawyer will withdraw unless the obligations is fulfilled;
- (f) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
- (g) other good cause for withdrawal exists.

Note: The lawyer may withdraw from the representation under any of the situations described in subsections 3(b)-(g) above, even if such withdrawal may have a material adverse effect upon the interests of the client (*See Rule 1.15 Comment 7*).

4. Prohibition on Withdrawal Even if Good Cause Exists

If a court orders a lawyer to continue the representation of a client, the lawyer must continue the representation even if the lawyer would otherwise be required or permitted to withdraw from the representation under the TDRPC. *Rule 1.15(c)*. For example, if a lawyer has been appointed to represent a client, ordinarily the lawyer would have to obtain the approval of the appointing authority or presiding judge in order to withdraw.

5. Obligations of Lawyer In Connection With Withdrawal

In connection with the termination of the attorney-client relationship, the lawyer must take all reasonable steps to protect the interests of the client *Rule 1.15(d)*. Such steps include, but are not limited to: giving the client reasonable notice to the client of the withdrawal, allowing the client time for employment of other counsel, providing the client with all papers and property to which the client is entitled, and refunding the client any advance fee payments which have not been earned by the lawyer. In addition, after the termination of the representation, the lawyer must abide by the confidentiality standards imposed by Rule 1.05 with respect to information obtained during the course of the representation of the former client. *Rule 1.05, Comment 21*.

6. Declining Representation

A lawyer must decline a new representation for the same reasons that a lawyer would be required to withdraw from an existing representation. *See Rule 1.15(a)*.

7. ABA Counterpart. Rule 1.16 of the ABA Model Rules is the ABA counterpart to Rule 1.15 of the TDRPC.

V. FAMILY REPRESENTATION MATTERS AND ATTORNEY-CLIENT PRIVILEGE

The TDRPC apply to all types of representations (i.e. litigation work, transactional work, etc.). However, they are more easily applied in some types of representations than others. Estate and family business planning is one area where a practitioner is likely to struggle with the TDRPC. The notion of a "family lawyer" permeates the fields of estate and family business planning. Oftentimes, the "family lawyer" is called upon to represent multiple family members with varying plans, goals and interests. The multiplicity of individuals and goals inherent in family

representation gives rise to ethical problems and legal problems in two main areas—confidentiality and conflicting interests.

For many practitioners, the most common type of family representation is the representation of a husband and wife for estate planning. In the context of estate planning for a husband and wife, three basic models of representation have been proposed by commentators and practitioners for addressing confidentiality and conflicting interests concerns -- 1) joint representation (i.e. the open relationship), 2) separate representation (i.e. the closed relationship), and 3) independent representation.

In a joint representation or open relationship, the same lawyer represents the husband and wife jointly. The husband, wife, and lawyer work together as a team to implement a coordinated estate plan. There are no secrets in a joint representation, and any information and communications relevant to the joint representation disclosed to the lawyer by one spouse should be disclosed by the lawyer to the other spouse. Furthermore, in the event litigation subsequently arises between the husband and wife involving estate planning matters, the attorney-client evidentiary privilege would not apply. See Rule 503(d) of the Texas Rules of Evidence for exceptions to the attorney-client privilege including fraud, claimants through the same deceased client, documents attested to by the lawyer, and joint clients. (**NOTE:** The attorney-client evidentiary privilege would continue to apply, however, to litigation between the husband and/or wife and outside third parties). A joint representation may discourage both the husband and wife from fully confiding in the lawyer because they know that anything disclosed that is relevant to the joint representation may be disclosed to the other spouse. Nevertheless, the joint representation model is probably the most common form of representation of husband and wife for estate planning purposes.

Like the joint representation model, in a separate representation or closed relationship, the same lawyer represents both the husband and the wife in the estate planning process. However, in a separate representation, the husband and wife are each regarded as separate and distinct clients of the lawyer. Because the lawyer regards the husband and wife as separate clients, the lawyer must not disclose the confidences of one spouse to the other spouse. This puts the lawyer at risk of being caught in the unenviable position of learning information from one spouse that would be important to the other spouse in formulating his or her estate plan. However, the lawyer would not be permitted to disclose such information to the other spouse because of the duty of confidentiality owing to the disclosing spouse and consequently the attorney-client privilege should apply to such information. It is important to note that there is disagreement among commentators about the propriety of the separate representation model. The practitioner should carefully review applicable rules and regulations before undertaking such representation.

In an independent representation, the husband and wife are each represented by different legal counsel. This form of representation ensures that each spouse has his or her own counsel “looking-out” solely for the interests of that spouse. It further protects the confidentiality and attorney-client privilege of communications between a spouse and his or her lawyer. From the lawyer’s perspective, independent representation is the safest form of representation in terms of avoiding conflict and confidentiality issues. A major drawback of this form of representation, however, is that it is more costly and less efficient than the other forms of representation in which only one lawyer is retained. If a lawyer does not believe that adequate representation can be provided to a husband and wife through either joint or separate representation, the lawyer should have one or both of the spouses retain separate legal counsel.

It is very important that the lawyer discuss each of the forms of representation described above

with the husband and wife at the very beginning, along with the advantages and disadvantages of each form, and let the husband and wife select the form of representation that will best suit their needs. In the event the husband and wife select either the joint representation (i.e. open relationship) or separate representation (i.e. closed relationship), the lawyer should obtain their agreement to such representation in writing.

VI. MALPRACTICE CONCERNS

Adverse client interests can arise any time the attorney represents more than one person. Each person has an opinion as to how a matter should be resolved and each is looking out for his or her own interests. For example, if a family business is represented by a lawyer who has also done legal work for the president or principal shareholders, conflicts may arise. When the stockholders are all members of the same family and the lawyer is considered the “family attorney,” each party often considers the lawyer his personal attorney. In disputes arising within the business framework and between family members, the lawyer may feel an allegiance to all sides if he has not determined the confines of his relationship with each party from the start. Also, an attorney should be especially wary of representing the president in a divorce suit as increasingly closely held corporations (through their officers, directors and attorney) are being joined in these suits as material witnesses, especially when stocks and benefits are included in a dispute over the allocation of community property.

A lawyer can minimize malpractice risk arising from family representation by carefully analyzing, defining, and documenting the lawyer’s advisory relationship.

A. Identifying Client(s)

The very first question a lawyer should ask himself or herself at the very beginning of a representation is, Who am I representing? The answer to this question is critical because it will establish the persons/organizations to whom the lawyer’s fiduciary duties will run.

B. Defining the Scope of the Representation

After determining who the client(s) will be, the lawyer must then define the scope of the representation (i.e. What am I being hired to do?/What services will I be performing on behalf of my client(s)?).

C. Recognizing Conflicts

After identifying the client(s) and establishing the scope of the representation, the lawyer must then analyze the representation for any conflicts under the TDRPC.

D. Analyzing and Resolving Conflicts

In the event the lawyer determines that the contemplated representation will give rise to a conflict under the TDRPC, the lawyer must determine whether he or she can undertake such representation through full disclosure of the conflict to the affected client(s) and obtaining the consent of each to the representation. If the lawyer determines that the conflict is such that he or she cannot possibly represent the client(s) even with full disclosure and consent, the lawyer should immediately decline the representation or undertake the representation to the extent permissible under the TDRPC. (i.e. This may mean agreeing to represent only one of two prospective clients with conflicting interests and having the other prospective client obtain separate legal representation.)

E. Documentation And Records

Another key to minimizing malpractice risk is to maintain good records concerning each representation. The prudent lawyer will begin documenting the attorney-client relationship from the outset and continue documenting the relationship until the conclusion of the representation. For example, a written engagement letter should be sent to each client at the beginning of the representation. This engagement letter should specifically address the matters discussed in Items A-D above by: (i) identifying the client(s) the lawyer is representing, (ii) defining the scope of the representation, (iii) fully disclosing any conflicts, including the risks involved, and (iv) obtaining the client(s) consent to the representation (if the lawyer believes he or she can properly undertake the representation despite the conflict). This engagement letter should also specify the manner in which the lawyer's fees will be determined, and, if more than one (1) client is involved in the representation the person or persons who will be responsible for paying the legal fees. In addition to preparing written engagement letters to persons the lawyer intends to represent, the lawyer may need to affirmatively advise persons whom the lawyer does not intend to represent that the lawyer is not representing that person and such person should obtain separate counsel. The failure to so advise that person could give rise to a negligence cause of action against the lawyer if the circumstances are such that it was reasonable for such person to believe the lawyer was representing the person. Parker v. Caunahan, 772 S.W. 2d 151, 157 (Tex. App. – Texarkana 1989, writ denied) (in overturning summary judgment in favor of defendant's law firm, the court held that even though the evidence rejected the showing of an attorney-client relationship between the plaintiff and defendant a fact issue was raised as to whether defendant was negligent in failing to advise plaintiff that they would not represent her); Burnap v. Linnantz, 914 S.W. 2d 142, 150 (Tex. App. – San Antonio 1995, writ denied) (in overturning summary judgment in favor of defendant law firm, the court held that fact issues were raised as to: (i) whether attorney-client relationship existed between defendant and plaintiff, and (ii) if no attorney-client relationship existed, whether defendant was negligent in failing to advise plaintiff that they did not represent him). If the lawyers feels a need to advise a person that the lawyer is not representing the person, the lawyer should make sure this is accomplished in writing, preferably with a signed acknowledgment by that person returned to the lawyer.

F. Estate Planning Quality Control Procedure

1. Presupposes good form book;
2. Presupposes good document assembly program;
3. Presupposes effective training and use of paralegal and/or legal secretary; and
4. Presupposes working knowledge of applicable TDRPC.

G. Professional Malpractice And The Privity Requirement

The law in Texas is now settled (at least for now) that an estate planning lawyer does not owe a legal duty to the beneficiaries of estate planning documents (i.e. will or trust) drafted by the lawyer when the lawyer has an attorney-client relationship only with the testator or grantor and not the beneficiaries. Barcelo v. Elliot, 923 S.W.2d 575 (Tex. 1996). As a result, such non-client beneficiaries cannot assert a malpractice action against an estate planning lawyer who negligently prepares estate planning documents to

their detriment. The opinion of the Texas Supreme Court in Barcelo affirms previous Texas court of appeals' decisions holding that a lawyer does not owe a duty to intended beneficiaries of a will who are not in privity of contract with the lawyer. Dickey v. Jansen, 731 S.W.2d 581, 582 (Tex. App.-Houston [1st Dist.] 1987, writ ref'd nr.e.) (lawyer who allegedly was negligent in drafting a testamentary trust owes no duty to intended beneficiaries); Berry v. Dodson, Nunley & Taylor, 717 S.W.2d 716, 718 (Tex. App.-San Antonio 1986) (lawyer who allegedly was negligent in failing to diligently prepare a will for execution before testator's death owed no duty to intended beneficiaries), *judgm't vacated by agr.*, 729 S.W.2d 690 (Tex. 1987).

In Barcelo, a lawyer prepared a poulover will and an inter vivos trust for a client as part of an estate plan for the client. After the death of the client, the probate court declared the trust to be invalid and unenforceable. As a result, the deceased client's residuary estate passed by intestacy to persons other than the intended beneficiaries of the inter vivos trust. The beneficiaries of the trust brought a malpractice action against the lawyer who prepared the estate planning documents. At the trial court level, the lawyer moved for summary judgment on the sole ground that he did not owe a duty to the beneficiaries of the trust because he never represented them. The trial court granted the lawyer's summary judgment motion and the court of appeals affirmed. On appeal to the Texas Supreme Court, the sole question presented was:

“Whether an attorney who negligently drafts a will or trust agreement owes a duty of care to persons intended to benefit under the will or trust, even though the attorney never represented the intended beneficiaries.”

