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"WHO'S ON FIRST????"

A LAWYER'S RESPONSIBILITY TO RECOGNIZE, RESPOND, AND REPORT WHEN REPRESENTING CLIENTS WITH CAPACITY ISSUES

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I. Introduction

When dealing with clients that have tendencies to forget the precise instructions and advice you have given them, remembering the ethical standards and rules to follow in representing these clients is of the utmost importance. Whether a long-retained client has now become incapacitated, and you are unsure of the best method to assist them in protecting their interests, or a new client with capacity issues has stumbled into your office, the waters of representing incapacitated clients can be turbulent and laced with ethical concerns, and the statues, guidelines, cases, and anecdotal evidence offer varying and sometimes conflicting guidance. This conflicting guidance leaves practitioners to wonder that age-old question "What's my Responsibility?" (i.e. "Who's on First?" "What's on Second?"). The purpose of this paper is to collate some of these guidelines, cases, and statutes and create a helpful guide for practitioners for dealing with the murky and grey areas associated with a client's capacity.

As the population has aged, several sources have provided guidelines to assist practitioners in dealing with clients who may have questionable capacity. A few of the guidelines are the ABA Committee on Law and Aging ("*ABA*"), the National Association of Elder Law Attorneys ("*NAELA*"), and the American College of Trust and Estate Counsel ("*ACTEC*"). While these guidelines are generally focused on elderly clients, they are equally as effective as a guideline for dealing with any client that may have capacity issues. Specifically, the ABA has outlined the "Four C's" for ethical and effective representation of clients with diminished capacity: (1) client identification, (2) conflicts of interest, (3) confidentiality, and (4) competence.

The realm of effective and ethical representation of diminished capacity clients gets murky very quickly, especially if an attorney has drafted estate planning documents for the client, is witnessing the client lose capacity in front of their eyes, and determines the client needs an effective guardian to help them take care of themselves and their estate. Specifically, this paper will address the following issues: (1) What are the responsibilities of an attorney dealing with a client with diminished capacity, (2) How to provide effective representation to a client with diminished capacity, (3) The responsibilities of an attorney who reasonably believes a client lacks capacity, and (4) How the courts have dealt with attorneys representing clients with diminished capacity.

II. Capacity and Texas Rules of Professional Conduct

A. Capacity

There are two definitions of capacity that are relevant to this discussion: Legal Capacity and Testamentary Capacity. Legal Capacity is the ability to provide clothing and shelter for oneself, care for one's own physical health, and manage one's own financial affairs. The Estates Code specifically defines an "incapacitated person" as:

(1) A minor;
(2) An adult who, because of a physical or mental condition, is substantially unable to:
- **a.** Provide food, clothing, or shelter for himself or herself;
- **b.** Care for the person's own physical health;
- **c.** Manage the person's own financial affairs; or

(3) A person who must have a guardian appointed for the person to receive funds due to the person from a governmental source.
See TEX. ESTATES CODE § 1002.017(2).

On the other hand, testamentary capacity is the ability, *at the time of making a will*, to understand a will is being made, understand the effect of making the will, understand the nature and extent of the maker's property, to know the maker's heirs and objects of their bounty, and to recall and assimilate the preceding

concepts and understand their relationship to each other enough to make a reasonable judgment as to each. *See Bracewell v. Bracewell*, 20 S.W.3d 14 (Houston [14th Dist.], 2000).

Testamentary Capacity is evaluated at one specific point in the client's life - the time at which the client is drafting a will and/or trust. Legal Capacity, however, can be an ebb and flow where the client can become incapacitated for a period of time, but can later on down the road recover their capacity. Knowing the difference is key in providing effective representation at every point in the attorney-client relationship. As lawyers, especially in the trust and estate realm, we often deal with both types of capacity ("Does a client have capacity to sign my Engagement Agreement?" "To execute a POA?" "A will?" "A trust?" "A deed?"). Questions regarding Legal Capacity arise in the everyday representation of a client, while questions of Testamentary Capacity often focus on the day a will or trust is executed.

B. Texas Ethical Rules to Keep in Mind

The Texas Disciplinary Rules of Professional Conduct ("*TDRPC*") provide the minimum standards for any lawyer representing a client. With representing a diminished capacity client, the rules pertaining to the scope, communication, and confidentiality are the most important to think about during the representation. From reviewing these rules, it should be clear that an attorney's ultimate responsibility is to their client, even when that counselor is considering whether the client has the capacity to make decisions or give directions. Further, the TDRPC, and its commentary, recognize that legal capacity is not a black or white determination, but rather a spectrum. A client may have capacity to do and understand some things, while lacking capacity to do or understand some other things. The ability to evaluate and understand your client's capacity is a key component in the lawyer's responsibility to communicate and keep their client informed. If a client's capacity issues interfere with a lawyer's ability to communicate with them, then the TDRPC provides some additional guidance on how a lawyer may discharge this important responsibility. Finally, the TDRPC provides how the duty of confidentiality may interfere with a lawyer's ability to assist a client with diminished capacity and provides a lawyer with some cover if disclosure of confidential information is necessary to serve the best interest of a client with capacity issues.

TDRPC Rule 1.02 Scope of Objectives of Representation:

"(a) subject to paragraphs (b), (c), (d), (e), and (f), a lawyer ***shall*** abide by the client's decisions:

(1) Concerning the objectives and general methods of representation;
(2) Whether to accept an offer of settlement of a matter, except as otherwise authorized by law;
(3) In a criminal case, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify."

Comment 12 of Rule 1.02 states that "[p]aragraph (a) assumes that the lawyer is legally authorized to represent the client. The usual attorney-client relationship is established and maintained by consenting adults who possess the legal capacity to agree to the relationship. Sometimes the relationship can be established only by a legally effective appointment of the lawyer to represent a person." Furthermore, Comment 13 of Rule 1.02 explains that if a legal representative has already been appointed for the client, the lawyer "…should ordinarily look to the representative for decisions on behalf of the client."

TDRPC 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."

Comment 5 clarifies and states "…a lawyer should seek to maintain a reasonable communication with a client under a disability, insofar as possible. When a lawyer reasonably believes a client suffers from a mental disability or is not legally competent, it may not be possible to maintain the usual attorney-client relationship. Nevertheless, the client may have an ability to understand, deliberate upon, and reach conclusions about some matters affecting the client's own well-being…to an increasing extent the law recognizes intermediate degrees of competence."

TDRPC Rule 1.05 Confidentiality and Information:

"**(a)** Confidential information includes both privileged information and unprivileged information. Privileged information refers to the information of a client protected by the lawyer-client privilege of Rule 5.01 of the Texas Rules of Evidence or of Rule 5.02 of the Texas Rules of Criminal Evidence or by the principles of attorney-client privilege governed by Rule 5.01 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 consultations.

(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 client 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 Rule 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 or 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 the 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 the 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 the revelation reasonably appears necessary to prevent the client from committing the criminal or fraudulent act.

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

Comment 17 of Rule 1.05 refers to representations under Rule 1.02(g) that require a lawyer representing a client under a disability to seek the appointment of a legal representative for the client. In this scenario, the comment illustrates "[t]he client may or may not, in a particular matter, effectively consent to the lawyer's revealing to the court confidential information and facts reasonably necessary to secure the desired appointment or order. Nevertheless, the lawyer is authorized by paragraph (c)(4) to reveal such information in order to comply with Rule 1.02(g)." In short, the lawyer, without effective consent of the client, may reveal confidential information to the court in order to secure the desired protections for the client, if the lawyer believes it is reasonably necessary to protect the client's interest.

With the minimum ethical standards established, the next step is to identify the client, determine if the client has diminished capacity, and how to effectively represent a diminished capacity client to protect their best interests.

III. Four "C's" for Effective Representation

In the area of estate and trust planning/litigation, identifying the client is often more difficult than you would typically expect because it is common that several people besides the proposed client (spouse, children, partners, friends) are involved and/or have a vested interest in the outcome of the legal representation. At the onset of any representation, especially when capacity may be in question, a lawyer's paramount duty is ensuring the prospective client and all third-parties know that the lawyer will only be representing the interest and honoring the wishes of the client.

A. Client Identification

The ABA proves several ways to ensure proper identification of the client: (1) Prepare and fill out an intake form to ascertain the identity of the client, their assets, objectives, and goals, (2) Schedule a face-to-face meeting with proposed client to establish a relationship of loyalty, discretion, and competence, (3) Draft a specific engagement agreement that sets out the parameters and objectives of representation, and (4) If family members or third-parties are involved, accommodating a family meeting to discuss the representation, client identity, and strategies for effective representation of a client, while ensuring all parties know that the lawyer's duties are solely to the proposed client.

B. Conflicts of Interest

In estate and trust matters, conflicts of interest can become infinitely more complicated because an attorney often takes on multiple representations. When dealing with a client with diminished capacity, conflicts of interest most often occur in either a sole representation of the individual with diminished capacity, and/or a representation of a fiduciary for an incapacitated individual.

To avoid conflicts when representing a client with diminished capacity, prevent yourself from treating third parties as the client because of their role in the client's life - or even their status as beneficiaries. Additionally, only accept payments for services from a third-party with the informed consent of the client. When dealing with the representation of a fiduciary of an incapacitated person NAELA has provided some advice: "lawyers must be guided by the known wishes and best interests of the person with diminished capacity, and may disclose otherwise confidential information, in the event a conflict arises between the fiduciary and the person with diminished capacity, if necessary to avoid substantial harm to the interest of the person with diminished capacity." NAELA *Aspirational Standard*.[1]

C. Maintaining Client Confidences

Client confidences become harder to protect when dealing with a client that has diminished capacity and/or an inability to fully understand the representation. In such situations, this duty requires special care due to the potential difficulties in communication and involvement of third parties. Thus, lawyers should take special care to instruct their clients about disclosure and the consequences disclosure could have. When a client with diminished capacity requests disclosure to a third-party (family member, care giver, etc.), a lawyer should take special care to explain the effect and implications of such disclosure. However, in these cases if the consultation is "necessary to assist in the representation" or made to an authorized agent it may not affect applicability of the attorney-client privilege that protects such communications form disclosure to third parties. *See* ABA Model Rule of Professional Conduct ("*MRPC*") 1.14, Cmt 3.

D. Duty of Competence

In representing a client, a lawyer fails to meet their duty of competence if they fail to assess the client's capacity. (*See* NAELA *Aspirational Standards*; MRPC 1.14). In assessing a client's capacity, a lawyer must analyze the client's ability to: (1) articulate the reasoning that led to making a decision, (2) the fairness and consistency of a decision in comparison to the known commitments and values of the client, and (3) the variability of their state of mind and ability to appreciate consequences.

ACTEC posits the general rule is that if testamentary capacity is uncertain, a lawyer should exercise "particular caution" in assisting with the drafting or modification of an estate plan. A lawyer should not prepare a will, trust agreement, or other dispositive instrument when the lawyer "reasonably believes" the client lacks the requisite capacity. However, in cases of borderline capacity, a lawyer may properly assist a client with dispositive instruments. In all such cases, a lawyer should preserve evidence of testamentary capacity. (*See* ACTEC Commentaries to MRPC 1.14).

A lawyer who represented a client before the client suffered diminished capacity may be considered to continue to represent the client after a fiduciary has been appointed for the person. Although incapacity may prevent a person with diminished capacity from entering into a contract or other legal relationship, the lawyer who represented the person with diminished capacity at a time when the person was competent may continue such representation to protect the interests of the client. (*See* ACTEC Commentaries to MRPC 1.14).

ACTEC Commentaries guide lawyers to anticipate and address potential capacity issues at the front-end of the attorney-client relationship. "As a matter of routine, the lawyer who represents a competent adult

[1] Stuart D. Zimring and A. Frank Jones, *Special Needs Trusts and Ethics: For Attorneys, Who's the Client Quicky Becomes Who's on First?* NAELA JOURNAL, Volume V, 2009, 71, at 90.

in estate planning matters should provide the client with information regarding the devices the client could employ to protect his or her interests in the event of diminished capacity, including the ways a client could avoid the necessity of a guardianship or similar proceeding - A lawyer may properly suggest that a competent client should consider executing a letter or other document that would authorize the lawyer to communicate to designated parties (e.g., family members, health care providers, an agent, or a court) concerns that the lawyer might have regarding the client's capacity." (*See* ACTEC Commentary to MRPC 1.14).