The Texas Supreme Court answered this question “**NO**” (in a 5 to 3 decision) adhering to the common law privity rule that a lawyer owes a duty of care only to his or her client, not to third parties who may have been harmed by the lawyer's negligent representation of the client. In addition, the Texas Supreme Court rejected a cause of action based on a third-party-beneficiary contract theory on the ground that a legal malpractice action in Texas is an action in tort, not in contract, and is therefore governed by negligence principles.

Three justices dissented from the majority opinion—declaring that it was time for Texas to join the majority of states which have relaxed the privity barrier in the estate planning context in order to provide intended beneficiaries a cause of action against a lawyer who negligently prepares estate planning documents. The dissent complained that the majority, by denying a cause of action in favor of the intended beneficiaries, has created a situation where a lawyer who is negligent in the preparation of estate planning documents is accountable to no one because the client (testator/grantor) is dead—and although the personal representative would succeed to the cause of action of the deceased client, the estate itself may not suffer any harm or diminution of funds as a result of the lawyer's negligence (except perhaps attorney's fees paid). Although all three dissenting justices generally agreed that intended beneficiaries of an estate plan should have a right of action against a negligent lawyer, they differed as to the class of persons who could qualify as intended beneficiaries and therefore maintain an action. Two dissenting justices favored a broad class of beneficiaries composed of any person claiming to be an intended beneficiary of the deceased client's estate. The third dissenting justice, on the other hand, advocated limiting the class of intended beneficiaries only to those persons specifically named or identified on the face of the estate planning documents.

As mentioned above, the decision by the Texas Supreme Court in Barcelo places Texas among the minority of states holding on to the privity requirement and denying beneficiaries a cause of action against a lawyer who negligently prepares estate planning documents. The overwhelming majority of states have provided beneficiaries with a cause of action against a lawyer who negligently prepares estate planning documents despite the lack of privity between the lawyer and beneficiaries. The California courts have been especially instrumental in relaxing the privity requirement in the estate planning context. See Biakanja v. Irving, 320 P.2d 16 (Cal. 1958)(California Supreme Court holds that notary, non-lawyer, who prepared a will but failed to have it properly executed, owes duty to intended beneficiaries); Lucas vs. Hamm 364 P.2d 685 (Cal. 1961)(California Supreme Court expands on Biakanja and holds that lawyer who prepared testamentary trust in violation of rule against perpetuities owes duty of care to intended beneficiaries—but lawyer did not breach duty of care because few practitioners understand the rule); Heyer v. Flaig, 449 P.2d 161 (Cal. 1969)(California Supreme Court holds that lawyer owes duty, in tort [as opposed to third party beneficiary contract], to intended beneficiaries of will), *overruled on other grounds*, Laird v. Blacker, 828 P.2d 691, 698 (Cal. 1992). The “majority states” have afforded beneficiaries this right of action on one of two theories. Some states hold that the cause of action of an intended beneficiary against the negligent estate planning lawyer sounds in tort/negligence in that the lawyer owes a duty of care directly to the beneficiary. Needham v. Hamilton, 459 A.2d 1060, 1061 (D.C. Ct. App. 1983); Heyer v. Flaig, 449 P.2d 161, 167 (Cal. 1969). Other states hold that the cause of action of the intended beneficiary sounds in contract in that the beneficiary is a third-party-beneficiary of the estate planning contract between the lawyer and the deceased client. Guy v. Liederbach, 459 A.2d 744, 752-753 (Pa. 1983). Whether the cause of action is based on tort or contract may be important because the statute of limitations for a tort action and a contract action may be different.

1. The Barcelo case is certainly a favorable development for Texas estate planners (and their malpractice insurance carriers). It will be interesting to see how long Barcelo remains the law in Texas. During the 1999 Texas legislative session, a bill was proposed that would overturn Barcelo and impose upon a lawyer a legal duty to intended beneficiaries of a will. This bill did not pass but may appear again in a future legislative session.
2. Assume a lawyer is coordinating the estate plans of persons A, B, and C. Assume further that B and C are beneficiaries of A’s estate plan (i.e. will) and the success of the estate plans of B and C is dependent to some extent on the validity of A’s estate plan. If A’s estate plan (i.e. will) is determined to be invalid or unenforceable for some reason such that B and C do not receive certain property that they expected in establishing their estate plans, would B and C have a claim against the lawyer for malpractice? Barcelo may not provide protection to a lawyer in these circumstances.
3. Negligent Misrepresentation – The Texas Supreme Court has recently recognized a negligent representation cause of action in favor of third-party/non-clients against an attorney in special circumstances based upon RESTATEMENT (SECOND) OF TORTS § 552(1977). McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests, 991 SW2d 787 (Tex. 1999). This negligent misrepresentation cause of action is separate and distinct from professional

malpractice and does not depend on the existence of traditional attorney-client relationship between the claimant and the attorney. Id. at 408-409. Generally speaking, in order to establish a cause of action for negligent misrepresentation, the claimant must show: (a) the attorney made a representation to the claimant specifically, (b) such representation was made by the attorney to induce some action on the part of the claimant, (c) the claimant relied on such representation, (d) such reliance by the claimant was justifiable, (e) the representation relied upon was false, and (f) the claimant suffered damages as a result.

4. Failure to Advise Persons/Non-clients of Non Representation – Even in the absence of conduct sufficient to support a finding of an attorney-client relationship, a lawyer may be liable to a person/non-client if the circumstances were such that it was reasonable for such person to believe that he or she was represented by the lawyer and lawyer fails to advise the person/non-client that the lawyer was not representing him or her. (See discussion in VI(E) above.)

CASE STUDY EXAMPLE No. 1

Husband (H) and Wife (W) are currently married. They have not had any children together, nor do they intend to. However, both H and W have two children from previous marriages. B and C are H's children from his prior marriage, while X and Y are W's children from her prior marriage.

H and W consult YOU for estate planning and to draft separate wills for them. They want it simple. In particular, H and W want YOU to draft their wills such that the surviving spouse acquires control over and benefit from the property (both separate and community) of the first spouse to die. Further, at the death of the surviving spouse, each will is to provide that B, C, X and Y will equally divide the combined estates of H and W. Prior to drafting the wills according to the specifications of H and W and conducting the execution: A) What should YOU consider advising H and W (i) for the protection of the goals of the first to die? (ii) for YOUR protection? B) Is property characterization of importance?

Later, H begins to have second thoughts about his will. He hates the idea that his community property interest and separate property might someday pass to X and Y (W's children) rather than to B and C - his own flesh and blood. H privately consults YOU about amending his will such that if he predeceases W, his community property interest and separate property will pass to W for her life, with the remainder going to B and C. YOU know that W would want to know of H's intentions and would likely make a similar change to her will if she did know. However, H demands that YOU keep this matter a secret. C) What do YOU do NOW? D) What should you have done at the outset of the engagement?

ABA/TEXAS RULES TO CONSIDER

	ABAMR	TDRPC	
1.	ABA 1.2	Rule 1.02(c)	Assisting Client in Committing a Fraud or Crime [Rule 1.02(c) prohibits a lawyer from assisting or counseling a client to engage in conduct that the lawyer <u>knows</u> is criminal or fraudulent.]
2.	ABA 1.4	Rule 1.03	Communication
3.	ABA 1.6	Rule 1.05	Confidentiality of Information
4.	ABA 1.7	Rule 1.06	General Conflict Rule
5.	ABA 1.7	Rule 1.07	Intermediary Conflict Rule
6.			Family Representation Matters
7.	ABA 1.16	Rule 1.15	Declining or Terminating Relationship

CASE STUDY EXAMPLE No. 2

The Smith Family consists of Husband (H), Wife (W), Son (S), and Daughter (D). The Smiths, including their children, own 100% of Smith Inc., with H serving as President and CEO. YOU have represented each member of the Smith Family in various matters (including estate planning) AND are also general counsel of Smith Inc.

On one particularly busy morning, the following events occur. What do you do?

- 1) H and W decide to file for divorce; they both want you to handle the matter by representing both of them; they tell YOU not to worry, that they pretty much agree on everything. Will it matter whether or not W is fully involved in Smith Inc., which is the largest asset in H and W's estate?
- 2) A) H informs YOU that he intends to start dumping the toxic and hazardous wastes generated by Smith Inc. in a remote part of the company's land because the current method of disposal is too costly; B) H also asks YOU to terminate the contract with the current disposal company;
- 3) H also informs YOU that he is going to enter into a business in another entity as to which W has no knowledge or interest;
- 4) An employee of Smith Inc. is caught stealing some property; she comes to you for advice;
- 5) S and D come to you for advice concerning their rights as to Smith Inc. S and D are each married, have children, and have worked for Smith Inc. all their lives; Smith Inc. is their only source of support; when more attractive offers for jobs outside Smith Inc. have arisen, H and W have told S and D that if they stay with the company it will someday belong to them. What advice can YOU give them?

ABA/TEXAS RULES TO CONSIDER

	ABAMR	TDRPC	
1.	ABA 1.2	Rule 1.02(c)	Assisting Client in Committing a Fraud or Crime
2.	ABA 1.4	Rule 1.03	Communication
3.	ABA 1.6	Rule 1.05	Confidentiality
4.	ABA 1.7	Rule 1.06	General Conflict Rule
5.	ABA 1.7	Rule 1.07	Intermediary Conflict Rule
6.	ABA 1.13	Rule 1.12	Organization as Client
7.	ABA 3.7	Rule 3.08	Lawyer as Witness [Subject to certain exceptions, Rule 3.08 generally prohibits a lawyer from representing a client in an adjudicatory proceeding if the lawyer knows or believes that he may be called as a witness to establish an "essential fact" on behalf of the client. The Rule also prohibits a lawyer from continuing representation in a pending adjudicatory proceeding if the lawyer believes that the lawyer will be compelled to furnish testimony that will be "substantially adverse" to the client unless the client consents after full disclosure.]
8.			Family Representation Matters

CASE STUDY EXAMPLE No. 3

The Jones Family consists of Mother (M), Daughter (D), and Son (S). M owns 100% of the stock of Jones Inc. Both M and D are actively involved in the daily operations of Jones Inc.; S is not.

M consults YOU about estate planning. M informs YOU that she would like to equally divide her entire estate between D and S; that she is extremely proud of Jones Inc. and would like to keep it in the family; that Jones Inc. comprises one-half of the total value of her estate; that ideally she would like to split the Jones Inc. stock 50/50 between D and S; that she has decided, however, to leave all of the Jones Inc. stock to D because D is the only family member involved in the business; and that S will receive the remainder of her estate.

After estate plan is implemented, M suffers a massive stroke and can no longer work in the business. Business is really booming and D is quickly overwhelmed. S decides to help and starts working in the business. Two years later, M dies. S has been working for Jones Inc. the entire time. However, due to her stroke, M never possessed the testamentary capacity to change her will. Furthermore, over this two year period, the value of Jones Inc. increased dramatically while the value of the remainder of M's estate decreased just as dramatically due to mounting medical costs.

S is extremely disappointed with the disposition of M's estate and asks YOU for help. What can YOU now do for S? YOUR only representation of the Jones Family has been M's estate planning. Alternatively, YOU have represented Jones Inc., done the estate planning for M, D and S and generally acted as "family counsel."

What should YOU have done prior to M's death? Do you have exposure for the way in which you prepared M's will?

ABA/TEXAS RULES TO CONSIDER

	ABAMR	TDRPC	
1.	ABA 1.4	Rule 1.03	Communication
2.	ABA 1.9	Rule 1.09	Former Client Conflict Rule
3.	ABA 3.7	Rule 3.08	Lawyer as Witness
4.			Family Representation Issues
5.			Malpractice and Privity Concerns

CASE STUDY EXAMPLE No. 4

Husband (H) and Wife (W) have three children - A, B, and C. Recently, A, B, and C each inherited \$100,000 from a wealthy grandparent. H and W are fearful that their children will squander their inheritance so they consult YOU. YOU advise H and W to form a family limited partnership ("FLP") with H and W as general partners and H, W, A, B, and C as limited partners.