ACTEC, NAELA and other organizations have put out warning signs lawyers should consider when evaluating or spotting capacity issues such as: lapse of short-term memory, communication difficulty (finding words, frequent shifts in topics), difficult recalling and repeating simple concepts, decreased mental flexibility, issues calculating simple math, disorientation of time, person, or place, significant unexplained distress, "inappropriate" reactions, delusions, hallucinations, and/or decreased personal grooming/hygiene.

IV. Strategies on Representing Diminished Capacity Clients

As with every case an attorney takes on, there are different strategies for dealing with clients that have capacity issues. From overarching decisions like seeking a guardianship to smaller strategies such as length and time of meetings, language used with your client, and slowing down in face-to face interaction, there are many different ways and strategies for a lawyer when dealing with representation of a client with diminished capacity.

For example, once it is determined that a client has some diminished capacity, lawyers should adapt the environment of meetings to maximize the client's capacity such as time of the meeting, using bright lights, having more short meetings instead of a long single meeting, and using face-to-face meetings as opposed to zoom or phone conversations. Additionally, modifying communication skills to speak slowly, clearly, in plain English (leave the legal jargon for opposing counsel), and facing the client to give them ample time to process concepts. You may also verbally offer multiple methods of achieving their goals and then have the client explain the reasoning they were or were not to follow and talk through the decisions. Lastly, while maintaining client confidence, use third-party resources, such as talking with family members or medical or psychological professionals about effective communication strategies. If your concerns about the client's capacity are serious, suggest an evaluation by a professional. After using these coping tools, if a lawyer still feels like their client lacks the requisite capacity to complete the representation, the TDRPC, as mentioned above, provides guidance for the duties owed by the lawyer.

Again, Rule 1.02(g) states "a lawyer should take reasonable action to secure the appointment of a guardian or other legal representative for, or seek other protective orders with respect to, a client whenever the lawyer reasonably believes that the client lacks legal competence and that such action should be taken to protect the client." Reasonable belief is when a lawyer "believes the matter in question and that the circumstances are such that the belief is reasonable." *See Terminology*, TDRPC.

Other than seeking a Guardianship to address capacity issues, a lawyer may try to find a Power of Attorney or other fiduciary appointment documents to protect the client - with a note of the date on which the power of attorney is effective on. A lawyer may also seek a family consultation about the client; have a cooling off and revaluation period before executing documents; the creation and use of other planning documents such as a trust; and/or utilizing adult protective services.

V. The Litigation Behind Diminished Capacity

Based on the differing professional standards of a jurisdiction, the Courts tend to encourage and protect attorneys and clients in situations where the capacity of a client may come into issue. However, Courts and attorneys should be sure that procedural safeguards are in place to protect the substantive and procedural rights of a client/litigant faced with a capacity determination.

A. A Shining Example of What Not to Do: The Brooke Astor Estate

The multiple lawyers in the Brooke Astor saga serve as a good example of practices to avoid when representing a client with declining capacity and vulturous family members. During the last years of her life, several lawyers who purported to represent Ms. Astor's interests took actions that implicated conflicts of interest, self-dealing, and were against her wishes, all while she faced diminishing capacity and family infighting. This section will focus on three of the lawyers who represented her and certain members of her family during the declining years of her life.

Brooke Astor was a famous New York socialite and philanthropist who lived to be 105 years old. She was diagnosed with Alzheimer's in 2000 and died in 2007. By 2002, the effects of her condition were clear, including her "wandering mind," memory issues, emotional outbursts, and inability to recall decisions and the reasoning behind her decisions. Despite her difficulties, several estate planning documents were executed in 2002, 2003, and 2004 which significantly departed from her original estate planning goals and charitable donations. Her son, Anthony Marshall, allegedly acting on her behalf, sold Ms. Astor's favorite painting in 2005 for $10 million and gave himself a $2 million commission. This painting, which Ms. Astor never wanted to part with, was in every will she made from 1992 forward, but disappeared from her will after it was sold.[2] In 2005 and 2006, concerns were raised about her care and capacity by the filing of a guardianship by her grandson, Philip Marshall.

It came to light that Ms. Astor's only son, Anthony Marshall, was subjecting his mother to neglect, intimidation, pressure, and undue influence to benefit him through *inter vivos* gifts and testamentary dispositions. Anthony wound up being prosecuted and the testamentary changes that he encouraged were challenged and resulted in a settlement in 2012, which significantly reduced Anthony's beneficial share of his mother's estate. Throughout the final years of Ms. Astor's life there were three lawyers who were involved in the challenged testamentary documents, and each provides a great example of abusing a position of trust and confidence: Henry "Terry" Christensen III, Francis X, Morrissey, and G. Warren Whitaker.

First, Henry "Terry" Christensen III ("*Terry*") was a family friend and third generation lawyer from his firm to represent Brooke Astor. Terry drafted and oversaw the execution of Brooke's 2002 will on January 30, 2002.[3] He oversaw and drafted documents related to substantial *inter vivos* gifts to Anthony Marshall—including a house in Maine (paying more than $3 million in gift taxes to transfer the property) and $5 million in cash.[4] He further drafted and executed Brooke's "First and Final Codicil" on December 18, 2003.[5] Terry had a substantial relationship with Anthony Marshall and was subsequently fired by Anthony in early 2004. In the litigation that followed Brooke's death, Terry was found to have failed to recognize or ignore signs of incapacity, neglect, and undue influence. In fairness, Terry likely recognized some of Ms. Astor's deficiencies and was attempting to shut down the ability to create any additional testamentary changes by labeling it a "final" codicil; however, he was still taking direction from Anthony and failed to communicate and take directions directly from his client. Further, if he had concerns about Ms. Astor's capacity and knew Anthony was attempting to create additional testamentary documents, he should have taken further actions to protect the interest of his client, including potential involvement of a court and state protective services.

Francis X. Morrisey ("*Morrissey*") was hired by Anthony Marshall to represent Brooke Astor. Morrissey oversaw the execution of two additional codicils in January 2004 and March 2004, respectively.[6] Each of these subsequent codicils significantly benefitted Anthony Marshall to the exclusion of Brooke's preferred charities and permitted Morrissey to serve in a lucrative fiduciary position. Morrissey was eventually convicted of forgery related to the March 2004 Codicil as well as fraud related to the representation of Brooke. He developed an inappropriate and close relationship with Anthony Marshall and honored

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[2] Joseph A. Rosenberg, *Regrettably Unfair: Brooke Astor and the Other Elderly in New Yorker*, Pace Law Review, Volume 30, Issue 3, Spring 2010, 1004, at 1019-20.

[3] *Id.* at 1023.

[4] *Id*. at 1021-22.

[5] *Id.* at 1023.

[6] *Id.*

Anthony's wishes over Brooke's intentions. Ultimately, he engaged in fraud and forgery to enrich himself and Anthony Marshall.

G. Warren Whitaker ("*Whitaker*") was a prominent trust and estate law attorney who was hired by Anthony Marshall to draft the Second Codicil (January 2004) and the Third Codicil (March 2004) alongside Morrissey for Brooke Astor. He drafted both codicils based on directions from Marshall and Francis X. Morrisey, all while never meeting privately with Ms. Astor, prior to the execution of the Second Codicil.[7] Whitaker drafted a memorandum to file with the Court supporting his impression of Ms. Astor's capacity, but his notes and actions were subject to questioning and inquiry during the criminal trial against Anthony Marshall and Francis Morrissey.[8] Instead of communicating or attempting confidences with his client, Ms. Astor, Whitaker took direction from her son and the hired counsel at the time (Morrissey), both of whom were ultimately criminally convicted.

After a 5-year legal battle, the parties reached a settlement agreement in 2012, with the New York Attorney General's office representing several charitable entities and foundations that were harmed by the codicils that were drafted from 2003 to 2004. Under the settlement, Anthony Marshall's inheritance was cut to $14.5 million, and his ability to direct funds to foundations/charities was stripped. [9] In short, it is clear from this case that aligning yourself as an attorney with a family member at the detriment of your diminished capacity client goes directly against the duties an attorney must meet in the representation. The last years of Brooke's life were defined by tragedy and family infighting and this situation was not helped by attorneys who failed to follow the first rule of representing any client, regardless of their capacity: Am I doing what my client wants and is it in their best interest? As seen in the Astor case, this inquiry becomes even more important when dealing with a client with diminished capacity and failing to follow the ethical guidelines could have dire consequences for all involved, including counsel.

B. *Cases Litigating the Capacity of an Individual*

While a discussion of the elements of the Astor case is interesting and beneficial from a general standpoint, it is important to see how courts treat counsel faced with a potentially incapacitated client during the pendency of litigation. This matter has been seen in a wide gamut of reported cases, and courts have treated the situation differently depending on the claims and level of incapacity that a lawyer is dealing with. Just as the TDRPC recognizes that capacity is a spectrum, courts also seem to have adopted a rule and treat each case involving the capacity of a litigant on a case-by-case basis.

(1) <u>The "Nightmare" Case</u>

In *Cheney v. Wells*, there was ongoing litigation in New York regarding a motion to withdraw as counsel when the client is a defendant in a civil action and lacks capacity to assist or participate in the defense of that action. *Cheney v. Wells*, 12 Misc. 3d 161,162 (2008). The Defendant went through more than four sets of attorneys during litigation. The different sets of counsels repeatedly attempted to withdraw and continue the trial settings based on the client's incapacity, stating, "It is clear that [Defendant] is a severely emotionally damaged person" and "[Defendant] has engaged in such conduct which renders it unreasonably difficult for [counsel] to carry out its employment effectively." *Id*. at 163-64.

The trial court held a hearing with the Defendant and her most recent counsel on the counsel's motion to withdraw. The court stated it was apparent that "Diane was incapable of managing the instant litigation and was able to appreciate the consequences of that incapacity." *Id.* at 167. The Court used the ABA Model Rules of Professional Conduct and the Restatement (third) as a guide for this case. Specifically Model Rule 1.14(b) that states: "When the lawyer reasonably believes that the client has diminished capacity . . . the

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[7] *Id.* at 1058.

[8] *Id.*

[9] https://www.nytimes.com/2012/03/29/nyregion/settlement-reached-in-battle-over-brooke-astors-estate.html

lawyer may take reasonably necessary protective action . . and in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian." *Id*. at 169. The Court ordered that Defendant's counsel could withdraw from the case, but the withdrawal was contingent upon filing a guardianship case within 30 days. As part of that guardianship proceeding, Defendant's counsel was permitted to disclose to the court whatever information may be necessary for the guardianship proceeding because the attorney is the only available person with significant knowledge to bring the guardianship proceeding, and such proceeding was the least restrictive alternative available for the client. *Id*. at 171.

(2) The "Deposition/Discovery" Case

In *Sells v. Drott*, the litigant had questionable capacity and health issues. The seller (Sells) in this case filed a Tex. R. Civ. P. § 44 motion to appoint her son as her "next friend" stating she had memory loss and other health problems as a result of having strokes. *Sells v. Drott*, 330 S.W.3d 696 (2010). Her counsel was trying to protect her interest through postponing her deposition until there was a determination of her capacity. *Id.* at 704. Sells was eighty-four years old at the time and had previously suffered four strokes, that left her physically incapable of managing her own interests and the demands of litigation. *Id.* Ultimately, the court continued sanctioning the client for failing to appear for depositions and responding to discovery, until death penalty sanctions were issues and default was taken against the potentially incapacitated litigant. *Id*. at 707. Shockingly, even in the face of grave health concerns and medical recommendations raised by counsel, the court continued to order the incapacitated litigant to appear for depositions.