H and W convince A, B, and C to participate in the FLP. Each child contributes \$75,000 to the FLP in exchange for a limited partnership interest. YOU agree to prepare the FLP agreement, handle the planning regarding the FLP, handle the funding of the FLP, and act as FLP counsel. One year later, the FLP is not as successful as A, B, and C feel that they had originally been led to believe it would be and A, B, and C want to withdraw from the FLP and receive assets. To their dismay, YOU inform them that, as limited partners, they cannot withdraw and receive assets without the consent of the other partners. A, B, and C are not happy and feel that you did not fully inform them at the outset. YOU: A) Did **or** B) Did not participate in advising A, B, and C to contribute funds to the FLP? YOU: A) Were **or** B) Were not engaged by A, B, and/or C to represent each of them in the initiation of this legal matter?

ABA/TEXAS RULES TO CONSIDER

	ABAMR	TDRPC	
1.	ABA 1.4	Rule 1.03	Communication
2.	ABA 1.6	Rule 1.05	Confidentiality of Information
3.	ABA 1.7	Rule 1.06	General Conflict Rule
4.	ABA 1.13	Rule 1.12	Organization As Client
5.			Family Representation Issues
6.			Malpractice and Privity Concerns

FIRM LETTERHEAD

Client 1

Client 2

Re: Consent to Joint Representation

Dear _____:

Our firm has been requested to represent Client 1 and Client 2 in connection with the formation of _____, an entity to be formed under the laws of the State of _____ (the "Company Formation"). An attorney has the duty to exercise independent professional judgment on behalf of each client. If an attorney is requested to represent multiple clients in the same matter, the attorney can do so only if he can impartially fulfill this duty for each client and if he obtains the consent of each client after explaining the possible risks, benefits, and implications involved in the joint representation.

Based upon our initial discussions, we have concluded that we can impartially represent Client 1 and Client 2 (the "Parties") in connection with the Company Formation. However, this does not preclude each Party from seeking separate, independent counsel on this matter--now or at any time in the future. In determining whether you should consent to this joint representation in the Company Formation, you should carefully consider the following:

1. Role as Joint Legal Counsel

In our joint representation of the Parties in the Company Formation, we will endeavor to represent each of you fairly and conscientiously, with our ultimate goal to reach an arrangement regarding the Company Formation that is mutually advantageous to all of the Parties and is compatible with the interests of all of the Parties. Because we will be representing all of the Parties in the Company Formation, we must consider, in carrying-out this representation, the interests of all of the Parties--not the interests of any particular Party or group of Parties. As you are probably aware, one advantage to separate legal representation for each Party is that your respective legal counsel would be acting solely on your behalf--looking out for your best interests exclusively without regard to the interests of the other Parties. On the other hand, utilizing separate representation for each Party is generally more costly, more contentious, and more time consuming than utilizing joint representation.

2. Open Relationship.

We believe that our firm cannot effectively represent each of you in the Company Formation if material information disclosed to us by any Party relating to the Company Formation must be preserved in confidence without disclosure to the other Parties. Accordingly, if we are to represent each of you jointly, it will only be with the express understanding that any material information disclosed to us by any of you and which relates to the Company Formation shall be disclosed to the other Parties if knowledge of such information would be necessary for them to make informed decisions regarding the Company Formation.

3. Attorney-Client Privilege

We believe that any information disclosed to our firm by any of you during this joint representation and relating to the Company Formation will not be protected by the attorney-client privilege in the event of a subsequent legal dispute between any of the Parties relating to the Company Formation. Additionally, we would not be able to represent any of you in connection with any such legal dispute and each of you would be required to obtain separate legal counsel.

4. Prior Legal Representation of Client 1.

[Consider including the following paragraph if the lawyer has an existing legal representation with one or more of the joint clients]

Our firm is currently performing (and in the past has performed) certain estate planning and business planning services for Client 1. However, we do not believe that these services will adversely affect our ability to fairly and impartially represent all of the Parties in the Company Formation. However, should we determine, at any time, that a material bias in favor of Client 1 exists such that we cannot fulfill our duties to the other Parties, then our firm will have to withdraw from this joint representation.

5. Future Conflicts.

At this time, there does not appear to be any difference of opinion among you regarding the fundamental terms of the Company Formation. However, it may turn out that on further consultation each of you may have differing opinions regarding the terms of the Company Formation. Should we determine that there are material differences on one or more issues that cannot be resolved amicably or on terms compatible with the mutual best interests of the Parties, then we must at that time withdraw from the joint representation. If this occurs, we will, if you wish, assist each of you in obtaining new counsel.

6. Legal Fees

Our legal fees for the Company Formation will be billed **[describe the legal fee arrangement in reasonable detail (i.e. hourly, fixed fee, etc.)]**

If you are in agreement with the terms and conditions of this engagement, please sign and date this letter where indicated below, and return it to me in the enclosed pre-paid return envelope. Again, we appreciate the opportunity to represent the two of you. If you have any questions about the terms of this engagement, our billing statements or any aspect of our representation, please do not hesitate to call me.

Sincerely,

Attorney

ACKNOWLEDGED AND AGREED:

Client 1

Date

Client 2

Date

Entity:

By: _____
Title: _____

Date

[SAMPLE CONSENT LETTER]

FIRM LETTERHEAD

DATE

Mr. and Mrs. _____

Re: Consent to Joint Representation of Husband and Wife for Estate Planning

Dear Mr. and Mrs. _____:

We are pleased that you have engaged our firm to represent the two of you in connection with estate planning matters (“Estate Planning”). An attorney has the duty to exercise independent professional judgment on behalf of each client. If an attorney is requested to represent multiple clients in the same matter, the attorney can do so only if the attorney can impartially fulfill this duty for each client and if the attorney obtains the consent of each client after explaining the possible risks, benefits, and implications involved in the joint representation.

Based upon our initial discussions with the two of you, we have concluded that our firm can impartially represent the two of you in connection with the Estate Planning. However, please be aware that each of you may obtain separate, independent counsel on this matter--now or at any time in the future. In determining whether you should consent to this joint representation, you should carefully consider the following:

1. Role as Joint Legal Counsel

In our joint representation of the two of you on the Estate Planning, we will strive to represent each of you in a professional manner, with our ultimate goal to reach an arrangement regarding the Estate Planning that is mutually advantageous to each of you and is compatible with the interests of each of you. Because we will be representing both of you, in carrying-out this representation, we must consider the interests of each of you--not the interests of any one person.

As you are probably aware, one advantage to separate legal representation for each of you is that your respective legal counsel would be acting solely on your behalf--looking out for your best interests exclusively without regard to the interests of the other person. On the other hand, utilizing separate representation for each of you is generally more costly, more contentious, and more time consuming than utilizing joint representation.

2. Disclosure of Information/Open Relationship.

We believe that our firm cannot effectively represent each of you in the Estate Planning if material information disclosed to us by either of you relating to the Estate Planning must be preserved in confidence without disclosure to the other person. Accordingly, if we are to represent the two of you, it will only be with the express understanding that any material information disclosed to our firm by either of you and which relates to the Estate Planning shall be disclosed to the other person if knowledge of such information would be necessary or useful for him or her to make informed decisions regarding the Estate

Planning.

3. Attorney-Client Privilege

We believe that any information disclosed to our firm by either of you during this joint representation and relating to the Estate Planning will not be protected by the attorney-client privilege in the event of a subsequent legal dispute between the two of you relating to the Estate Planning. Additionally, our firm would not be able to represent either of you in connection with any such legal dispute and each of you would be required to obtain separate legal counsel.

4. Prior Legal Representation of Husband or Wife.

[Consider including the following paragraph if the attorney or the firm has an existing legal representation with Husband or Wife]

Our firm is currently performing (and in the past has performed) certain legal services for _____. However, we do not believe that our relationship with _____ will adversely affect our ability to fairly and impartially represent each of you in the Estate Planning. However, should we determine, at any time, that a material bias in favor of _____ exists such that our firm cannot fulfill our duties to both of you, then our firm will have to withdraw from this joint representation.

5. Future Conflicts.

At this time, there does not appear to be any difference of opinion among you regarding the fundamental terms of the Estate Planning. However, it may turn out that upon further consultation each of you may have differing opinions regarding the terms of the Estate Planning, such as the persons who will be the beneficiaries of your estate or the property such persons will receive. Should we determine that there are material differences on one or more issues that cannot be resolved amicably or on terms compatible with the mutual best interests of the two of you, then we must at that time withdraw from the joint representation and our firm would not be able to represent either of you in connection with the Estate Planning. If this occurs, we will, if you wish, assist each of you in obtaining new counsel.

6. Legal Fees and Other Charges

Our legal fees and other costs and expenses in connection with the Estate Planning will be billed to you in the following manner. **[Describe the legal fee arrangement in reasonable detail (i.e. hourly, fixed fee, etc.) along with other costs and expenses to be charged].**

If you are in agreement with the terms and conditions of this engagement, please sign and date this letter where indicated below, and return it to me in the enclosed pre-paid return envelope. Again, we appreciate the opportunity to represent the two of you. If you have any questions about the terms of this engagement, our billing statements or any aspect of our representation, please do not hesitate to call me.

Sincerely,

Attorney

ACKNOWLEDGED AND AGREED:

Mr. _____

Date

Mrs. _____

Date

Texas Disciplinary Rules of Professional Conduct

Rule 1.02. Scope and Objectives of Representation

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

Rule 1.03. Communication

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

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

Rule 1.05. Confidentiality of Information

(a) “Confidential information” includes both “privileged information” and “unprivileged client information” “Privileged information” refers to the information of a client protected by the lawyer-client privilege of Rule 503 of the Texas Rules of Evidence or of Rule 503 of the Texas Rules of Criminal Evidence or by the principles of attorney-client privilege governed by Rule 501 of the Federal Rules of Evidence for United States Courts and Magistrates. “Unprivileged client information” means all information relating to a client or furnished by the client, other than privileged information, acquired by the lawyer during the course of or by reason of the representation of the client.

(b) Except as permitted by paragraphs (c) and (d), or as required by paragraphs (e) and (f), a lawyer shall not knowingly:

(1) Reveal confidential information of a client or a former client to:

(i) a person that the client has instructed is not to receive the information; or

(ii) anyone else, other than the client, the client’s representatives, or the members, associates, or employees of the lawyer’s law firm.

(2) Use confidential information of a client to the disadvantage of the client unless the client consents after consultation.

(3) Use confidential information of a former client to the disadvantage of the former client after the representation is concluded unless the former client consents after consultation or the confidential information has become generally known.

(4) Use privileged information of a client for the advantage of the lawyer or of a third person, unless the clients consents after consultation.

- (c) A lawyer may reveal confidential information:
 - (1) When the lawyer has been expressly authorized to do so in order to carry out the representation.
 - (2) When the client consents after consultation.
 - (3) To the client, the client's representatives, or the members, associates, and employees of the lawyer's firm, except when otherwise instructed by the client.
 - (4) When the lawyer has reason to believe it is necessary to do so in order to comply with a court order, a Texas Disciplinary Rules of Professional Conduct, or other law.
 - (5) To the extent reasonably necessary to enforce a claim or establish a defense on behalf of the lawyer in a controversy between the lawyer and the client.
 - (6) To establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer or the lawyer's associates based upon conduct involving the client of the representation of the client.
 - (7) When the lawyer has reason to believe it is necessary to do so in order to prevent the client from committing a criminal or fraudulent act.
 - (8) To the extent revelation reasonably appears necessary to rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used.
- (d) A lawyer also may reveal unprivileged client information:
 - (1) When impliedly authorized to do so in order to carry out the representation.
 - (2) When the lawyer has reason to believe it is necessary to do so in order to:
 - (i) carry out the representation effectively;
 - (ii) defend the lawyer or the lawyer's employees or associates against a claim of wrongful conduct;
 - (iii) respond to allegations in any proceeding concerning the lawyer's representation of the client; or
 - (iv) prove the services rendered to a client, or the reasonable value thereof, or both, in an action against another person or organization responsible for the payment of the fee for services rendered to the client.
- (e) When a lawyer has confidential information clearly establishing that a client is likely to commit a criminal or fraudulent act that is likely to result in death or substantial bodily harm to a person, the lawyer shall reveal confidential information to the extent revelation reasonably appears necessary to prevent the client from committing the criminal or fraudulent act.

(f) A lawyer shall reveal confidential when required to do so by Rule 3.03(a)(2), 3.03(b), or by Rule 4.01(b).

Amended by Supreme Court order of Oct. 23, 1991.

Rule 1.06. Conflict of Interest: General Rule

(a) A lawyer shall not represent opposing parties to the same litigation.

(b) In other situations and except to the extent permitted by paragraph (c), a lawyer shall not represent a person if the representation of that person:

(1) involves a substantially related matter in which that person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer's firm; or

(2) reasonably appears to be or become adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person or by the lawyer's or law firm's own interests.

(c) A lawyer may represent a client in the circumstances described in (b) if:

(1) the lawyer reasonably believes the representation of each client will not be materially affected; and

(2) each affected or potentially affected client consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved in any.

(d) A lawyer who has represented multiple parties in a matter shall not hereafter represent any of such parties in a dispute among the parties arising out of the matter, unless prior consent is obtained from all such parties to the dispute.

(e) If a lawyer has accepted representation in violation of this Rule, or if multiple representation properly accepted becomes improper under this Rule, the lawyer shall promptly withdraw from one or more representations to the extent necessary for any remaining representation not to be in violation of these Rules.

(f) If a lawyer would be prohibited by this Rule from engaging in particular conduct, no other lawyer while a member or associated with that lawyer's firm may engage in that conduct.

Rule 1.07. Conflict of Interest: Intermediary

(a) A lawyer shall not act as intermediary between clients unless:

(1) the lawyer consults with each client concerning the implications of the common representation, including the advantages and risks involved, and the effect on the attorney-client privileges, and obtains each client's written consent to the common representation;

(2) the lawyer reasonably believes that the matter can be resolved without the necessity of contested litigation on terms compatible with the clients' best interests, that each client will be able to make adequately informed decisions in the matter and that there

is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful; and

(3) the lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.

(b) While acting as intermediary, the lawyer shall consult with each client concerning the decision to be made and the considerations relevant in making them, so that each client can make adequately informed decisions.

(c) A lawyer shall withdraw as intermediary if any of the clients so requests, or if any of the conditions stated in paragraph (a) is no longer satisfied. Upon withdrawal, the lawyer shall not continue to represent any of the clients in the matter that was the subject of the intermediation.

(d) Within the meaning of this Rule, a lawyer acts as intermediary if the lawyer represents two or more parties with potentially conflicting interests.

(e) If a lawyer would be prohibited by this Rule from engaging in particular conduct, no other lawyer while a member of or associated with that lawyer's firm may engage in that conduct.

Rule 1.09. Conflict of Interest: Former Client

(a) Without prior consent, a lawyer who personally has formerly represented a client in a matter shall not thereafter represent another person in a matter adverse to the former client:

(1) in which such other person questions the validity of the lawyer's services or work product for the former client; or

(2) if the representation in reasonable probability will involve a violation of Rule 1.05.

(3) if it is the same or a substantially related matter.

(b) Except to the extent authorized by Rule 1.10, when lawyers are or have become members of or associated with a firm, none of them shall knowingly represent a client if an one of them practicing alone would be prohibited from doing so by paragraph (a).

(c) When the association of a lawyer with a firm has terminated, the lawyers who were then associated with that lawyer shall not knowingly represent a client if the lawyer whose association with that firm has terminated would be prohibited from doing so by paragraph (a)(1) or if the representation in reasonable probability will involve a violation of Rule 1.05.

Amended by Supreme Court order of Oct. 23, 1991.

Rule 1.12. Organization as a Client

(a) A lawyer employed or retained by an organization represents the entity. While the lawyer in the ordinary course of working relationships may report to, and accept direction from, an entity's duly authorized constituents, in the situations described in paragraph (b) the lawyer shall proceed as reasonably necessary in the best interest of the organization without involving unreasonable risks of disrupting the organization and of revealing information relating to the representation to persons outside the organization.

(b) A lawyer representing an organization must take reasonable remedial actions whenever the lawyer learns or knows that:

- (1) an officer, employee, or other person associated with the organization has committed or intends to commit a violation of a legal obligation to the organization or a violation of law which reasonably might be imputed to the organization;
- (2) the violation is likely to result in substantial injury to the organization; and
- (3) the violation is related to a matter within the scope of the lawyer's representation of the organization.

(c) Except where prior disclosure to persons outside the organization is required by law or other Rules, a lawyer shall first attempt to resolve a violation by taking measures within the organization. In determining the internal procedures, actions or measures that are reasonably necessary in order to comply with paragraphs (a) and (b), a lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Such procedures, actions and measures may include, but are not limited to, the following:

- (1) asking reconsideration of the matter;
 - (2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and
 - (3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.
- (d) Upon a lawyer's resignation or termination of the relationship in compliance with Rule 1.15, a lawyer is excused from further proceeding as required by paragraphs (a), (b) and (c), and any further obligations of the lawyer are determined by Rule 1.05.
- (e) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing or when explanation appears reasonably necessary to avoid misunderstanding on their part.

Rule 3.08. Lawyer as Witness

(a) A lawyer shall not accept or continue employment as an advocate before a tribunal in a contemplated or pending adjudicatory proceeding if the lawyer knows or believes that the lawyer is or may be a witness necessary to establish an essential fact on behalf of the lawyer's client, unless:

- (1) the testimony relates to an uncontested issue;
- (2) the testimony will relate solely to a matter of formality and there is no reason to

believe that substantial evidence will be offered in opposition to the testimony;

- (3) the testimony relates to the nature and value of legal services rendered in the case;
- (4) the lawyer is a party to the action and is appearing pro se; or
- (5) the lawyer has promptly notified opposing counsel that the lawyer expects to testify in the matter and disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer shall not continue as an advocate in a pending adjudicatory proceeding if the lawyer believes that the lawyer will be compelled to furnish testimony that will be substantially adverse to the lawyer's client, unless the client consents after full disclosure.

(c) Without the client's informed consent, a lawyer may not act as advocate in an adjudicatory proceeding in which another lawyer in the lawyer's firm is prohibited by paragraphs (a) or (b) from serving as advocate. If the lawyer to be called as a witness could not also serve as an advocate under this Rule, that lawyer shall not take an active role before the tribunal in the presentation of the matter.

Amended by Supreme Court Order of June 15, 1994, eff. Oct. 1, 1994.

Rule 7.01. Firm Names and Letterhead

(a) A lawyer in private practice shall not practice under a trade name, a name that is misleading as the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm, except that the names of a professional corporation, professional association, limited liability partnership, or professional limited liability company may contain "P.C.," "P.A.," "L.L.P.," "P.L.L.C.," or similar symbols indicating the nature of the organization, and if otherwise lawful a firm may use as, or continue to include in, its name the name of one or more deceased or retired members of the firm or of a predecessor firm in continuing line of succession. Nothing herein shall prohibit a married woman from practicing under her maiden name.

(b) A firm with offices in more than one jurisdiction may use the same name in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

(c) The name of a lawyer occupying a judicial, legislative, or public executive or administrative position shall not be used in the name of a firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

(d) A lawyer shall not hold himself or herself out as being a partner, shareholder, or associate with one or more other lawyers unless they are in fact partners, shareholders, or associates.

(e) A lawyer shall not advertise in the public media or seek professional employment by written communication under a trade or fictitious name, except that a lawyer who practices under a trade name as authorized by paragraph (a) of this Rule may use that name in such advertisement or such written communication but only if that name is the firm name that appears on the lawyer's letterhead, business cards, office sign, fee contracts, and with the lawyer's

signature on pleadings and other legal documents.

(f) A lawyer shall not use a firm name, letterhead, or other professional designation that violates Rule 7.02(a).

Rule 7.02. Communications Concerning a Lawyer's Services

(a) A lawyer shall not make a false or misleading communication about the qualifications or the services of any lawyer or firm. A communication is false or misleading if it:

- (1) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;
- (2) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate these rules or other law;
- (3) compares the lawyer's services with other lawyer's services, unless the comparison can be substantiated by reference to verifiable, objective data;
- (4) states or implies that the lawyer is able to influence improperly or upon irrelevant grounds an tribunal, legislative body, or public official; or
- (5) designates one or more specific areas of practice in an advertisement in the public media or in a written solicitation unless the advertising lawyer is competent to handle legal matters in each such area of practice.

(b) Rule 7.02(a)(5) does not require that a lawyer be certified by the Texas Board of Legal Specialization at the time of advertising in a specific area of practice, but such certification shall conclusively establish that such lawyer satisfies the requirements of Rule 7.02(a)(5) with respect to the area(s) of practice in which such lawyer is certified.

(c) A lawyer shall not advertise in the public media that the lawyer is a specialist except as permitted under Rule 7.04.

(d) Any statement or disclaimer required by these rules shall be made in each language used in the advertisement or writing with respect to which such required statement or disclaimer relates; provided however, the mere statement that a particular language is spoken or understood shall not alone result in the need for a statement or disclaimer in that language.

Rule 7.03. Prohibited Solicitation & Payments

(a) A lawyer shall not by in-person or telephone contact seek professional employment concerning a matter arising out of a particular occurrence or event, or series of occurrences or events, from a prospective client or nonclient who has not sought the lawyer's advice regarding employment or with whom the lawyer has no family or past or present attorney-client relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. Notwithstanding the provisions of this paragraph, a lawyer for a qualified nonprofit organization may communicate with the organization's members for the purpose of educating the members to understand the law, to recognize legal problems, to make intelligent selection of counsel, or to use

legal services. In those situations where in-person or telephone contact is permitted by this paragraph, a lawyer shall not have such a contact with a prospective client if:

- (1) the communication involves coercion, duress, fraud, overreaching, intimidation, undue influence, or harassment;
- (2) the communication contains information prohibited by Rule 7.02(a); or
- (3) the communication contains a false, fraudulent, misleading, deceptive, or unfair statement or claim.

(b) A lawyer shall not pay, give, or offer to pay or give anything of value to a person not licensed to practice law for soliciting prospective clients for, or referring clients or prospective clients to, any lawyer or firm, except that a lawyer may pay reasonable fees for advertising and public relations services rendered in accordance with this Rule and may pay the usual charges of a lawyer referral service that meets the requirements of article 320d, Revised Statutes.

(c) A lawyer, in order to solicit professional employment, shall not pay, give, advance, or offer to pay, give, or advance anything of value, other than actual litigation expenses and other financial assistance as permitted by Rule 1.08(d), to a prospective client or any other person; provided however, this provision does not prohibit the payment of legitimate referral fees as permitted by paragraph (b) of this Rule.

(d) A lawyer shall not enter into an agreement for, charge for, or collect a fee for professional employment obtained in violation of Rule 7.03(a), (b), or (c).

(e) A lawyer shall not participate with or accept referrals from a lawyer referral service unless the lawyer knows or reasonably believes that the lawyer referral service meets the requirements of Article 320d, Revised Statutes.

Rule 7.04. Advertisement in the Public Media.

(a) A lawyer shall not advertise in the public media that the lawyer is a specialist, except as permitted under Rule 7.04(b) or as follows:

(1) A lawyer admitted to practice before the United States Patent Office may use the designation "Patents," "Patent Attorney," or "Patent Lawyer," or any combination of those terms. A lawyer engaged in the trademark practice may use the designation "Trademark," "Trademark Attorney," or "Trademark Lawyer," or any combination of those terms. A lawyer engaged in patent and trademark practice may hold himself or herself out as specializing in "Intellectual Property Law," "Patent, Trademark, Copyright Law and Unfair Competition," or any of those terms.

(2) A lawyer may permit his or her name to be listed in lawyer referral service offices that meet the requirements of Article 320d, Revised Statutes, according to the areas of law in which the lawyer will accept referrals.