On appeal, the Court of Appeals overturned the sanctions as the death penalty sanctions were excessive for Sells' failure to appear at her scheduled depositions. The Court reasoned that while there is a possibility of prejudice from the dimming of Sell's memory, the quality of her memory is necessarily subsumed by her overall physical and mental health. *Id*. at 706. Sells' counsel, Peacock, made several attempts to secure a doctor's deposition but the opposing counsel was either scheduled to be out of town, or made no effort to respond to rescheduled dates. *Id.* at 707. Furthermore, Peacock consistently argued that Sells should not appear at a deposition or at a trial until her mental and physical limitations had been ascertained. *Id.* The Court ruled that this was not an indication of bad faith on the part of Sells, that she was not disregarding her legal responsibilities of discovery, and Sells had continuously responded to the written discovery that was served on her. *Id.*

In short, the Court ruled that Sells' failure to comply with the deposition requests and order were justified, that Sells' attorney had properly discharged his duty in trying to protect his client's health and safety, and the trial court abused its discretion in assessing sanctions against Sells *Id.* at 708. Here, despite pressure from the court and opposing counsel, the lawyer took steps to ensure the health and safety of his client and was ultimately vindicated by the appellate court for his actions in looking out for his client's best interest.

(3) The "No Shortcuts" Case

Saldarriaga v. Saldarriaga is another "next friend" matter attempting to circumvent a formal guardianship proceeding. This began as a divorce litigation case where counsel for wife told the Court that she had capacity concerns for her client and needed a "next friend" appointed for the client to manage litigation under TEX. R. CIV. P. 44. *Saldarriaga v. Saldarriaga*, 121 S.W.3d 493, 495 (2003). The "next friend" was appointed at a hearing where there were doubts whether this was the appropriate avenue to pursue. Mr. Jones, who was appointed the next friend, stated that he did not believe the Family Court had the authority to appoint him as a guardian - he believed only the probate court had such authority. *Id*. at 496. After some hesitancy from the judge, the Court ended up granting the next friend appointment. *Id*.

Shortly after the next friend was appointed, Mr. Jones filed a guardianship on the incapacitated wife's behalf out of an abundance of caution. *Id.* While the guardianship proceedings were pending, Mr. Jones, acting as the next friend, entered into a Rule 11 Agreement settling the divorce proceeding over the wife's

objections. The incapacitated wife hired a different attorney and filed a motion to set aside the next friend appointment and the Rule 11 Agreement. *Id*. at 496-97.

On appeal, the Court held that Rule 44 was not a short cut for a guardianship. The Court reasoned that it was "…incongruous that a next friend would have the same *rights* as a guardian, but not be bound by the same *procedure* for appointment." *Id.* at 499. If the wife's attorney believed her to be incompetent, the proper procedure would have been to ask the probate court to find her incapacitated and appoint a guardian. *Id.* Specifically, the "probate court contains uniform, strict, procedural safeguards to protect a person's liberty and property interests before a court may take the drastic action of removing her ability to make her own legal decisions [and the] consequences are too great to risk a haphazard determination of whether a person is incapacitated." *Id*. In the end, the Court struck the appointment of "next friend" and approval of the Rule 11 Agreement because a district judge may not accomplish an unlawful end by "merely calling a guardian a 'next of friend.'" *Id*. at 500.

When dealing with capacity issues, shortcuts are discouraged because you are ultimately dealing with your client's self-autonomy, which should not be taken absent all of the procedural safeguards available to them. As lawyers for a potentially incapacitated individual, you should not try to find the "easy" way out, but rather find the way that best protects your client and their interests.

(4) <u>The "Fee Dispute" Case</u>

The matter of *Oldham v. Calderon* litigated a fee dispute in a guardianship matter. This was a contested guardianship matter between sons and their mother, who was the proposed Ward. The Court appointed an attorney ad litem for the Ward, but the attorney-client relationship ultimately broke down, and the Ward hired her own private counsel, with the Court's approval. *Oldham v. Calderon,* 1998 Tex. App. LEXIS 1539 at 2. The guardianship was granted over the Ward's estate and the newly appointed guardian (the Ward's son) objected to paying the fees and expenses of Ward's private counsel because he claimed the attorney was unsuccessful in the guardianship contest and thus, the representation was antithetical to the interests of the Ward's Estate *Id*. At 3 and 6.

The Court overruled this objection and held that the award of attorney's fees to the ward's counsel was authorized. *Id*. At 9. In holding that the private counsel served the same role as the statutorily required attorney ad litem and were entitled to fees, the Court reasoned that "even though appellees were not *selected* by the court, the trial court could not conduct the guardianship proceeding without [the Ward's] interests being represented by an attorney." *Id*. At 4. Furthermore, the work of an attorney ad litem in a guardianship is different than that of an administrator of an estate in the sense the attorney ad litem is not required to produce a pecuniary benefit to the proposed ward's estate in order for the attorney ad litem's fees to be paid. *Id.* At 6-7. "Therefore, to the extent [privately retained counsel] could work more effectively with [the Ward] in this case than an attorney selected by the court, her estate was benefitted, not harmed, by their involvement." Id. At 8.

When a person is subject to a guardianship proceeding and seeks to retain privately selected counsel, it is always a best practice for that counsel to seek court approval before performing substantial work representing the proposed ward in a contested guardianship matter. Such prior court approval will likely make it easier to collect the representative fee and also ensure the court is aware of and approves the counselor's role in the litigation.

(5) <u>Representing a Party Against an Incapacitated Client</u>

The main question in *In re* Thetford was if the TDRPC requires that a lawyer be disqualified from representing a client against a former client in a guardianship proceeding, without that prior client's consent.

In 2012, L.D and Verna Thetford loaned their niece Jamie Rogers a sum of money to purchase land and had Alfred Allen represent the Thetfords in preparing the five-year note and the corresponding deed of

trust - in which Allen was named trustee. *In re Thetford*, 574 S.W.3d 362, 364 (2019). Jamie had previously worked as an assistant in Allen's office. *Id*. In 2015, Verna who was now 84, executed a will and power of attorney that were both prepared by Allen. *Id*. Jamie was designated as the agent under the power of attorney and her preferred guardian if the need arose. *Id.* The following year, Verna's mental state began to deteriorate - she would verbally abuse caregivers, forget things she had asked Jamie to do, and was briefly admitted to the hospital twice before being transferred to an assisted living center. *Id*.

In 2016, Jamie, represented by Allen, filed an application for temporary guardianship of Verna's person and management trust for her estate. *Id*. A physician's certificate was attached to the application. *Id*. Verna answered the application and moved to disqualify Allen as Jamie's counsel because "…'at all times material to the matters involved in this proceeding, [Allen] has represented [Verna]', that Allen had 'obtained confidential information' during his representations of [Verna] that 'could be used to [her] disadvantage…in the current matter…." *Id*. at 368.

First, the Court looked at whether Allen's representations of Verna were substantially related to the guardianship proceeding. The comments to the rules of professional conduct explain that substantially related "primarily involved situations where a lawyer could have acquired confidential information concerning a prior client that could be used either to that prior client's disadvantage or for the advantage of the lawyer's current client…." *Id.* at 374, quoting TDRPC 1.09 Cmt. 4(b). The test is whether the facts involved create a "genuine threat of disclosure," and while estate planning matters and guardianships are similar in the sense they are both end of life matters, this superficial comparison cannot govern lawyer disqualification. *Id*. at 374-75. The Court presumed that Verna shared confidences with Allen related to her estate planning and future possible incapacity when he prepared her will and power of attorney. *Id.* at 374. Any possible confidential information represented to Allen is reflected in the documents he prepared which are open knowledge. *Id.* Therefore, there can be no threat of disclosure of confidences that Verna already revealed to her alleged adversary. *Id.*

Next, the Court considered whether Allen's representation of Jamie in the guardianship matter, without Verna's consent, is adverse to Verna and is a violation of the TDRPC. *Id*. at 375. To start, the Court defined adversity as the "… likelihood of the risk [that a lawsuit] poses to a person's interests' and the seriousness of its consequences." *Id.* After reviewing the TDRPC and it's comments under Rule 1.09 and 1.06, the court concluded that a proceeding is adverse to a person if it poses a "high risk to their interests—if a judgment favorable to another party would harm that person's interest [and] a lawyer's representation of one client is adverse to another client if the lawyer's ability to faithfully and loyally represent his other client is compromised." *Id.* at 376.

Because guardianships are not generally adverse in character, in order for a guardianship to be adverse, the applicant's interests must be adverse to the proposed ward's interests or the interests as the proposed ward would have defined their interests when he or she had the capacity. *Id*. at 379. If there is an absence of the proposed ward's interests before she lost capacity, the Court would analyze the presence of adversity if the applicant's interests would not promote and protect the ward's well-being. *Id.* Therefore, a lawyer may represent a third-party seeking a guardianship over his incapacitated client if the lawyer "reasonably believes the representation is in his client's best interests as the client would have defined it when she had capacity." *Id.*

In the case at hand, the Court could look to see what Verna's interests were as she drafted a power of attorney and will before she became incapacitated. *Id.* The power of attorney appointed Jamie as her agent/guardian if the need ever arose. *Id*. Verna opposing the guardianship does not, by itself, create adversity, the court reasoned, because proposed wards often mistakenly believe that they do not need a guardian. *Id.* Furthermore, the Estates Code expressly permits a formerly indebted person to the proposed ward, to be appointed as their guardian because a prior debt creates no present adverse interest for purposes of TDRPC 1.06 and 1.09. *Id.* at 380. Because the court found no conflict of interest or full disclosure violation

on Allen's side as well as no adversity between the applicant, Jamie, and the proposed ward, the petition for mandamus was denied and the temporary guardianship that was ordered in the trial court was in effect until the trial court decided otherwise. *Id.* 381

(6) The "Fiduciary Duty" Case

Frank v. Roades involved an attorney (Roades) who previously represented his client (Franks) in the context of estate planning by drafting a Power of Attorney that named Franks' son as her agent. *Franks v. Roades*, 310 S.W3d 615, 618 (2010). Franks ultimately changed this Power of Attorney and named her daughter as agent two years later. *Id.* Over time, Franks' capacity deteriorated, and her daughter took the necessary steps to provide and pay for her care. *Id.* While Franks' son continually disagreed with Franks' diagnoses, encouraged Franks to not take her medication, and even threated his sister and her family. *Id.* at 619. There were multiple disputes between the son and daughter regarding their mother's care and estate.

Roades attempted to advise the daughter about solutions, including a referral to a separate estate planning lawyer, the daughter, acting under the Power of Attorney, retained Roades to file an application for guardianship on Franks, and paid Roades a retainer. *Id*. Roades filed the application for guardianship and believed that the guardianship was necessary to protect Franks and considered himself obligated to file it under Rule 1.02(g) of the TDRPC. *Id*. The attorney ad litem and Franks' son opposed Roades representing the daughter in the application because of a conflict of interest in his previous legal work for Frank. *Id.* at 620. The Court ultimately denied the motion to disqualify Roades that was filed by the attorney ad litem. *Id*. Ultimately, this matter was settled in mediation, and Franks was not placed under a guardianship. *Id*.

After the resolution of the guardianship matter, Franks sued Roades claiming that he breached his fiduciary duties to her - the duty of loyalty and duty of full disclosure - and had been negligent by seeking to have her placed under a guardianship. *Id*. When the guardianship was filed, Roades believed - and the undisputed facts supported her incapacity - that Franks was incapacitated and in need of a guardian. *Id*. at 627. Roades maintained that he was Franks' attorney and he was acting under the disciplinary rules, which required him to seek the guardianship under TDRPC Rule 1.02(g). *Id*. In analyzing Roades' position, the Court held that guardianships are not inherently adversarial proceedings and thus, the applicant is not automatically adverse to the ward. *Id*. The Court noted that under Tex. Prob. Code Ann. § 642(a), any person may bring an application for the appointment of a guardian, so long as the applicant does not have an interest adverse to the ward. *Id*.