(3) A lawyer available to practice in a particular area of law or legal service may distribute to other lawyers and publish in legal directories and legal newspapers a listing or an announcement of such availability. The listing shall not contain a false or misleading

representation of special competence or experience, but may contain the kind or information that traditionally has been included in such publications.

(b) A lawyer who advertises in the public media:

(1) shall publish or broadcast the name of at least one lawyer who is responsible for the content of such advertisement.

(2) shall not include a statement that the lawyer has been certified or designated by an organization as possessing special competence or a statement that the lawyer is a member of an organization the name of which implies that its members possess special competence, except that:

(i) a lawyer who has been awarded a Certificate of Special Competence by the Texas Board of Legal Specialization in the area so advertised, may state with respect to each such area, “Board Certified, [area of specialization] – Texas Board of Legal Specialization;” and

(ii) a lawyer who is a member of an organization the name of which implies that its members possess special competence, or who has been certified or designated by an organization as possessing special competence, may include a factually accurate statement of such membership or may include a factually accurate statement, “Certified [area of specialization] [name of certifying organization],” but such statements may be made only if that organization has been accredited by the Texas Board of Legal Specialization as a bona fide organization that admits to membership or grants certification only on the basis of objective, exacting, publicly available standards (including high standards of individual character, conduct, and reputation) that are reasonably relevant to the special training or special competence that is implied and that are in excess of the level of training and competence generally required for admission to the Bar; and

(3) shall state with respect to each area advertised in which the lawyer has not been awarded a Certificate of Special Competence by the Texas Board of Legal Specialization, “Not Certified by the Texas Board of Legal Specialization.” However, if an area of law so advertised has not been designated as an area in which a lawyer may be awarded a certificate of Special Competence by the Texas Board of Legal Specialization, the lawyer may also state, “No designation has been made by the Texas Board of Legal Specialization for a certificate of Special Competence in this area..”

(c) Separate and apart from any other statements, the statements referred to in paragraph (b) shall be displayed conspicuously with no abbreviations, changes, or additions in the quoted language set forth in paragraph (b) so as to be easily seen or understood by an ordinary consumer.

(d) Subject to the requirements of Rule 7.02 and of paragraphs (a), (b), and (c) of this Rule, a lawyer may, either directly or through a public relations or advertising representative, advertise services in the public media, such as (but not limited to) a telephone directory, legal directory, newspaper or other periodical, outdoor display, radio, or television.

(e) All advertisements in the public media for a lawyer or firm must be reviewed and

approved in writing by the lawyer or a lawyer in the firm.

(f) A copy or recording of each advertisement in the public media and relevant approval referred to in paragraph (e), and a record of when and where the advertisement was used, shall be kept by the lawyer or firm for four years after its last dissemination.

(g) In advertisements utilizing video or comparable visual or comparable visual images, any person who portrays a lawyer whose services or whose firm's services are being advertised, or who narrates an advertisement as if he or she were such a lawyer, shall be one or more of the lawyers whose services are being advertised. In advertisements utilizing audio recordings, any person who narrates an advertisement as if he or she were a lawyer whose services are being advertised.

(h) If an advertisement in the public media by a lawyer or firm discloses the willingness or potential willingness of the lawyer or firm to render services on a contingent fee basis, the advertisement must state whether the client will be obligated to pay all or any portion of the court costs and, if a client may be liable for other expenses, this fact must be disclosed. If specific percentage fees or fee ranges of contingent fee work are disclosed in such advertisement, it must also disclose whether the percentage is computed before or after expenses are deducted from the recovery.

(i) A lawyer who advertises in the public media a specific fee or range of fees for a particular service shall conform to the advertised fee or range of fees for the period during which the advertisement is reasonably expected to be in circulation or otherwise expected to be effective in attracting clients, unless the advertisement specifies a shorter period; but in no instance is the lawyer bound to conform to the advertised fee or range of fees for a period of more than one year after the date of publication.

(j) (Editor's note: This rule was found to be unconstitutional as applied to one plaintiff in *Texans Against Censorship, Inc. et al v. State Bar of Texas, et al*, U.S. District Court, Eastern District of Texas. The State Bar Board of Directors has approved the petitioning, of the Supreme Court of Texas asking that the rule be modified. The Supreme Court of Texas asking that the rule be modified. The Supreme Court of Texas asking that the rule be modified. The Supreme Court will consider the following revision to the rule:

A lawyer or firm who advertises in the public media must disclose the geographic location by city or town of the lawyer's or firm's principal office. A lawyer or firm shall not advertise the existence of any office other than the principal office unless:

1. the other office is staffed by a lawyer at least three days a week; or

2. the advertisement states:

- (a) the days and times during which a lawyer will be present at that office, or

- (b) that meetings with lawyers will be by appointment only.

(k) A lawyer may not, directly or indirectly, pay all or a part of the cost of an advertisement in the public media for a lawyer not in the same firm unless such advertisement discloses the name and address of the financing lawyer, the relationship between the advertising lawyer and the

financing lawyer, and whether the advertising lawyer is likely to refer cases received through the advertisement to the financing lawyer.

(l) If an advertising lawyer knows or should know at the time of an advertisement in the public media that a case or matter will likely be referred to another lawyer or firm, a statement of such fact shall be conspicuously included in such advertisement.

(m) No motto, slogan, or jingle that is false or misleading may be used in any advertisement in the public media.

(n) A lawyer shall not include in any advertisement in the public media the lawyer's association with a lawyer referral service unless the lawyer knows or reasonably believes that the lawyer referral service meets the requirements of article 320d, Revised Statutes.

(o) A lawyer may not advertise in the public media as part of an advertising cooperative venture of two or more lawyers not in the same firm unless each such advertisement:

(1) states that the advertisement is paid for by the cooperating lawyers;

(2) names each of the cooperating lawyer;

(3) sets forth conspicuously the special competency requirements required by Rule 7.04(b) of lawyers who advertise in the public media.

(4) does not state or imply that the lawyers participating in the advertising cooperative or venture possess professional superiority, are able to perform services in a superior manner, or possess special competence in any area of law advertised, except that the advertisement may contain the information permitted by Rule 7.04(b)(2); and

(5) does not otherwise violate the Texas Disciplinary Rules of Professional Conduct.

(p) Each lawyer who advertises in the public media as part of an advertising cooperative or venture shall be individually responsible for:

(1) ensuring that each advertisement does not violate this Rule; and

(2) complying with the filing requirements of Rule 7.07.

Rule 7.05. Prohibited Written Solicitations

(a) A lawyer shall not send or deliver, or knowingly permit or cause another person to send or deliver on the lawyer's behalf, a written communications to a prospective client for the purposes of obtaining professional employment if:

(1) the communication involves coercion, duress, fraud, overreaching, intimidation, undue influence, or harassment;

(2) the communication contains information prohibited by Rule 7.02 or fails to satisfy each of the requirements of Rule 7.04(a) through (c), and (h) through (o) that would be applicable to the communication contains false, fraudulent, misleading, deceptive, or unfair

statement or claim.

(b) Except as provided in paragraph (e) of this Rule, a written solicitation communication to prospective clients for the purpose of obtaining professional employment:

(1) shall conform to the provisions of Rule 7.04(a) through (c);

(2) shall be plainly marked "ADVERTISEMENT" on the first page of the written communication, and the face of the envelope also shall be plainly marked "ADVERTISEMENT." If the written communication is in the form of a self-mailing brochure or pamphlet, the word "ADVERTISEMENT" shall be:

(i) in a color that contrasts sharply with the background color; and

(ii) in a size of at least 3/8" vertically or three times the vertical height of the letters used in the body of such communication, whichever is larger.

(3) shall not be made to resemble legal pleadings or other legal documents;

(4) (Editor's Note: This rule was found unconstitutional in *Texans Against Censorship, Inc., et al v. State Bar of Texas, et al*, U.S. District Court, Eastern District of Texas. The Supreme Court of Texas will consider deletion of the rule which currently reads:

shall not contain a statement or implication that the written communication has received any kind of authorization or approval from the State Bar of Texas or from the Law Advertisement and Solicitation Review Committee);

(5) (Editor's Note: This rule was found unconstitutional in *Texans Against Censorship, Inc., et al v. State Bar of Texas, et al*, U.S. District Court, Eastern District of Texas. The Supreme Court of Texas will consider deletion of the rule which currently reads:

shall not in any manner, such as by registered mail, that requires personal delivery to a particular individual).

(6) shall not reveal on the envelope used for the communication or on the outside self-mailing brochure or pamphlet, the nature of the legal problem of the prospective client or nonclient; and

(7) shall disclose how the lawyer obtained the information prompting such written communication to solicit professional employment if such contact was prompted by a specific occurrence involving the recipient of the communication or a family member of such person(s).

(c) All written communications to a prospective client for the purpose of obtaining professional employment must be reviewed and either signed by or approved in writing by the lawyer of a lawyer in the firm.

(d) A copy of each written solicitation communication, the relevant approval thereof, and a record of the date of each such communication; the name and address to which each such communication was sent; and the means by which each such communication was sent shall be

kept by the lawyer or firm for four years after its dissemination.

(e) The provisions of paragraph (b) of this Rule do not apply to a written solicitation communication:

- (1) directed to a family member or a person with whom the lawyer had or has an attorney-client relationship;
- (2) that is not motivated by or concerned with a particular past occurrences or events and also is not motivated by or concerned with the prospective client's specific existing legal problem of which the lawyer is aware;
- (3) if the lawyer's use of the communication to secure professional employment was not significantly motivated by a desire for, or by the possibility of obtaining, pecuniary gain; or
- (4) that is requested by the prospective client.

Rule 7.06. Prohibited Employment

A lawyer shall not accept or continue employment when the lawyer knows or reasonably should know that the person who seeks the lawyer's services does so as a result of conduct prohibited by these rules.

Rule 7.07. Filing Requirements for Public Advertisements and Written Solicitations

(a) Except as provided in paragraph (d) of this Rule, a lawyer shall file with the Advertising Review Committee of the State Bar of Texas, either before or concurrently with the mailing or sending of a written solicitation communication:

- (1) a copy of the written solicitation communication being sent or to be sent to one or more prospective clients for the purpose of obtaining professional employment, together with a representative sample of the envelopes in which the communications are enclosed; and
- (2) a check or money order payable to the State Bar of Texas for the fee set by the Board of Directors. Such fee shall be for the sole purpose of defraying the expense of enforcing the rules related to such solicitations.

(b) Except as provided in paragraph (d) of this Rule, a lawyer shall file with the Advertisement and Solicitation Review Committee of the State Bar of Texas, either before or concurrently with the first dissemination of an advertisement in the public media, a copy of each of the lawyer's advertisements in the public media. The filing shall include:

- (1) a copy of the advertisement in the form in which it appears or is or will be disseminated, such as a videotape, an audiotape, a print copy, or a photograph of outdoor advertising;
- (2) a production script of the advertisement setting forth all words and describing in detail the actions, events, scenes, and background sounds used in such advertisement together with a listing of the names and addresses or persons portrayed or heard to speak,

if the advertisement is in or will be in a form in which the advertised messages is not fully revealed by a print copy of photograph;

(3) a statement of when and where the advertisement has been, is, or will be used;

(4) a check or money order payable to the State Bar of Texas for the fee set by the Board of Directors. Such fee shall be for the sole purpose of defraying the expense of enforcing the rules related to such advertisements.

(c) A lawyer who desires to secure an advance advisory opinion concerning compliance of a contemplated written solicitation communication or advertisement may submit to the Advertising Review Committee, not less than thirty (30) days prior to the date of first dissemination the material specified in paragraph (a) or (b) of this Rule, including the required fee; provided however, it shall not be necessary to submit a videotape if the videotape has not then been prepared and the production script submitted reflects in detail and accurately the actions, events, scenes, and background sounds that will be depicted or contained on such videotapes, when prepared, as well as the narrative transcript of the verbal and printed portions of such advertisement. An advisory opinion of the Advertising Review Committee of noncompliance is not binding in favor of the submitting lawyer if the representations, statements, materials, facts and written assurances received in connection therewith are true and are not misleading. The finding constitutes admissible evidence if offered by a party.