Regarding the duty of full disclosure, the Court acknowledged that the disciplinary rules recognize that, in some situations, an attorney's communication with his client will be hampered by the client's particular situation. *Id*. at 628. "…fully informing the client according to the [full disclosure] standard may be impractical, as for example, where the client is a child or suffered from mental disability…and a lawyer should seek to maintain reasonable communication with a client…[that] is not legally competent, [and] it may not be possible to maintain the usual attorney client relationship." *Id*. quoting Tex. Disciplinary R. Prof'l Conduct 1.03 Cmt 3.

In general, an attorney has a duty to follow their client's decisions, but when the attorney "reasonably believes that the client lacks legal competence and that…action should be taken to protect the client[,]' the 'lawyer shall take reasonable action to secure the appointment of a guardian….'" *Id*. at 629 quoting Tex. Disciplinary R. Prof'l Conduct 1.03(a), (g). The trial and appellate courts held that instead of abandoning his client, as Franks suggested that Roades did, he acted under the disciplinary rules and in Franks' best interest when he believed she was incompetent. *Id*.

CONCLUSION

Ultimately, representing a client with diminished capacity comes with risks and any possible representation should be done with caution and intention. I hope this presentation gives practitioners enough information to preemptively discover a client with potential capacity issues, and how to navigate protecting the client's interest, but to the extent it does not, this short primer should be able to provide attorneys with insights into the substantive and procedural battles involved in representing a client with diminished capacity in multiple facets for representation.

If You're Going to the Courthouse, Please File this for Me: Ten Documents Which Must be Filed in the Trial Court to Preserve Error for Appeal

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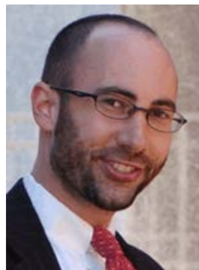
presented to North Texas Probate Bench Bar
March 9, 2023



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appellate attorney 1998-2001

Fort Worth Court of Appeals
briefing attorney to Justice Lee Ann Dauphinot 1997-1998

Education

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Juris Doctor 1997

The University of Texas at Austin
Bachelor of Business Administration 1994

Leadership

William "Mac" Taylor Inn of Court
president 2021-present
executive committee 2017-present
various committee leadership roles 2013-2017

Dallas Association of Young Lawyers
president 2006

Dallas Bar Association
ambassador 2018-present

Honors

“Master of the Bench” in the William “Mac” Taylor Inn of Court

former member of the Patrick Higginbotham Inn of Court

“AV” rating (signifying “very high to preeminent legal ability”) by Martindale-Hubbell
(based on peer review by lawyers and judges)

included in the “Appellate Practice” section of The Best Lawyers in America
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5 star rating (the highest rating) by Lawyers.com
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Published Articles

Dalla Bar Association Headnotes
Dallas Business Journal
Texas Lawyer
The Appellate Advocate (the journal of the State Bar of Texas Appellate Section)
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Quoted in News Stories

Amarillo Globe-News
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KTRK channel 13 (Houston ABC affiliate)
KRIV channel 26 (Houston FOX affiliate)
KDAF channel 33 (Dallas – Fort Worth CW TV affiliate)
KXAN channel 36 (Austin NBC TV affiliate)
KERA 90.1 FM
KLIF 570 AM
WBAP 820 AM
KRLD 1080 AM
KFXR 1190 AM
Voice of America

1.
Special appearance

A. If your client is not a resident of Texas and has not had "minimum contacts" with Texas, but is nevertheless sued in Texas, you must file a special appearance to contest the court exercising personal jurisdiction over your client. *See* TEX. R. CIV. P. 120a(1); *Petrie v. Widby*, 194 S.W.3d 168, 174 (Tex. App.—Dallas 2006, no pet.).

B. You must file the special appearance before filing an answer, motion, or any other pleading. *See* TEX. R. CIV. P. 120a(1); *Exito Elec. Co., Ltd.*, 142 S.W.3d 302, 305 (Tex. 2004).

C. A special appearance must be verified. *See* TEX. R. CIV. P. 120a(1); *Siemens AG v. Houston Cas. Co.*, 127 S.W.3d 436, 439 (Tex. App.—Dallas 2004, pet. dism'd).

2.
Motion to transfer venue

A. If your client is sued in an improper county, you must file a motion to transfer venue. *See* TEX. R. CIV. P. 86(1); *Accelerated Christian Educ. v. Oracle Corp.*, 925 S.W.2d 66, 70 (Tex. App.—Dallas 1996, no writ).

B. You must file the motion to transfer venue before or concurrently with the filing of answers, motions, or any other pleading except a special appearance. *See* TEX. R. CIV. P. 86(1); TEX. CIV. PRAC. & REM. CODE ANN. §15.063 (Vernon 2002); *Accelerated Christian Educ. v. Oracle Corp.*, 925 S.W.2d 66, 70 (Tex. App.—Dallas 1996, no writ).

3.
Motion asserting forum non conveniens

A. If your client is sued in Texas, but a court outside of Texas has jurisdiction over the case and is a more appropriate forum, you must file a motion asserting forum non conveniens. *See Morrill v. Cisek*, 2006 WL 3751501, at *4 (Tex. App.—Houston [1st Dist.] Dec. 21, 2006, no pet.).

B. Texas Civil Practice and Remedies Code section 71.051 codifies the common law principle of forum non conveniens, but does so only for personal injury and wrongful death cases. *See Tullis v. Georgia-Pacific Corp.*, 45 S.W.3d 118, 122 (Tex. App.—Fort Worth 2000, no pet.). Pursuant to section 71.051, in personal injury or wrongful death cases, you must file the motion no later than 180 days after the deadline to file a motion to transfer venue. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 71.051(d) (Vernon Supp. 2006). For all other types of cases, the common law still applies, and the motion is timely as long as it is filed before trial. *See Direct Color Servs., Inc. v. Eastman Kodak Co.*, 929 S.W.2d 558, 567 (Tex. App.—Tyler 1996, writ denied).

4.
Motion for continuance

A. If your trial setting is on a date before you will have been able to complete discovery, you must file a motion for continuance supported by an affidavit. *See* TEX. R. CIV. P. 251; *Taherzadeh v. Ghaleh-Assadi*, 108 S.W.3d 927, 928 (Tex. App.—Dallas 2003, pet. denied).

B. Among other things, the affidavit must show that the discovery is material and that the movant was diligent in seeking the discovery. *See* Tex. R. Civ. P. 252; *Verkin v. Southwest Ctr. One, Ltd.*, 784 S.W.2d 92, 94 (Tex. App.—Houston [1st Dist.] 1989, writ denied).

C. Although there is no state-wide deadline to file a motion for continuance, such a deadline may be imposed by local rules. For example, Bexar County civil district court Local Rule 3.18(C) provides that the motion must be filed fourteen days before the trial setting or at the pre-trial conference, whichever comes first.

5.
Motion seeking judge's recusal

A. If the judge should be recused, you must file a motion for recusal. Texas Rule of Civil Procedure 18b(2) lists situations in which a judge should be recused. *See McCollough v. Kitzman*, 50 S.W.3d 87, 88 (Tex. App.—Waco 2001, pet. denied).

B. You must file the motion at least ten days before the hearing or trial from which you would like the judge to be disqualified or recused. TEX. R. CIV. P. 18a(a); *Carmody v. State Farm Lloyds*, 184 S.W.3d 419, 421 (Tex. App.—Dallas 2006, no pet.). When the judge is assigned to the case less than ten days before the date of the hearing or trial which he is scheduled to conduct, you must file the motion ASAP. *See* TEX. R. CIV. P. 18a(e); *Carmody v. State Farm Lloyds*, 184 S.W.3d 419, 421 (Tex. App.—Dallas 2006, no pet.). Similarly, when the basis of recusal is not known until less than ten days before the date of the hearing or trial, you must file the motion ASAP. *See Hudson v. Texas Children's Hosp.*, 177 S.W.3d 232, 235-36 (Tex. App.—Houston [1st Dist.] 2005, no pet.); *Keene Corp. v. Rogers*, 863 S.W.2d 168, 171-72 (Tex. App.—Texarkana 1993, no writ).

C. The motion must be verified. *See* TEX. R. CIV. P. 18a(a); *Hudson v. Texas Children's Hosp.*, 177 S.W.3d 232, 237 (Tex. App.—Houston [1st Dist.] 2005, no pet.).

6.
Motion to remove attorney

A. If your opposing counsel has a conflict of interest, you must file a motion to have him or her disqualified. *See In re George*, 28 S.W.3d 511, 513 (Tex. 2000).

B. You must file the motion without much delay. *See In re George*, 28 S.W.3d 511, 513 (Tex. 2000). However, there is no bright-line test for determining how much delay is too much delay.

7.
Plea in abatement

A. If your client is sued by a plaintiff who does not have the capacity to sue, you must file a plea in abatement. *See Lighthouse Church v. Texas Bank*, 889 S.W.2d 595, 600 (Tex. App.—Houston [14th Dist.] 1994, writ denied); *Mtrust Corp., N.A. v. LJH Corp.*, 837 S.W.2d 250, 255 (Tex. App.—Fort Worth 1992, writ denied). Similarly, if your client is sued but does not have the capacity to be sued, you must file a plea in abatement. *See Trailways, Inc. v. Clark*, 794 S.W.2d 479, 489 (Tex. App.—Corpus Christi 1990, writ denied); *Butler v. Joseph's Wine Shop, Inc.*, 633 S.W.2d 926, 929 (Tex. App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.). If your client is sued while a substantially identical case is already pending between your client and the plaintiff, you must file a plea in abatement. *See Qualls v. Angelina County*, 98 S.W.3d 369, 372 (Tex. App.— Beaumont 2003, no pet.); *Starnes v. Holloway*, 779 S.W.2d 86, 95 (Tex. App.—Dallas 1989, writ denied). Finally, if your client has been sued, but other necessary parties have not been sued, you must file a plea in abatement. *See Spruill v. Spruill*, 624 S.W.2d 694, 697 (Tex. App.—El Paso 1981, writ dism'd).

B. You must file the plea without much delay. *Wyatt v. Shaw Plumbing Co.*, 760 S.W.2d 245, 248 (Tex. 1988). However, there is no bright-line test for determining how much delay is too much delay. *See In re Louisiana-Pacific Corp.*, 112 S.W.3d 185, 189 (Tex. App.—Beaumont 2003, orig. proceeding); *In re Luby's Cafeterias*, 979 S.W.2d 813, 817 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding). In any case, you must file the plea before your case goes to trial. *See Long v. Tascosa Nat'l Bank*, 678 S.W.2d 699, 702 (Tex. App.—Amarillo 1984, no writ); *Pullen v. Swanson*, 667 S.W.2d 359, 363 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.).

C. A plea in abatement must be verified. *See* TEX. R. CIV. P. 93(1), (3), and (4); *Southern County Mut. Ins. Co. v. Ochoa*, 19 S.W.3d 452, 461 (Tex. App.—Corpus Christi 2000, no pet.).

8.
Special exceptions

A. If your client is sued and the plaintiff's petition is so general as to fail to give you "fair notice" of the facts and the legal theories under which the plaintiff seeks to recover, you must file special exceptions to this defect. *See* TEX. R. CIV. P. 45(b), 47(a), and 90; *Emerson Elec. Co. v. American Permanent Ware Co.*, 201 S.W.3d 301, 309 (Tex. App.—Dallas 2006, no pet.).

B. You must file the special exceptions before the jury charge is given. In a non-jury case, you must file the special exceptions before the court signs its judgment. *See* TEX. R. CIV. P. 90; *Hays v. Old*, 385 S.W.2d 464, 465 (Tex. Civ. App.—Texarkana 1964, writ ref'd n.r.e.).

9.
Request for findings of fact and conclusions of law

A. In a situation in which a judge has served as finder of fact, and has ruled against you, you should request findings of fact and conclusions of law. Your request must be filed within twenty days of the date the judgment was signed. *See* TEX. R. CIV. P. 296. If you do not timely file a request, the court of appeals will infer all findings against you. *See Niskar v. Niskar*, 136 S.W.3d 749, 753 (Tex. App.—Dallas 2004, no pet.).

B. The trial court should file its findings and conclusions within twenty days of your request. *See* TEX. R. CIV. P. 297. If the trial court fails to do so, you must file a notice of past due findings and conclusions within thirty days of the date you filed your initial request. *See* TEX. R. CIV. P. 297.

C. If the trial court files findings and conclusions, but they do not address all of the issues you believe necessary, you must, within ten days of the court's entering the initial findings and conclusions, file a request for additional findings and conclusions. *See* TEX. R. CIV. P. 298.

10.
Motion for new trial

A. If you lose at trial, and there was factually insufficient evidence to support the jury's finding of liability or award of damages, you must file a motion for new trial.[1] *See* TEX. R. CIV. P. 324(b); *Cecil v. Smith*, 804 S.W.2d 509, 510 (Tex. 1991).

B. You must file the motion within thirty days of the date the judgment was signed. *See* TEX. R. CIV. P. 329b(a); *Compass Bank v. MFP Fin. Servs., Inc.*, 152 S.W.3d 844, 850 (Tex. App.—Dallas 2005, pet. denied).

C. When you file the motion, you must pay a $15 fee. *See* TEX. GOV'T CODE ANN. § 51.317(b)(2) (Vernon Supp. 2006); *Garza v. Garcia*, 137 S.W.3d 36, 37 n.5 and 38 (Tex. 2004).

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[1] If you lose at trial, and there was legally insufficient evidence to support the jury's finding of liability or award of damages, making this complaint in a motion for new trial will preserve this error for appeal. *See Cecil v. Smith*, 804 S.W.2d 509, 510-12 (Tex. 1991). However, making this complaint solely in a motion for new trial carries significant risk. Specifically, if you make this complaint in a motion for new trial, the court of appeals will be able to remand your case for a new trial, but will not be able to render the judgment in your favor. *See Werner v. Colwell*, 909 S.W.2d 866, 870 n.1 (Tex. 1995); *Horrocks v. Texas Dep't of Transp.*, 852 S.W.2d 498, 499 (Tex. 1993). For the court of appeals to render judgment in your favor, you must have filed a motion for directed verdict (a/k/a instructed verdict), objection to the court's charge, motion for JNOV, or motion to disregard a certain jury finding. *See BYC Water Supply Corp.*, 170 S.W.3d 596, 604 (Tex. App.—Tyler 2005, pet. denied); *Ana, Inc. v. Lowry*, 31 S.W.3d 765, 772 (Tex. App.—Houston [1st Dist.] 2000, no pet.).

USING MANAGEMENT TRUSTS INSTEAD OF, OR WITH, GUARDIANSHIP OF THE ESTATE

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NORTH TEXAS PROBATE BENCH BAR 2023
March 8-10, 2023
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Professional
Catherine H. Goodman, PLLC (2018-Present)
Harris, Finley & Bogle, P.C., Fort Worth, Texas (2016 to 2018)
Shannon, Gracey, Ratliff & Miller, L.L.P., Fort Worth, Texas (2007 to 2016)
Bruner, Jamieson & Pappas, L.L.P., Fort Worth, Texas (1999 to 2007)
Kroney·Silverman·Mincey, Inc., Dallas, Texas (1994-1998)
Martindale-Hubbell Peer Review Rating: ***AV Preeminent*** (2005 to present)
Board Certified **by the Texas Board of Legal Specialization in Estate Planning and Probate Law** (2001 to present)
Fellow, **American College of Trust and Estate Counsel** [(ACTEC); 2012 to present]
Fellow, Texas Bar and Tarrant County Bar Foundations

Education
Southwestern University, Georgetown, Texas, B.A., Political Science **and** Spanish (1991)
Baylor University School of Law, Waco, Texas, J.D. (1994); *Licensed*, The Supreme Court of Texas (1994)

Publications
In re: Estate of Jenkins, No. 2-05-164-CV, 2006 WL 1452669 (Fort Worth May 25, 2006)
In re: Guardianship of Bays, 355 S.W.3d 715 (Tex. Civ. App.—Fort Worth 2011, no pet.)
Extraordinary Remedies in Guardianships, 7 EST. PLAN. & COMMUNITY PROP. J. 159 (2015)

Selected Professional Activities and Honors
Member, American, Texas, and Tarrant County Bar Associations and various state and local bar associations and committees
Member, Decedents' Estates Committee, Real Estate, Probate, and Trust Law Section, State Bar of Texas (2013-2017)
Guardianship Chair, **Real Estate, Probate, and Trust Law Section (REPTL), State Bar of Texas** (2016-2020)
Colleen Colton Service Award and Ad Litem Award, Guardianship Services, Inc. (2018 and 2007)
Fort Worth, Texas Magazine, Top Lawyers in Tarrant County (2001, 2007 to present)
Rising Star and Texas Super Lawyer, Texas Monthly and Texas Super Lawyers Magazines (2005, 2007–2009; 2011 to present)
President, Tarrant County Probate Bar Association (2006–2007)

Recent Speaking Engagements
State Bar of Texas, 22nd Annual Advanced Guardianship Law, Case Law and Legislative Updates (November 2021)
State Bar of Texas, 31st Annual Estate Planning & Probate Drafting Annual Courses, Guardianships: Pre-Trial Toolbox (October 2020)
North Texas Probate Bench Bar; The (Un)Contested Guardianship (March 2020)
Lubbock County Office of Court Administration Annual Guardianship Seminar, Legislative Update and Bench/Bar Panel (October 2019)
State Bar of Texas, 20th Annual Advanced Guardianship Law, The (Un)Contested Guardianship (April 2019)
State Bar of Texas, Estate Planning & Probate Drafting, Drafting Guardianship Management Trusts: A New Look at Our Old Friend (October 2018)
Tarrant County Probate Bar Association Litigation Seminar, (Un)Contested Guardianships (September 2018)
State Bar of Texas, Advanced Estate Planning & Probate Seminar, Probate Matters: A View from Both Sides of the Bench (June 2018)
State Bar of Texas, Estate Planning & Probate Drafting, Drafting Common and Uncommon Pleadings-A View from Both Sides of the Bench (October 2017)
Tarrant County Probate Bar Association Nuts & Bolts, Realistic Solutions for Guardianship Issues (September 2017)
Baylor Law School CLE, 40th Annual General Practice Institute, When Independent Administrations Aren't So Independent (April 2017)
Course Director, *State Bar of Texas, Estate Planning & Probate Drafting* Annual Courses (October 2016)
State Bar of Texas, Opening (or Running) Your First GP Office; Estate Planning 101 (October 2016)
Course Director, *State Bar of Texas, Advanced Guardianship and Advanced Elder Law* Annual Courses (April 2016)
State Bar of Texas Webcast, Panelist, Drafting Your First Will—Practical Considerations and Drafting Recommendations (November 2015)
State Bar of Texas Estate Planning & Probate Drafting, Panelist, Drafting Settlement Agreements at Mediation (October 2015)
Tarrant County Probate Bar Association Nuts & Bolts, Declaring Your Independence: Making Dependent Administrations Less Dependent (September 2015)
State Bar of Texas, Advanced Estate Planning and Probate Seminar, When Independent Administrations Aren't So Independent (June 2015)
State Bar of Texas, Advanced Guardianship Seminar, Moderator and Panelist, ADR, Mediation and Contested Guardianships (April 2015)
Texas Tech School of Law, CLE & Expo, Extraordinary Remedies in Guardianship (March 2015)
Tarrant County Probate Bar Association Litigation Seminar, Panelist, Mock Guardianship Hearing (September 2014)
State Bar of Texas, Advanced Estate Planning and Probate Seminar, Declaring Your Independence: Making Dependent Administrations Less Dependent (June 2014)
Baylor University Office of Gift Planning, Heart of Texas Estate Planning Council, and McLennan Community College Foundation, Planning for Incapacity (May 2014) *Hidalgo County Bar Association 2014 Trust, Probate, and Guardianship Law Course*, Extraordinary Remedies in Guardianships (May 2014)
State Bar of Texas Advanced Guardianship Seminar, Extraordinary Remedies in Guardianships (April 2014)

Civic Activities
Membership Vice President & Secretary: Tarrant Star Republican Women
President and Board Member, Alliance For Children, Tarrant County, Texas (2011 to 2017; 2019-Present)
Board Member, Guardianship Services, Inc. (2012 to 2015)
President and Board Member, Heritage Elementary School PTA, Grapevine, Texas (2009-2017)
Board Member, Heritage Middle School PTSA, Colleyville, Texas (2014-present)
Board Member, Colleyville Heritage High School PTSA, AP Booster Club, Colleyville, Texas (2017-present)
Legal Advisor, GC-SAGE, INC. (Grapevine/Colleyville Supporting and Advocating for Gifted Education) (2010 to present)
Financial Advisor, Gamma Chi Chapter of Alpha Delta Pi International Sorority, Texas Christian University (2001-2004)
President, Dallas Alumnae Association of Alpha Delta Pi International Sorority (1998-1999)

Personal
Married to Don Goodman (23 years); two sons: Michael David (20 years) and Andrew John (16 years) who keep me busy with their activities and infrequent injuries; Resident of Grapevine, Texas (22 years); Member, Argyle United Methodist Church

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EDUCATION
Southern Methodist University School of Law, J.D., *High Honors* (1986); *Journal of Air Law and Commerce* (1984 to 1986)
Texas Christian University, B.F.A. Radio/TV/Film*, Summa Cum Laude* (1980)

PROFESSIONAL
The Blum Firm, P.C., Fort Worth, Texas (2016 to present)
Bakutis, McCully & Sawyer, P.C., Fort Worth, Texas (1995 to 2016)
Cantey Hanger, Fort Worth, Texas (1986 to 1995)
Certified Mediator (2013 to present) ("Pioneer" Guardianship Mediation Training Course, 2018)
Martindale-Hubbell Peer Review Rating: ***Judicial AV Preeminent***
Board Certified **by the Texas Board of Legal Specialization in Estate Planning & Probate Law** (1994 to present)
National Registered Guardian (NCG) (2007 to present); *Texas Registered Guardian* (2007 to present)
Fellow, Texas Bar Foundation (2019)

BAR MEMBERSHIPS AND PROFESSIONAL ORGANIZATIONS
Member, State Bar of Texas Real Property, Probate and Trust Law (REPTL); REPTL Section Council Member (2019);
Member, Guardianship Legislative Affairs Committee (2001-2004, 2017 to present)
Tarrant County Bar Associations and various state and bar associations and committees
President, Tarrant County Probate Bar Association Board of Directors (2005–2006); *Director* (2002-2007)
National Guardianship Association; Texas Guardianship Association
Association of Attorney Mediators; Texas Attorney-Mediators Coalition

PROFESSIONAL ACTIVITIES
Unlicensed Practice of Law Committee, District 7 and 14B Subcommittee (2017 to present)
Planning Committee State Bar of Texas Fiduciary Litigation Course (2017)
Planning Committee State Bar of Texas Advanced Guardianship Law and Elder Law Course (2011, 2013-2016)
Course Director, State Bar of Texas Advanced Elder Law & Guardianship Course (2015)
Chairman of the Board of Directors, LivingStone University Partners, (2012-2015), Director (2011-2015)
Trustee, Fort Worth Christian School Board of Trustees (2003 – 2008)
Co-Chair*, Tarrant County Probate Bar Association's Nuts & Bolts Seminar* (2007)
Co-Chair, *Tarrant County Probate Bar Association's Probate Litigation Seminar* (2002, 2003)

SPEAKING ENGAGEMENTS
Association of Attorney Mediators Fall Conference (2019)
State Bar of Texas Advanced Guardianship Law Course (2005, 2011, 2013, 2014, 2016, 2019)
Texas Guardianship Association (2019);*North Texas Probate Bench Bar* (2019)
State Bar of Texas Estate Planning and Probate Drafting Course (2018)
State Bar of Texas Advanced Estate Planning and Probate Course (2007, 2010, 2011, 2018)
Texas Tech University School of Law Estate Planning and Community Property Law Journal CLE & Expo (2018)
Tarrant County Probate Bar Association Probate Litigation Seminar (2012, 2014, 2018)
State Bar of Texas Fiduciary Litigation Course (2017)
Tarrant County Probate Bar Association Nuts & Bolts Course (2006, 2007, 2009, 2011, 2013)
State Bar of Texas Alternative Dispute Resolution Course (2015)
Moderator, *State Bar of Texas Webcast,* "How to Draft Living Wills and Incapacity Documents" (2012)
U. T. School of Law 12th Annual Estate Planning, Guardianship and Elder Law Conference (2010)
State Bar of Texas Advanced Estate Planning and Probate Course Nuts & Bolts (2006)
National Guardianship Association National Conference (2007, 2008)

PROFESSIONAL HONORS
Texas Super Lawyer, Texas Monthly and Texas Super Lawyers Magazines (2008, 2009, 2011, 2013 to present)
Fort Worth, Texas Magazine, Top Attorneys in Tarrant County (2003 to present)
360West Magazine, Top Attorney (2018 to present)
Ad Litem of the Year, Guardianship Services, Inc. (2011)

LAW RELATED PUBLICATIONS
Texas Guardianship Manual, State Bar of Texas, Manual Committee (2019)
Extraordinary Remedies in Guardianships, 7 EST. PLAN. & COMMUNITY PROP. J. 159 (2015).
Reviewing Editor in Practitioners Publishing Company's *Guide to Administering Estates*, July 2004. Co-Author, *Removal, Resignation, and Successor Representatives*, *& Final Settlement, Accounting and Discharge*, Matthew Bender, Estate Planning and Probate Guide (1993)

USING MANAGEMENT TRUSTS IN LIEU OF OR WITH A GUARDIANSHIP OF THE ESTATE.