(d) The filing requirements of paragraphs (a) and (b) do not extend to any of the following materials:

(1) an advertisement in the public media that contains only part or all of the following information, provided the information is not false or misleading:

(i) the name of the lawyer or firm and lawyers associated with the firm, with office addresses, telephone numbers, office and telephone service hours, telecopier numbers, and a designation of the profession such as “attorney,” “lawyer,” “law office,” or “firm”;

(ii) the fields of law in which the lawyer or firm advertises specialization and the statements required by Rule 7.04(a) through (c);

(iii) the date of admission of the lawyer or lawyers to the State Bar of Texas, to particular federal courts, and to the bars of other jurisdictions;

(iv) technical and professional licenses granted by this state and other recognized licensing authorities;

(v) foreign language ability;

(vi) fields of law in which one or more lawyers are certified or designated , provided the statement of this information is in compliance with Rule 7.02(a) through (c);

(vii) identification of prepaid or group legal service plans in which the lawyer participates;

- (viii) the acceptance or nonacceptance of credit cards;
 - (ix) any fee for initial consultation and fee schedule;
 - (x) that the lawyer or firm is a sponsor of a charitable, civic, or community program or event, or is a sponsor of a public service announcement;
 - (xi) any disclosure or statement required by these rules; and
 - (xii) any other information specified from time to time in orders promulgated by the Supreme Court of Texas:
- (2) an advertisement in the public media that:
 - (i) identifies one or more lawyers or a firm as a contributor to a specified charity or as a sponsor of a specified charitable, community, or public interest program, activity, or event; and
 - (ii) contains no information about the lawyers or firm other than name of the lawyers or firm or both, location of the law offices, and the fact of the sponsorship or contribution;
 - (3) a listing or entry in a regularly published law list;
 - (4) an announcement card stating new or changed associations, new offices, or similar changes relating to a lawyer or firm, or a tombstone professional card;
 - (5) a newsletter mailed only to:
 - (i) existing or former clients;
 - (ii) other lawyers or professionals; and
 - (iii) members of a nonprofit organization that meets the following conditions: the primary purposes of the organization do not include the rendition of legal services; the recommending, furnishing, paying for, or educating persons regarding legal services is incidental and reasonably related to the primary purposes of the organization; the organization does not derive a financial benefit from the rendition of legal services by a lawyer; and the person for whom the legal services are rendered, and not the organization, is recognized as the client of the lawyer who is recommended, furnished, or paid by the organization;
 - (6) a written solicitation communication that is not motivated by or concerned with a particular past occurrence or event or a particular series of past occurrences or events, and also is not motivated by or concerned with the prospective client's specific existing legal problem of which the lawyer is aware;
 - (7) a written solicitation communication if the lawyer's use of the communication to secure professional employment was not significantly motivated by a desire for, or by the

possibility of obtaining, pecuniary gain; or

(8) a written solicitation communication that is requested by the prospective client.

(e) If requested by the Advertising Review Committee, a lawyer shall promptly submit information to substantiate statements or representations made or implied in any advertisement in the public media and/or written solicitation.

APPLICATION FORM LAWYER ADVERTISING AND WRITTEN SOLICITATION

Effective July 29, 1995, Part VII of the Texas Rules of Disciplinary Procedure requires that a lawyer file with the Advertising Review Committee a copy of all public media advertisements and written solicitations, except those exempt by Rule 7.07(d), contemporaneously with first dissemination or mailing. (If pre-approval is requested for an advertisement that is to be placed in a telephone directory or similar publication, the ad must be submitted at least 30 days prior to the printing deadline of the publication rather than 30 days prior to dissemination date of the publication.) If a pre-approval is requested, a response will be mailed within 25 days of the date of receipt of a completed application packet.

For Committee Use Only

Fee Enclosed
 Letter
 Print Ad
 Script
 Video/Cassette

 Case No. _____
 Date Rec'd _____
 Date Rec'd _____
 if Re-sub. _____

INSTRUCTIONS FOR SUBMISSION OF A COMPLETE APPLICATION PACKET

1. Complete Application in full. Please print or type. Application may be reproduced.
2. Attach advertisement or writing.
 - > For a solicitation letter, attach a sample of the envelope in which it will be mailed.
 - > For a television or radio ad, attach a detailed production script, including as title or number and an audio or video tape.
 - > If requesting pre-approval for a TX or radio ad that has not yet been produced, a production script can be submitted without a video or audio tape.
 - > For an ad or letter in any language other than English, attach a complete, accurate English translation.
 - > For a website, include URL address of site on this form.
3. Enclose check in the amount of \$50.00 payable to the State Bar of Texas for each ad or writing.

4. Mail original and one copy* of each completed application packet to:

Advertising Review Committee
State Bar of Texas
P.O. Box 12487
Austin, TX 78711-2487

*Note exception: It is not necessary to include an additional copy of the video or audio tape submitted for TV or radio commercials.

A separate application packet must be submitted for each advertisement or writing. If submitting more than one packet at a time, TV or radio commercials may be combined onto one tape. Filing fees may be combined into one check. Incomplete application packets will be returned. They will not be docketed for review.

For questions concerning filing requirements or to request a Lawyer Advertising Information Packet, call 1-800-566-4616.

Lawyer: _____ Bar Card #: _____

Firm: _____

Firm's Principal Office Address: _____

Phone: _____ Fax: _____

Nature of advertisement or written solicitation:

- A. _____ Letter C. _____ Magazine/Newspaper E. _____ Brochure/Newsletter
 B. _____ Telephone Directory D. _____ Television/Radio F. _____ Other (billboards, websites, etc.)

It is extremely important that you review the explanation of the difference between filing and pre-approval at the top of this page before answering the following question:

Does applicant seek pre-approval? Yes (pre-approval) _____ No(filing) _____
 If you answered No, state the date of the advertisement or writing was first disseminated or mailed. _____

Is it likely that a case or matter resulting from the advertisement or writing will be referred to another lawyer or law firm? Yes _____ No _____

Does the advertisement or writing disclose or allude to a specific fee, range of fees, or that the lawyer or law firm will render fees on a contingent fee basis? Yes _____ No _____

Does the advertisement or writing disclose the existence of an office other than the firm's principal office? Yes _____ No _____

If you answered Yes, is the satellite office staffed by a lawyer at least three days per week? Yes ___ No ___

Does the advertisement or writing designate or allude to one or more specific areas of practice?

Yes _____ No _____

If you answered Yes, is the lawyer board certified in the areas of practice advertised? Yes _____ No _____

Has another lawyer or law firm paid for any part of the advertisement or writing? Yes _____ No _____

If you answered Yes, identify the lawyer or law firm.

In what geographic location(s) will the advertisement be disseminated?

Identify any lawyers depicted in the advertisement.

Identify any actual clients depicted in the advertisement along with such clients' addresses and phone numbers.

ATTEST: I HAVE REVIEWED THE ADVERTISEMENT OR WRITING SUBMITTED AS REQUIRED BY RULE 7.04(e) OR 7.05(c), TEX. DISCIPLINARY RULES OF PROFESSIONAL CONDUCT. THE REPRESENTATIONS CONTAINED THEREIN AND THE INFORMATION IN THIS APPLICATION ARE TRUE AND CORRECT.

Signed

Date

<u>FOR COMMITTEE USE ONLY</u>				
PRE-APPROVED	APPROVED	ADDITIONAL INFORMATION REQUESTED	DISAPPROVED	REFERRED TO CHIEF DISCIPLINARY COUNSEL
DATE _____	DATE _____	DATE _____	DATE _____	DATE _____
BY _____	BY _____	BY _____	BY _____	BY _____

BOURLAND, WALL & WENZEL
ESTATE PLANNING SECTION - QUALITY CONTROL PROCEDURE CHECKLIST
(This Document Is Placed in Each Estate Planning Documents File)

- | |
|--|
| <p>1. The attorney receives a call from a client who needs estate planning. In response, the attorney directs the legal secretary to open a file and send out the information questionnaire (<i>Estate Planning Fact Sheet - SEE SAMPLE</i>) along with a firm brochure and the <i>Texas Estate Planning-Made Simple</i> article (AVAILABLE FROM BOURLAND, WALL & WENZEL UPON REQUEST - OMITTED FROM THESE SEMINAR MATERIALS BECAUSE OF LENGTH), and ask the client to return the questionnaire and all of the client's current documents to the attorney at the client's earliest convenience. Thereafter, the legal secretary sends out reminder letters as necessary. (See Sample CLIENT INQUIRY LETTERS.)</p> |
| <p>2. After the attorney receives the questionnaire and all current documents from the client, the attorney provides them to the legal assistant who reviews the questionnaire and the documents and prepares a Summary.</p> |
| <p>3. After the legal assistant reviews the client documents and prepares the Summary, the legal assistant meets with the attorney to discuss the client documents and the Summary.</p> |
| <p>4. Within 7 calendar days after receipt by the attorney of the questionnaire and all current documents, a conference with the client is scheduled by the legal secretary to discuss the client's estate planning needs.</p> |
| <p>5. At the client meeting, the attorney and the legal assistant inquire as to the estate planning goals of the client and discuss the estate planning options with the client.</p> |
| <p>6. After the meeting, the legal assistant and the attorney discuss the proposed estate plan based on notes from the client meeting, the questionnaire, and the Summary. Within 7 calendar days after the client meeting, the attorney prepares a project Engagement Letter which summarizes the proposed estate plan of the client (including special drafting in lay language and the names of all persons and entities involved so that proper spelling of names can be checked by the client), provides the client the option of an open or closed attorney-client relationship (if more than 1 client is involved and independent representation not selected by clients), and sets out the fee to be charged. The Engagement Letter is signed by the attorney and sent to the client for review, approval, and payment of ½ of fee prior to the beginning of work. (See Sample ENGAGEMENT LETTER and ENGAGEMENT LETTER FOLLOW-UP.)</p> |
| <p>7. Upon receipt by the attorney of the signed Engagement Letter from the client, the attorney prepares all special drafting for the documents and provides the legal assistant with the Engagement Letter and specially drafted provisions. The legal assistant completes the field notes for the relevant document forms from the information in the Engagement Letter, as well as attorney's specially drafted provisions, and provides the field notes, Engagement Letter and specially drafted provisions to the legal secretary.</p> |
| <p>8. Upon receipt of the field notes, Engagement Letter and specially drafted provisions from the legal assistant, the legal secretary reviews the spelling of all names and basic information in the field notes against that contained in the Engagement Letter and specially drafted provisions to ensure that they are correct and then processes the documents.</p> |
| <p>9. After the documents are completed, the legal secretary checks the field notes and specially drafted provisions against the completed documents to make sure all information was input properly and checks the first and last word of each paragraph of each document and all Articles and Paragraphs and their titles against the proper form to ensure that the forms printed properly.</p> |