I. INTRODUCTION

A management trust established under Chapter 1301 of the Texas Estates Code ("TEC") is a court-ordered trust created for a ward or an incapacitated person. Placing the assets of a ward's estate into a trust can alleviate the need for a guardianship of the estate and allows the ward's property to be managed without the cost of time and money for making applications to the court for approval of discretionary distributions, payment of expenses, and other day-to-day administrative actions. Utilizing an independent third party to handle the ward's finances may also reduce contention and strain among parties competing for appointment as guardian, helping to improve relations among those persons with a true interest in the ward's well-being. There are, however, significant legal and practical differences between meeting a ward's needs through a trust structure or a guardianship, and those representing clients or serving as an ad litem in a guardianship proceeding must understand those differences to fulfill their duties to clients and the court.

The purpose of this paper is to explain the technical requirements for management trusts, as set forth in TEC Chapter 1301 and provisions of the Texas Trust Code, found in Chapter 111 to Chapter 17 [§§ 111.001 – 117.012] of the Texas Property Code, to identify when such trusts may be used in lieu of, or in addition to, the appointment of a guardian for the ward's estate. For the most part, the paper will follow the organizational outline of Chapter 1301, with references to and excerpts from the specific TEC sections, while also including tips on practical ways to approach factors and issues presented in various circumstances affecting the needs and protection of wards.

II. ACKNOWLEDGMENTS.

Gratitude and acknowledgment are given to the State Bar of Texas for allowing the inclusion in this paper of material from the new TexasBarBooks publication, *Guardianship Alternatives*, which is a valuable resource to assist in avoiding unnecessary guardianships. *See* Comm. on Guardianship Alternatives, State Bar of Texas, *Guardianship Alternatives* (2016). In particular, Forms 23 through 40 included in that book can be adapted for various situations involving management trusts. Another good source of information pertaining to management trusts is the 2016, 2018 *Texas Guardianship Manual, 4th Edition*, a project of the Texas State Bar Guardianship Manual Committee, chaired by Sarah Patel Pacheco, which provides practice notes and forms, organized by the sequence of events occurring during the administration of a guardianship.

III. LEGISLATIVE HISTORY; DEFINITION; GOVERNING LAW.

A. Legislative History. Previously, Section 867 of the Texas Probate Code laid out the mechanism for creating a trust by which a trust company could hold and manage a ward's assets. Such a trust was commonly referred to as an "867 Trust," referring to the statutory provision under which it was created. Since the Texas Probate Code was recodified and introduced as the Texas Estates Code, effective January 1, 2014, the provisions controlling management trusts are now found in Chapter 1301 of the Texas Estates Code, under Subtitle H, Court-Authorized Trusts & Accounts. Even so, many existing trusts are still referred to, by courts, practitioners and trust officers, as "867 Trusts," and the terms of those trusts may differ slightly from a trust created under the new TEC Chapter 1301. An attorney dealing with a management trust should closely review the terms of that document, to determine the requirements for management of a ward's estate.

B. Definition. A management trust established under Chapter 1301 of the Estates Code is a court-ordered trust created for a ward or an incapacitated person. Specifically, TEC Section 1301.001 defines "management trust" as a trust created under TEC Sections 1301.053 (in connection with a guardianship proceeding), or under Section 1301.054 (for an incapacitated person without a guardian). TEC § 1301.001.

C. Applicability of Texas Trust Code. A management trust is subject to the Texas Trust Code. TEC § 1301.002(a). In the event of a conflict between the Texas Trust Code and a provision of TEC Chapter 1301 or of a management trust instrument, Chapter 1301 or the trust instrument controls over the Texas Trust Code. TEC § 1301.002(b). To fully understand the trustee's powers, duties and obligations for holding and administering the assets of a management trust, one must look to the applicable provisions of both the Estates Code and the Trust Code.

III. STANDING; VENUE; JURISDICTION.

A. Eligibility to Apply for Creation of Trust. The persons who may apply to the court for creation of a management trust are:

1. the guardian of a ward;

2. an attorney ad litem or guardian ad litem appointed to represent the ward or the ward's interests;
3. a person interested in the welfare of an alleged incapacitated person who does not have a guardian;
4. an attorney ad litem or guardian ad litem appointed to represent an alleged incapacitated person who does not have a guardian; or
5. a person with a physical disability.

TEC § 1301.051.

Note that the standing provided to an "interested person," in Section 1301.051 matches the right given in Section 1055.001 to "any person" to commence a guardianship proceeding. TEC § 1055.001(a). Therefore, the issue of standing does not propel a choice between an application for guardianship or a management trust.

B. Venue for Proceeding Involving Trust. An application for the creation of a management trust for an alleged incapacitated person under TEC § 1301.054 must be filed in the same court in which a proceeding for appointment of a guardian for that person is pending, if any. TEC § 1301.052(a). If there is no pending guardianship proceeding on the date the application for creation of the management trust is filed, venue for the action must be determined in the same manner as venue for a suit for appointment of a guardian, pursuant to TEC § 1023.001. *See* TEC § 1301.052(b).

Thus, a proceeding for creation of a management trust would be initiated in the county in which an adult proposed ward resides or is located on the date the application is filed, or in the county in which the principal estate of the proposed ward is locate. TEC § 1023.001(a). Venue for a suit to create a trust for a minor would be determined by the county in which the minor's parents or managing conservators reside or, if the parents are deceased, in the county in which they resided prior to their deaths. TEC § 1023.001(b).

C. <u>Jurisdiction over Trust Matters</u>. A court that creates a management trust has the same jurisdiction to hear matters relating to the trust as the court has with respect to guardianships. TEC § 1301.151.

IV. CREATION OF TRUST.

A. Creation of Trust. On application by one of the persons described in TEC Section 1301.051 (subject to TEC § 1301.054(a), if applicable), the court with jurisdiction of the proceeding may enter an order creating a management trust, if the court finds that creation of the trust is in the best interests of the person with respect to whom the application is filed. TEC § 1301.053(a). The court may maintain a trust created under § 1301.053 under the same cause number as the guardianship proceeding, if the person for whom the trust is created is a ward or proposed ward. TEC § 1301.053(b). Forms for the application and order to create a guardianship management trust may be found in the State Bar's *Texas Guardianship Manual, 4th Edition* (2016), Forms 11-1 and 11-4.

> ***Practice Tip #1:*** TEC Section 1301.053(a) makes clear that the court may create a management trust only if it makes a finding that the trust is in the ward's best interests; however, Chapter 1301 does not define the term "best interests." Nor does it address the factors the court may consider in determining what is in the ward's best interests. Thus, the attorney for the applicant seeking to establish a management trust should include in the application the reason that a trust would be beneficial for the ward. For instance, if the goal is to create a special needs trust under Chapter 1301, the application should explain that the ward's best interests will be served by preserving the ward's eligibility for government benefits. If the trust is not a special needs trust, it is presumptively in the ward's best interest to save the court costs and legal fees associated with a regular guardianship and obtain the advantages of the professional management and broader investment options available to a corporate trustee.

B. Notice. Effective September 1, 2021, notice must be issued in the manner provided in Subchapter C, Chapter 1051 of the Texas Estates Code. TEC § 1301.0511(a). It is not necessary to serve citation on, or require a waiver of citation from a person who files the application to create the management trust. TEC § 1301.0511(b). If the person for whom an application to create a management trust is a ward under a guardianship proceeding, the guardian must be personally served with citation. TEC § 1301.0511(c). Notice of an application to create a management trust is not required if a proceeding for the appointment of a guardian is pending, presumably because proper notice was given at the time of the filling of the application for the appointment of a guardian. TEC § 1301.0511(d).

C. Creation of Trust for Incapacitated Person Without Guardian. Regardless of whether an application for guardianship has previously been filed by a person authorized under TEC § 1301.051, a proper court exercising probate jurisdiction may enter

an order to create a trust for management of the estate of an alleged incapacitated person who does not have a guardian, if the court, after a hearing, finds that (a) the person is an incapacitated person, and (b) the creation of the trust is in that person's best interest. TEC § 1301.054(a). In other words, the court has the right to sidestep a pending application for appointment of a guardian of the estate, and create a management trust instead. Particularly in an instance where there is a pending contest between parties seeking to be appointment as guardian of an incapacitated person's estate, the court may likely view a management trust as an attractive alternative to guardianship, to curb litigation costs and reduce the strain on the ward, caused by constant strife and uncertain circumstances.

D. Procedural and Evidentiary Standards; Ad Litems. The hearing on creation of a management trust pursuant to Section 1301.054(a) must be conducted using the same procedures and evidentiary standards as are required in a hearing for appointment of a guardian for a proposed ward. TEC § 1301.054(b). Unless the application for creation of a management trust is filed by a person with only a physical disability, the court must appoint an attorney ad litem to represent the alleged incapacitated person in the hearing to determine incapacity under TEC Section 1301.054(a). TEC § 1301.054(c). The court, in its discretion, may also appoint a guardian ad litem to represent the interests of the alleged incapacitated person. *Id.* Likewise, the court may, but is not required to, appoint an attorney ad litem and/or guardian ad litem in a proceeding for creation of a management trust filed by a person with only a physical disability. TEC § 1301.054(c-1). The court may maintain a trust created under Section 1301.053 under the same cause number as the guardianship proceeding, if the person for whom the trust is created is a ward or proposed ward. TEC § 1301.054(d).

Practice Tip #2: If the attorney for the applicant seeking to create a management trust or guardianship of the estate has reason to believe that there may be a pending action involving the potential ward or incapacitated person, he should check with the clerk's office in the county in which the application will be filed, to determine whether the new application should be filed under the existing cause number, or be assigned a new number. This will prevent confusion, delay and cost for the client, and likely engender goodwill with the clerk's office, which is always a worthwhile goal.

E. Authority of Court to Appoint Guardian Instead of Creating Trust. If, after a hearing on an application for creation of a management trust for an alleged incapacitated person, pursuant to TEC Section 1301.054, the court finds that the person for whom the trust is sought to be created is, in fact, incapacitated, but a management trust would not be in the person's best interests, the court may appoint a guardian of the person and/or estate for the incapacitated person, without commencing a separate guardianship proceeding for that purpose. TEC § 1301.055. The court has broad discretion to determine whether to avoid a guardianship and establish a management trust, under Section 1301.054(a), or to reject the trust application and appoint a guardian, under Section 1301.055. This is likely the main reason why there is a dearth of reported cases involving issues directly related to creation of a management trust.

F. Contents of Order Creating Trust. An order creating a management trust must include terms and limitations placed on the trust and must direct any person or entity holding assets belonging to the trust beneficiary, or assets to which that person is entitled, to deliver all or part of that property to the appointed trustee of the trust. TEC § 1301.056. If the court agrees to waive the hearing, the order should state that the court is creating a Chapter 1301 management trust for the ward and direct any guardian of the estate to file the final account.

G. Required Terms of Trust Instrument. TEC Section 1301.101 sets out the terms that must be included in a management trust for a ward or incapacitated person:

1. the ward, incapacitated person or person who only has a physical disability, is the sole beneficiary of the trust;
2. the trustee may disburse an amount of the trust's principal or income that the trustee determines is necessary for the beneficiary's health, education, maintenance, or support;
3. the income that the trustee does not disburse for health, education, maintenance or support must be added to the trust principal;
4. a trustee that is a corporate fiduciary serves without giving a bond; and
5. a trustee is entitled to reasonable compensation for services the trustee provides to the trust beneficiary, subject to the court's approval.

TEC § 1301.101(a). Forms 11-2 and 11-3 in the State Bar's *Texas Guardianship Manual, 4th Edition* (2016), include these required provisions, as well as optional special needs trust terms.

H. Optional Terms of Trust. A management trust created for a ward or incapacitated person may provide that the trustee may make distributions for the health,

education, maintenance or support of another person whom the trust beneficiary is “legally obligated to support.” TEC § 1301.102(a). The “other person” may (1) include the ward’s guardian; (2) a person with physical custody of the trust beneficiary or someone whom the trust beneficiary is obligated to support; or (3) a person providing a good or service to the ward or a person that the ward is legally obligated to support. *Id.* The court may also include other provisions in the trust instrument, upon creation or modification of the trust, if the court determines that the addition does not conflict with Section 1301.101. TEC § 1301.102(b).

Practice Tip #3: Exceptions exist to the mandatory health, education, support and maintenance standard for Chapter 1301 management trusts. If the attorney wants the trust to qualify as a special needs trust so that the ward's eligibility for government benefits will be preserved, the trust must not permit distributions for the ward's basic health, education, maintenance, and support, but only for the ward's special needs not covered by a government benefits program. For all other Chapter 1301 trusts, no distributions should be permitted for the benefit of others who have a legal obligation to support the ward. In particular, such a provision should not be included in a trust for a minor beneficiary. The parents have a legal obligation to support the minor ward; the minor ward does not have a legal obligation to support the parents. TEC §1301.101(c).

I. Pay-Back Provision in Special Needs Trust. If the management trust qualifies as a special needs trust, the ward may be able to access government benefits programs. If the trust is seeking to qualify as a special needs trust, special care must be given to ensure that the trust conforms to the provisions of 42 U.S.C. § l396p(d)(4)(A), and includes a pay-back provision in the trust document. A pay-back provision requires that on the termination of the trust upon on the death of the beneficiary, the trust is required to reimburse the state Medicaid agency for all medical expenses paid on behalf of the ward. Failure to include this pay-back provision will result in the loss of the government benefit. 42 U.S.C. § 1396p(d)(4)(A).

J. Termination of Guardianship. On or after a management trust is created under Chapter 1301, the court may discharge the guardian of the estate if the guardian of the ward’s person remains and the court determines that the discharge is in the ward’s best interests. TEC § 1301.152. If all the assets of the guardianship estate are transferred to a Chapter 1301 trust, the guardian of the estate terminates the guardianship in the same way that it would terminate at the death of the ward or on the removal of the ward’s disabilities—by filing a final account, an application and order to discharge the guardian and terminate the guardianship, a waiver of notice of the final account, a receipt from the recipient of assets, and other appropriate documents. TEC § 1204(b)(7).

V. TRUSTEE.

A. Appointment of Trustee. The court must appoint a “financial institution” to serve as trustee of a management trust, other than in limited circumstances. TEC § 1301.057(b). Those circumstances include:

1. the trust is created for a person who has only a physical disability (*see* TEC §1301.057(b)); or
2. the court finds that it would be in the best interests of the ward or incapacitated person that a financial institution not serve as trustee.

TEC §1301.057(c).

In the latter instance, if the trust principal is greater than $150,000, the court must also find that the applicant for creation of the trust has been unable, after exercising due diligence, to find a financial institution in the geographic area willing to serve as trustee. *Id.* If that is the case, the court may appoint as trustee instead of a financial institution either an individual (including a certified private professional guardian), a non-profit corporation qualified to serve as a guardian, or a guardianship program. TEC § 1301.057(c)–(d). To confirm whether there is any financial institution willing to serve as trustee, the attorney seeking creation of the trust should check any lists of corporate fiduciaries held by the presiding judge of the statutory probate courts, or at the principal office of the Texas Bankers Association.

For purposes of Section 1301.057, “financial institution” is defined as an institution that has trust powers and is authorized to conduct business in Texas, another state or the United States, pursuant to Texas Finance Code Section 201.101. TEC § 1301.057(a).

Note that one of the primary reasons courts tend to favor a management trust over a guardianship of the estate, is the opportunity to have professional oversight and experienced financial management of the ward’s assets, while reducing the possibility of harm to the ward’s estate from acts or omissions of an individual guardian. Also, the appointment of a financial institution as trustee of a management trust relieves the judge of liability on the judge’s bond for damages or losses resulting from the judge’s failure to exercise diligence in examining a guardian’s acts and accounting. *See* TEC § 1201.003; *James v. Underwood*, 438 S.W.3d 704, 714, 715 (Tex. App.—

Houston [1st Dist.] 2014, no pet.) (finding judge cannot have failed to fulfill statutory duties if no guardian has been appointed). Similarly, unless the value of the ward's assets is too low to make a trust financially feasible, or the nature of the assets is so unique (e.g., real property in need of environmental reclamation), that finding a corporate trustee is virtually impossible, then the court will usually be reluctant to appoint an individual trustee.

B. Bond Requirements for Trustees. A trustee that is a corporate fiduciary, or any trustee of a management trust for a person with only a physical disability, may serve without posting a bond. TEC § 1301.058(a). Otherwise, the court must require a person serving as trustee of a management trust to post bond in an amount equal to the value of the trust's principal and projected annual income, and that meets any conditions the court determines are necessary. TEC § 1301.058(b).

Practice Tip #4: If an individual is seeking to serve as trustee, the applicant client should be advised to begin communications early with insurance agents or bonding companies regarding the issuance of a bond, prior to the hearing on the application for creation of the trust. Although the bond cannot be approved until after the court's order is entered, the client may complete the bond application prior to the hearing, and obtain a preliminary indication of likely approval or rejection, much like a pre-qualification for a mortgage loan. Important factors in the bond approval process will be the client's employment record, credit history and FICO score. If the client has a poor employment or credit history, it is better to determine that the client is not bondable, before expending time incurring fees for naught.

C. Trustee's Compensation. Subject to the court's approval, the trustee of a Chapter 1301 trust may receive reasonable compensation from the trust estate, calculated and paid in the same manner as compensation of a guardian, pursuant to TEC Chapter 1155. TEC §1301.101(a)(5), (b). Chapter 1155 permits the guardian of an estate a fee of five percent of the estate's gross income and five percent of all money paid out, on a finding that the guardian has prudently managed the estate. TEC § 1155.003. Note that "gross income" does not include Social Security benefits, Veterans benefits. TEC § 1155.001(1). "Money paid out" does not include compensation to the guardian or "money loaned, invested or paid over on the settlement of a guardianship." TEC § 1155.001(2); 3 T. Featherston, Jr., et al, *Tex. Practice: Probate*, *Compensation of Guardian* § 18:55 (2015). A commission may not include insurance proceeds or monthly pension benefits, as these are deemed to be corpus and not income. *Gilbert v. Hines*, 32 S.W.2d 876, 878 (Tex. Civ. App. – Dallas 1930, no writ). Distributions of income generated by a trust are considered to be "gross income," for purposes of the five percent commission. *Henderson v. Viesca*, 922 S.W.2d 876, 559 (Tex. App. – San Antonio 1996, writ den.)

There are exceptions to the five percent rule, allowing for the trustee's compensation to be increased when the court finds that the amount is unreasonably low when considering the services provided. TEC §§ 1155.003(b), 1155.006(a). The court may also wholly or partly deny a fee. *See* TEC §§ 1155.005-.008. In some instances, however, courts will permit a corporate trustee to be compensated according to the trustee's regular fee schedule. The usual corporate trustee's customary fee schedule is based on a percentage of market value of assets under management, with the percentage gradually declining as the value of the assets goes up. In addition, the trustee may charge additional fees for services (e.g., stop payment orders, wire transfers, etc.) or for dealing with assets requiring special handling or storage, such as artwork or jewelry. Some courts require the trustee to keep a record of time expended to demonstrate that the "five in, five out" fee is unreasonably low.

Practice Tip #5: To determine what compensation standard will be in the best interests of the trust beneficiary, while still allowing a sufficient fee for the trustee's services, the attorney representing the guardian or trustee should calculate the total fee that would result based on the anticipated income to and disbursements from the trust in the first year of the trust's existence. The applicable fee structure for compensating an institutional trustee should then be confirmed with the trustee in writing, prior to obtaining the court's approval of the trust terms. If the court authorizes compensation in accordance with the trustee's fee schedule, that schedule should be attached to the application creating the trust, and the order approving the trust should include language approving the trustee's compensation based on the regular fee schedule, as may be amended from time to time, with the court's approval. Check with the court before enlisting a corporate fiduciary to agree to serve as management trustee, as some courts do not allow compensation in accordance with the trustee's fee schedule.

Regardless of the manner in which the fee is calculated, a trustee's court approved compensation authorized under § 1301.101(a)(5) will be paid from the trust's income, principal or both. TEC §

1301.101(b)(1). Forms 11-17 and 11-18 in the State Bar's *Texas Guardianship Manual, 4th Edition* (2016), may be used to apply for payment of the trustee's compensation.

D. Successor Trustee. If the trustee of a management trust resigns, becomes ineligible, or is removed, the court may appoint a successor trustee. TEC § 1301.155. For instance, once the assets of the management trust fall below a minimum level, an institutional trustee may determine that the fee structure for compensation of the trustee is no longer advantageous to the beneficiary, or financially feasible for the services being provided by the trustee. In that case, the trustee could file a motion to resign as trustee, with a request for appointment of the successor trustee. If the trustee becomes ineligible or unable to serve, the guardian or another interested person may file an application to appoint a successor trustee, pointing out to the court the reasons why the successor should serve. The court order approving the appointment of the successor trustee should require the prior trustee to file a final account of its actions. *See* Guardianship Manual Committee, State Bar of Texas, *Texas Guardianship Manual, 4th Edition* (2016), Forms 11-7 through 11-9.

E. Liability for Trustee. Neither the guardian of the person or estate nor a surety on the guardian's bond is liable for the acts or omissions of the trustee of a Chapter 1301 trust. TEC § 1301.156. A provision of the trust that relieves a trustee from a duty, responsibility, or liability is enforceable only if:

1. the provision is limited to specific facts and circumstances unique to the property of the trust and is not applicable generally to the trust; and
2. the court makes a specific finding by clear and convincing evidence that the provision is in the best interest of the trust beneficiary.

TEC § 1301.103.

VI. TRUST ADMINISTRATION.

A. Investments; Comparison to Guardianships.

Perhaps the best reason to use a management trust to oversee a ward's finances, rather than a guardianship, is the greater variety of investment options available to a trustee than is generally available to a guardian of the estate, without the increased cost of seeking the court's approval. TEC Chapter 1161 controls the requirements for retaining and investing a ward's assets under guardianship, and sets out the applicable standards that a guardian must meet in making investments. For instance, a guardian has a duty to keep the ward's estate invested, other than those funds immediately necessary for the education, support and maintenance of the ward or persons the ward supports. TEC § 1161.001. The guardian must exercise the discretion of a person of "ordinary prudence, discretion and intelligence," considering various factors, including probable income and increase in value of the assets; safety of capital; anticipated costs of supporting the ward; the ward's age, education, current income, net worth, liabilities, and ability to earn additional income; the nature of the ward's estate; and any other resources reasonably available to the ward. TEC § 1161.002(a).