<p>The legal secretary then provides the documents, field notes, Engagement Letter and specially drafted provisions to the legal assistant.</p>			
<p>10. The legal assistant checks the field notes, Engagement Letter and specially drafted provisions against the completed documents to verify they are correct. The legal assistant then provides the completed documents, the specially drafted provisions and the Engagement Letter to the attorney.</p>			
<p>11. The attorney reviews the dispositive provisions and any special drafting in the completed documents against the specially drafted provisions and the Engagement Letter. If satisfied, the documents are sent to the client for review. The completed documents are provided the client within 21 calendar days of the receipt by the attorney of the signed Engagement Letter. Follow-up letters are sent to the client to discuss questions and to set up an appointment to review and execute the documents. (See Sample DRAFT DOCUMENTS TRANSMISSION LETTERS.)</p>			
	LA	LS	Atty
<p>12. Within 7 calendar days after the documents are reviewed with the client and executed, the legal assistant rechecks all documents to ensure proper execution. Thereafter, the legal secretary, legal assistant and the attorney meet to discuss and enter in the various data bases the client information - for example, irrevocable life insurance trust annual notice letters and partition agreements, irrevocable asset trust annual notice letters, gift tax returns, etc. In addition, they discuss and enter in the data base when the file will be retrieved for an estate planning review (normally 1, 3, or 5 years from date of execution, depending on dynamics of estate of client and of applicable laws) and remove all unnecessary document drafts and notes from the file, as well as clear documents from computer except unique portions of estate plan which are transferred to diskette and placed in estate planning documents file of client. They finalize the file, send all originals and copies of the documents to the client under cover of a DOCUMENTS TRANSMISSION/PROJECT TERMINATION LETTER (see Sample Letter), complete the FILE SUMMARY SHEET (see Sample) (which will contain each data base file entered into and date of next estate planning review), place the File Summary Sheet on top of the Quality Control Procedure Checklist which is placed on top of the Field Notes Sheet which is on top of the copies of the executed documents in the documents file. They then each initial the Quality Control Procedure Checklist and File Summary Sheet that the file completion process has been performed and place the file in the file room.</p>			

Bourland, Wall & Wenzel
ESTATE PLANNING FACT SHEET

(Please Print)

Completed By: _____
(Name of interviewer, or client's own name if completed directly by client)

Date: _____

I.
PERSONAL AND FAMILY INFORMATION
(Give full names, no initials)

Client's Name: _____
(First) (Middle) (Last)

Primary Occupation: _____

Address (Include County): _____

Business Address: _____

Email Address: _____

Telephone: Home _____ Business _____

Birthdate: _____ Soc. Sec. No. _____

U.S. Citizen: Yes _____ No _____ If No, Country _____

Spouse's Name: _____

(First) (Middle) (Last)

Primary Occupation: _____

Address (Include County): _____

Business Address: _____

Email Address: _____

Telephone: Home _____ Business _____

Birthdate: _____ Soc. Sec. No. _____

U.S. Citizen: Yes _____ No _____ If No, Country _____

Marriage Date: _____ Place _____

CHILDREN
(indicate if adopted)

(If any child listed is not a child of your present marriage, please place an asterisk beside that child's name, and furnish any additional information on the reverse side of this sheet)

	1st Child	2nd Child
Name:	_____	_____
Soc. Sec.:	_____	_____
Address:	_____	_____
Phone:	_____	_____
Birthdate:	_____	_____
Spouse:	_____	_____
Children:	_____	_____
Names & Birthdates:	_____	_____
	_____	_____
	_____	_____

	3rd Child	4th Child
Name:	_____	_____
Soc. Sec.:	_____	_____
Address:	_____	_____
Phone:	_____	_____
Birthdate:	_____	_____
Spouse:	_____	_____
Children:	_____	_____
Names & Birthdates	_____	_____
	_____	_____
	_____	_____

OTHER DEPENDENTS

	1st	2nd
Name:	_____	_____
Soc. Sec.:	_____	_____
Address:	_____	_____
Phone:	_____	_____
Birthdate:	_____	_____
Relationship:	_____	_____

	3rd	4th
Name:	_____	_____
Soc. Sec.:	_____	_____
Address:	_____	_____
Phone:	_____	_____
Birthdate:	_____	_____
Relationship:	_____	_____

II.
PROFESSIONAL ADVISORS

	<u>Accountant</u>	<u>Insurance Agent</u>
Name:	_____	_____
Firm	_____	_____
Address:	_____	_____
Phone:	() _____	() _____
Fax:	() _____	() _____

Stock Broker

Regular Physician

Name: _____
Firm _____
Address: _____
Phone: (____) _____
Fax: (____) _____

Financial Planner

Bank Officer

Name: _____
Firm _____
Address: _____
Phone: (____) _____
Fax: (____) _____

PERSON RESPONSIBLE FOR EMPLOYMENT BENEFITS AT EMPLOYER'S OFFICE

Client

Spouse

Name: _____
Phone: _____
Fax: _____

**III.
NOMINATIONS**

A. EXECUTOR(S) (if co-executors, indicate with an asterisk (*). Indicate successor(s) by number)

	<u>Client's Will</u>	<u>Spouse's Will</u>
Name:	_____	_____
Soc. Sec.:	_____	_____
Address:	_____	_____
Phone:	() _____	() _____
Relationship:	_____	_____
Name:	_____	_____
Soc. Sec.:	_____	_____
Address:	_____	_____
Phone:	() _____	() _____
Relationship:	_____	_____
Name:	_____	_____
Soc. Sec.:	_____	_____
Address:	_____	_____
Phone:	() _____	() _____
Relationship:	_____	_____

B. TRUSTEES (if different from Executor)

Name:	_____	_____
Soc. Sec.:	_____	_____
Address:	_____	_____
Phone:	() _____	() _____
Relationship:	_____	_____

(Trustee continued)

Name: _____

Soc. Sec.: _____

Address: _____

Phone: () _____

Relationship: _____

Name: _____

Soc. Sec.: _____

Address: _____

Phone: () _____

Relationship: _____

C. ATTORNEY(S)-IN-FACT (if different from Executor)

Name: _____

Soc. Sec.: _____

Address: _____

Phone: () _____

Relationship: _____

Name: _____

Soc. Sec.: _____

Address: _____

Phone: () _____

Relationship: _____

(Attorney -in-Fact continued)

Name: _____
Soc. Sec.: _____
Address: _____
Phone: () _____
Relationship: _____

D. GUARDIAN(S) OF MINOR CHILDREN (if different from Executor)

Name: _____
Soc. Sec.: _____
Address: _____
Phone: () _____
Relationship: _____

Name: _____
Soc. Sec.: _____
Address: _____
Phone: () _____
Relationship: _____

Name: _____
Soc. Sec.: _____
Address: _____
Phone: () _____
Relationship: _____

E. COMPENSATION (for individuals)

1. Executor Yes _____ No _____

If Yes, conditions: _____

2. Trustee Yes _____ No _____

If Yes, conditions: _____

IV.
ASSET/LIABILITY SUMMARY

<u>Assets</u> <u>Property</u>	<u>Community Property</u>	<u>Husband's Sep. Property</u>	<u>Wife's Sep.</u>
A. Personal Effects	\$ _____	\$ _____	\$ _____
B. Home (Principal)	\$ _____	\$ _____	\$ _____
C. Other Real Estate	\$ _____	\$ _____	\$ _____
D. Cash, Bank Accounts & Certificates of Deposit	\$ _____	\$ _____	\$ _____
E. Marketable Securities	\$ _____	\$ _____	\$ _____
F. Non-Marketable Securities	\$ _____	\$ _____	\$ _____
G. Business Interests	\$ _____	\$ _____	\$ _____
H. Other Assets (Brief Description)	\$ _____	\$ _____	\$ _____
I. TOTAL	\$ _____	\$ _____	\$ _____
<u>Liabilities</u> <u>Property</u>	<u>Community Property</u>	<u>Husband's Sep. Property</u>	<u>Wife's Sep.</u>
J. Current Debts	\$ _____	\$ _____	\$ _____
K. Bank Loans	\$ _____	\$ _____	\$ _____
L. Mortgages Payable	\$ _____	\$ _____	\$ _____
M. Income Taxes (include possible tax shelter liabilities)	\$ _____	\$ _____	\$ _____

N.	Other Debts (Brief Description)	\$ _____	\$ _____	\$ _____
O.	TOTAL	\$ _____	\$ _____	\$ _____
P.	Estimated Combined Present Net Worth	\$ _____	\$ _____	\$ _____
Q.	Estimated Value of Estate Including Insurance and Employment Benefits	\$ _____	\$ _____	\$ _____

Please attach financial statement, if available, and copies of legal descriptions of any real property that you own (including home).

LIFE INSURANCE

INSURED	COMPANY	POLICY (Type & Number)	FACE AMOUNT	CASH VALUE	LOAN BALANCE	OWNER <u>H W C M T O</u>	BENEFICIARY <u>C H E S T C O</u>
CLIENT							
SPOUSE							
OTHER							
TOTAL							

H = Husband W = Wife
 T = Trust C = Child
 E = Estate S = Spouse
 O = Other CM = Community
 CH = Charity

Indicate insurance agent: _____

Date of this valuation: _____

RETIREMENT BENEFITS

PARTICIPANT	EMPLOYER/COMPANY	PLAN TYPE	ACCRUED BENEFIT	CASH VALUE	BENEFICIARY <u>C H E S T C O</u>
CLIENT					
SPOUSE					
OTHER					
TOTAL					

T = Trust O = Other
 E = Estate C = Child
 S = Spouse CH = Charity

Indicate person(s) responsible for employee benefits:

ESTIMATED INCOME FOR CURRENT YEAR

	CLIENT	SPOUSE
BASE SALARY	_____	_____
BONUS AND OTHER COMPENSATION	_____	_____
TAXABLE DIVIDENDS AND INTEREST	_____	_____
TAX-EXEMPT INCOME	_____	_____
CAPITAL GAINS OR LOSSES	_____	_____

OTHER INCOME (SPECIFY)	_____	_____
TOTAL:	=====	=====

V.
OTHER INFORMATION

A. What are your estate planning objectives? (Help children, avoid taxes, avoid probate, make charitable gifts, etc)

1.

2.

3.

B. In general, to whom do each of you want your estates to be distributed:

1. Your Will

2. Your Spouse's Will

C. Is there any reason to treat children (or grandchildren) other than equally?

D. History of Gifts: (1) List all gifts made in excess of \$10,000 (or in excess of \$3,000 if gift was made before 1982); and (2) list all gifts of life insurance:

(State the reason for making the gift)

<u>Date of Gift</u>	<u>Donor</u>	<u>Donee</u>	<u>Value</u>
---------------------	--------------	--------------	--------------

E. Have you or your spouse ever filed a gift tax return? Yes _____ No _____
If yes, list years, and attach copies of all returns.

F. Do you have any expected inheritances from your parents or other relatives?

<u>Person Who May Leave You Something</u>	<u>Relationship</u>	<u>Age</u>	<u>Estimated Value of Your Interest</u>
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

G. Describe any other contingent asset your are entitled to receive, i.e., negligence recovery, contract rights.

H. Is this a second marriage for either of you?

Is there a pre-marital agreement?

Is there a post-marital agreement?

If you have ever been divorced, do you have any payment obligations either to your former spouse or to children of the prior marriage embodied in any court decree or written agreement? If so, please provide copies of the documents.

I. Did you acquire any of your property while a resident of any state other than Texas? (List by state and property)

J. Do you own any real property located outside of Texas? (List by state and property)

K. Do you have any special requests regarding donation of body organs (eyes, kidneys, etc.)?

Do you have any special requests regarding sustaining life by artificial support systems.

Have you made provisions for managing your estate during disability (i.e., durable power of attorney)? If so please provide date of signing and attach a copy.

CLIENT INQUIRY LETTERS

LETTER 1:

We appreciate (client's) call and look forward to meeting with you at your earliest convenience. To make our meeting more productive, we request that you review the following materials which are enclosed with this letter:

1. *Estate Planning Fact Sheet* (See Attachment) - reviews information concerning your financial situation, as well as estate planning goals and objectives. Review and completion of this will cause you to consider most of the important questions and issues that will be discussed concerning your estate planning.
2. *Texas Estate Planning-Made Simple* (See Attachment) - reviews the basic law and alternatives in the estate planning process.

To introduce our firm and make you more familiar with our areas of expertise, also enclosed is our firm brochure.

Please return the completed information sheet to us, along with copies of your existing Wills and other estate planning documents. After we have reviewed these materials, we will call you to schedule an appointment to discuss your estate planning goals. We look forward to visiting with you. We appreciate (referral source, if applicable) referring you to our law firm and will do all within our power to deserve the confidence (he/she) and you place in our organization.

c: (referral source, if applicable - note of thanks)

LETTER 2: (2 weeks following original letter.)

On (date) we provided you with an *Estate Planning Fact Sheet* which reviews information concerning your financial situation, as well as estate planning goals and objectives, and *Texas Estate Planning-Made Simple* which reviews for you the basic law and alternatives in the estate planning process. Since that time we have had no contact from you regarding your estate planning. This letter is to determine if you received the materials, need additional information, are ready to proceed with your review, or if there is any way in which we can be of assistance to you.

We look forward to hearing from you.

LETTER 3: (3 weeks following Letter 2.)

Some time ago we provided you with an *Estate Planning Fact Sheet* and *Texas Estate Planning-Made Simple* to assist you with a review of your estate planning. Since that time we have had no contact from you. This letter is to determine if you need additional information, are ready to proceed with your review, or if there is any way in which we can be of assistance to you.

We look forward to hearing from you.

LETTER 4: (4 weeks following Letter 3. Send Certified Mail, Return Receipt Requested.)

Since sending you materials regarding your estate planning, we have had no contact from you. If you are ready to proceed, please contact my office to schedule an appointment. However, if we do not hear from you within the next few weeks, we will presume that you have made other arrangements or wish to continue to postpone your planning and close our file. If you subsequently decide to proceed, please call our office and we will be happy to reopen your file and schedule an appointment.

We look forward to visiting with you at your convenience.

[2 weeks following Letter 4, place Return Receipt in file (to verify receipt of letter by client), close file, and return to file room.]

as separate confidences. In this situation, any information pertinent to the representation given to the attorney by one of you or otherwise acquired will be kept confidential from the other of you in addition to all outside parties.

Please indicate below your decision concerning these two options.

Option 1 Option 2 Signature Date

Mr. Testator

Mrs. Testator

We look forward to working with you to accomplish your estate planning goals.

Sincerely yours,

BOURLAND, WALL & WENZEL

Attorney

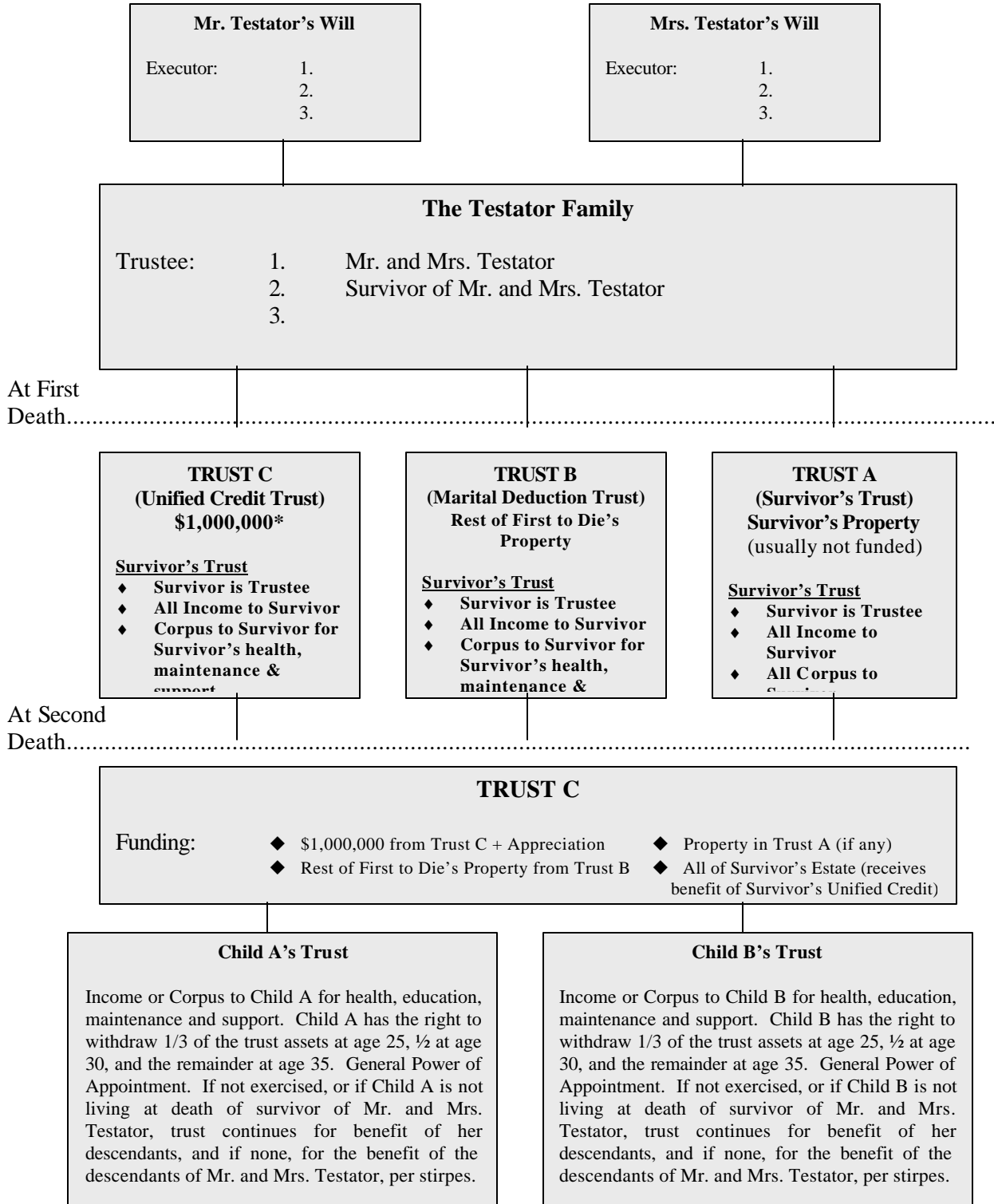
LEGAL WORK AND FEE PROCEDURE APPROVED:

Date Mr. Testator

Date Mrs. Testator

Estate Plan for Mr. and Mrs. Testator

The home, personal effects and vehicles pass outright to the survivor. The rest passes to The Testator Family Trust and the scheme within the trust is outlined below.



*Unified Credit Amount is currently \$1,000,000, but it will increase to \$3,500,000 through the year 2009.

ENGAGEMENT LETTER FOLLOW-UP

LETTER 1: (2 weeks following original letter.)

On (date) we provided you with an Engagement Letter concerning your estate plan. This letter is to determine if you received the Engagement Letter, need additional information, are ready to proceed, or if there is any way in which we can be of assistance to you.

If you are ready to proceed, please execute the Engagement Letter and return it, along with the retainer, to our office.

We look forward to hearing from you.

LETTER 2: (3 weeks following Letter 1.)

Some time ago we provided you with an Engagement Letter concerning your estate plan. This letter is to determine if you need additional information, are ready to proceed, or if there is any way in which we can be of assistance to you.

We look forward to hearing from you.

LETTER 3: (4 weeks following Letter 2, Send Certified Mail, Return Receipt Requested.)

Since sending you an Engagement Letter regarding your estate plan, we have had no contact from you. If you are ready to proceed, please execute the Engagement Letter and return it, along with the retainer, to our office. However, if we do not hear from you within the next few weeks, we will presume that you have made other arrangements or wish to continue to postpone your estate planning, and close our file. If you subsequently decide to proceed, please execute the Engagement Letter and return it to our office. We will be happy to reopen your file and proceed with the preparation of your estate plan.

We look forward to visiting with you at your convenience.

[2 weeks following Letter 3, place Return Receipt in file (to verify receipt of letter by client), close file, and return to file room.]

DRAFT DOCUMENTS TRANSMISSION LETTERS

LETTER 1:

Enclosed are draft copies of your Last Wills and Testaments, Durable Powers of Attorney, Declarations of Guardian, Directives to Physicians, Health Care Powers of Attorney, [optional: the Family Trust; the Irrevocable Trust Agreement; the Irrevocable Asset Trust Agreement; OTHERS] which we have prepared for your review. Also enclosed is a chart explaining and outlining your estate plan and some suggested beneficiary designation language for certain of your life insurance and employee benefits.

As we quoted a fee in advance for these documents, we are forwarding our bill at this time. Payment is due upon execution of the documents or three weeks from this date, whichever is earlier. Please be assured that there will be no additional fee charged other than for conferences as stated in the Engagement Letter unless you authorize additional work because of substantial changes to the documents made at your request as a result of a change in decision by you concerning your estate planning goals or otherwise.

Additionally, please check all of your joint bank accounts, certificates of deposit, money market accounts, stock brokerage and similar accounts to confirm that these accounts are not held in any type of joint tenancy with right of survivorship ownership. Accounts held in this manner may result in property passing in a way other than as provided in your Wills and could result in greater estate taxes to your estates. Please check these accounts to determine how they are held, and we can discuss them at the review and/or execution conference for your estate planning documents. In the meantime, after you have had a chance to review these documents, please call our office to arrange an appointment to discuss their content and/or have them properly executed.

We look forward to visiting with you at your convenience.

LETTER 2: *(2 weeks following original letter.)*

I am writing to remind you that the estate planning documents we prepared for you have not been executed. We sent drafts of these documents to you on for your review. If you have reviewed these documents, please give us a call so that we can set up an appointment to discuss their content and to have them properly executed. If you have not had a chance to review them, please do so at your convenience.

We look forward to visiting with you at your convenience.

LETTER 3: *(3 weeks following Letter 2.)*

This is an additional reminder that the estate planning documents we prepared for you have not been executed. Drafts of these documents, along with this firm's statement for legal services, were sent to you on for your review. If you have not yet had a chance to review these documents, please do so at your convenience. Should you have questions regarding any of these documents or note corrections to be made, please let us know. We look forward to hearing from you.

LETTER 4: *(4 weeks following Letter 3. Send Certified Mail, Return Receipt Requested.)*

Enclosed is a rebill of our statement for legal services rendered to date as you authorized pursuant to the Engagement Letter dated . Your prompt payment will be appreciated.

By letter of , we provided you copies of the documents we prepared for you. The originals of these documents have not been executed. We will close your file but continue to hold the originals of these documents for you in your file until such time as you notify us that you are ready to execute them. At that time we will reopen your file and schedule an appointment. We look forward to hearing from you.

[2 weeks following Letter 4, place Return Receipt in file (to verify receipt of letter by client), close file, and return to file room.]

DOCUMENT TRANSMISSION/PROJECT TERMINATION LETTER
(Send Certified Mail, Return Receipt Requested)

LETTER:

Re:

We have enclosed three packages; one marked "Originals", one marked "Duplicate Originals", and one marked "Copies". The package marked "Originals" should be placed with your other important documents for safekeeping. The package marked "Duplicates" contains duplicate originals of the documents executed [date] and conformed copies of your Last Wills and Testaments. The package marked "Copies" contains an extra set of all documents for home reference. The Directives to Physicians in the package marked "Duplicates" should be given to your general physician for his/her file.

As a reminder, please check all of your joint bank accounts, certificates of deposit, money market accounts, stock brokerage and similar accounts to confirm that these accounts are not held in any type of joint tenancy with right of survivorship ownership. Accounts held in this manner may result in property passing in a way other than provided in your Wills and could result in greater estate taxes to your estate.

Enclosed is our final Statement for legal services and expenses rendered in connection with the above referenced project.

We have enjoyed working with you on the above referenced project. While our work on this project is now complete, we look forward to working with you in the future on other estate planning matters. Please contact us when you have questions or other matters to discuss.

**BOURLAND, WALL & WENZEL
PROFESSIONAL CORPORATION**

***** MEMORANDUM *****

TO: File # _____ - (_____)

REGARDING: **Finish Up**

DATE:

FILE SUMMARY SHEET

	INITIALS		
	LA	LS	Atty
Documents Executed (Date)			
File Organized			
Executed Documents for File			
SS-4 Filed, if applicable			
Documents Mailed/Hand Delivered			
Bill Sent _____ / Bill Paid			
Close File			

Suspense Dates and Future Work Entered In Data Base:

110707