Chapter 1161 sets out very specifically the types of investments that will meet the "prudent investor" standard required under TEC Section 1161.002. For instance, the guardian is considered to have exercised appropriate discretion if the guardian invests in United States bonds, tax-supported bonds of the state of Texas, or FDIC-insured share accounts held at a state or federal savings and loan association or savings bank with its main office in Texas. TEC § 1161.003. The court may modify or eliminate the guardian's duty only upon a showing by clear and convincing evidence that the action is in the best interests of the ward. TEC § 1161.005. A guardian who fails to invest or lend estate assets in the manner provided by Chapter 1161 may be held liable for the principal and the greater of the highest legal rate of interest on the principal or the overall return that would have been made on the principal if it had been properly invested under the statutory standard. TEC § 1161.008. Unfortunately, absent the time and cost of filing an application, setting a hearing and obtaining a court order, a guardian of the estate often cannot generate enough income from permitted investments to meet the monthly support needs and other financial obligations of the ward without invading the principal of the estate.

By comparison, the Estates Code mentions only one particular investment that may be made by the trustee of a management trust: in the Texas Tomorrow Fund operated by the State of Texas, if the trustee determines that the investment is in the best interest of the trust beneficiary. TEC § 1301.151. Otherwise, pursuant to TEC § 1301.002, investment of the assets of a management trust are generally governed by the provisions of the Trust Code, which allows for greater flexibility and creativity in obtaining the best returns for the ward's estate. In addition, trustees may invest trust assets without having to gain prior approval from the court. The broader discretion and investment power afforded under the Trust Code often saves significant time and expense, and results in increased income from and value to, the beneficiary's estate.

B. Significant Texas Trust Code provisions. For an attorney representing a guardian, ward, or the trustee of a management trust, there are some important Texas Trust Code ("TTC") provisions to keep in mind regarding trust administration:

1. General Principles. In allocating receipts and disbursements to or between principal and interests, the trustee (a) must administer the trust in accordance with the terms of the trust instrument; (b) may exercise the discretion given by the trust instrument, even if the exercise of that power produces a result different than that provided by the Trust Code; (c) must follow the Trust Code if the trust is silent or does not give the trustee discretionary power of administration; and (d) must allocate a receipt or charge a disbursement to principal if the trust instrument or the Trust Code does not otherwise provide. TTC § 116.004(a).

2. Business Activities. A trustee who conducts a business or other activity may maintain separate accounting records for the business, rather than including the business transactions as a part of the general trust accounting. TTC § 116.153(a). If a separate accounting is maintained, the trustee may determine the extent to which the business's net cash receipts must be retained for working capital, replacing fixed assets or other reasonably foreseeable business needs. TTC § 116.153(b). Activities for which a trustee may maintain separate accounting records include, but are not limited to, a retail business, manufacturing, other traditional business activities, farming, livestock operations, and management of rental properties, extraction of minerals and other natural sources, and timber operations. TTC § 116.153(c).

3. Receipts from Entities. A trustee must allocate certain receipts from an "entity" to principal, including (a) property other than money; (b) money received in one distribution or a series of related distributions in exchange for part or all of a trust's interest in the entity; (c) money received in total or partial liquidation of the entity; and (d) money received from an entity that is a regulated investment company or a real estate investment trust, if the money distributed is a capital gain dividend for federal income tax purposes. TTC § 116.151(c). The trustee must allocate to income all other receipts from an entity. TTC § 116.151(b). An "entity" generally includes a regulated investment company, real estate investment trust, common trust fund, or other organization in which a trustee has an interest. TTC § 116.151(a).

4. Other Principal Receipts. A trustee must allocate to principal:

A. an amount received as a distribution of principal from a trust or an estate in which the trust or the beneficiary has an interest [TTC § 116.152];

B. money received from the sale, exchange, liquidation or change in form of a principal assets, including realized profit, subject to provisions of TTC Chapter 116, Subchapter D [TTC § 116.161 (2)];

C. amounts recovered from third parties to reimburse the trust because of disbursements for environmental matters, or for other reasons to the extent not based on the loss of income [TTC § 116.161 (3)];

D. proceeds of property taken by eminent domain, except for awards for the loss of income associated with that property [TTC § 116.161 (4)];

E. amounts received as refundable deposits, such as a security deposit, to be held subject to the terms of the lease, not to be distributed to the beneficiary until the contractual obligations of the lease have been satisfied with respect to that amount [TTC § 116.162];

F. amounts received from sales, redemptions or other dispositions of obligations to pay money to the trustee more than one year after the obligations are acquired. [TTC § 116.163 (b)]; and

G. proceeds of a life insurance policy or other contract in which the trustee or beneficiary is named as a beneficiary, including a policy that insures the trustee or trust against loss for damage to or destruction of a trust asset. TTC § 116.164 (a);

5. Other Receipts of Income. The trustee must allocate to income:

A. an amount received as a distribution of income from a trust or an estate in which the trust or the ward has an interest[TTC § 116.152];

B. an amount received as rent of real or personal property, including an amount received for cancellation or renewal of a lease [TTC § 116.162];

C. an amount received as interest on an obligation to pay money to the trustee, without any provision for amortization [TTC § 116.163 (a)]; and

D. proceeds of a contract insuring the trustee against loss of occupancy, loss of income or lost profits from a business TTC § 116.164 (b)].

6. Apportionment of Receipts Between Principal and Income. The trustee must apportion receipts between principal and income as follows:

A. payments that a trustee receives from a private or commercial annuity, an individual retirement account, or a pension or profit-sharing plan. TTC § 116.172 (b). The trustee must allocate to income that portion of a payment that the payer characterizes a payment as interest, a dividend or an equivalent payment, and must allocate the balance to principal. *Id.*;

B. receipts from an interest in minerals, including a production payment, royalty, shut-in well payment, take-or-pay payment or bonus [TTC § 116.174 (a)];

C. proceeds from the sale of timber and related products [TTC § 116.175]; and

D. payments in exchange for the trust's interest in an asset-backed security, whose value is based upon the owner's right to receive distributions from the proceeds of financial assets that provide collateral for the security [TTC § 116.178].

7. Allocations of Disbursements from Principal. A trustee must make the following disbursements from principal:

A. one-half of the disbursements paid for compensation of the trustee or any person providing investment advisory or custodial services to the trustee, unless the trustee, consistent with the trustee's fiduciary duty, determines that a different portion should be allocated to principal [TTC § 116.202(a)(1)];

B. one-half of all expenses for accountings, judicial proceedings, and other matters that involve both income and remainder interests [TTC § 116.202(a)(1-a)];

C. all of the trustee's compensation as a fee for acceptance, distribution or termination of the trust, and disbursements made to prepare property for sale [TTC § 116.202(a)(2)];

D. payments on the principal of trust debt [TTC § 116.202(a)(3)];

E. expenses of a proceeding to construe the trust, to protect the trust or its property, or otherwise concerning the trust principal [TTC § 116.202(a)(4)];

F. premiums paid on a policy of insurance of which the trust is an owner or beneficiary, other insurance covering loss of a principal asset or the loss of income from or use of the asset [TTC § 116.202(a)(5)];

G. estate, inheritance and other transfer taxes, including penalties, apportioned to the trust [TTC § 116.202(a)(6)]; and

H. disbursements related to environmental matters. TTC § 116.202(a)(7).

If a principal asset of the trust is encumbered with an obligation that requires income from that asset to be paid directly to the creditor, the trustee must transfer from principal to income an amount equal to the income paid to the creditor in reduction of the principal balance of the debt. TTC § 116.202(b).

8. Allocations of Disbursements from Income. The trustee of a Chapter 1301 trust must make the following disbursements from income:

A. the other one-half of disbursements paid for compensation of the trustee or any person providing investment advisory or custodial services to the trustee, unless the trustee, consistent with the trustee's fiduciary duty, determines that a different portion should be allocated to principal [TTC § 116.201(1)];

B. one-half of all expenses for accountings, judicial proceedings, and other matters that involve both income and remainder interests [TTC § 116.201(2)];

C. all other ordinary expenses incurred in connection with the administration, management or preservation of trust property, including interest, ordinary repairs, regularly recurring taxes assessed against principal, and expenses of a proceeding or other matter that concern primarily the income interest [TTC § 116.201(3)]; and

D. recurring premiums paid on insurance of covering loss of a principal trust asset or the loss of income from or use of the asset. TTC § 116.201(4).

9. Transfers Between Principal and Income. In general, a trustee may make transfers to principal of the net cash receipts from a principal asset that is subject to depreciation, to account for the reduction in value due to wear, tear and decay. TTC § 116.203. The trustee may also transfer income to principal to reimburse for certain extraordinary repairs or capital improvements to a principal asset, expenses to prepare property for rental or to pay for environmental matters. TTC § 116.204.

10. Income Taxes. A tax required to be paid by a trustee based on receipts allocated to income must be paid from income; a tax based on receipts allocated to principal must be paid from principal, even if the tax is called an income tax. TTC § 116.205(a), (b). Chapter 1301 trusts are considered grantor trusts under Internal Revenue Code sections 671-678. Income from trust assets is taxable to the beneficiary. The costs of preparing tax returns may come out of trust proceeds. The trustee should be certain the appropriate tax returns are filed. *See 26* U.S.C §§ 671-678.

C. Initial Accountings. Not later than the 30th day after the date a trustee to which TEC Section 1301.1535 applies receives property into the trust, the trustee is to file with the court an initial report describing all property in the trust and its value on the date of the report. TEC § 1301.1535(b). This section applies only to a trustee of a management trust created for a person who on the date the trust is created is: a ward under an existing guardianship; or a proposed ward with respect to whom an application for guardianship has been filed and is pending. TEC § 1301.1535(a). A trustee of a Chapter 1301 trust created for an incapacitated person without a guardian is not mentioned in this section; however, a trustee of such a trust would be wise to file the initial report.

D. Annual Accountings. The trustee of a Chapter 1301 trust must prepare an annual account and file it with the court. TEC § 1301.154. The requirements for a trustee's accounting are the same as those for a guardian of the estate under TEC Section 1163.001, *et seq.*, and the annual account is subject to court review in the same manner as an annual account prepared by a guardian. TEC § 1301.154. The trustee must provide a copy of the annual account to the guardian of the ward's estate or person. *Id.* However, the court may not require a trustee of a trust created for a person with only a physical disability to prepare and file an annual accounting. *Id.*

VII. TRUST MODIFICATION.

The court may amend, modify, or revoke a Chapter 1301 trust at any time before the trust terminates. TEC § 1301.201(a). The trust may not be modified or revoked by the trust beneficiary or the guardian of the ward's estate, or the incapacitated person for whom the trust is created. TEC § 1301.201(b)(1), (2). Also, the person who has only a physical disability for whom the trust is created may not revoke the trust. TEC § 1301.201(b)(3). When creating or modifying a Chapter 1301 trust, the court may omit or modify terms required by TEC Sections 1301.101(a), (a-1), or (b), which mandate distributions for the beneficiary's health, education, maintenance, and support, only if the court determines that modification or omission is necessary and appropriate for the beneficiary to receive public benefits or assistance under a state or federal program not otherwise available to the beneficiary, and that it is in the beneficiary's best interests. TEC § 1301.101(c). Forms 11-10 and 11-11 in the State Bar's *Texas Guardianship Manual, 4th Edition* (2016), may be used for modification of a management trust.

VIII. TERMINATION OF TRUST.

A. Termination. A management trust for a minor beneficiary terminates on the death of the beneficiary or on the beneficiary's eighteenth birthday, whichever is earlier, or on a date selected by the court that is not later than the beneficiary's twenty-fifth birthday. TEC § 1301.203(a). Some courts will not permit a Chapter 1301 trust to extend beyond the beneficiary's eighteenth birthday, assuming the beneficiary is not otherwise incapacitated. If the applicant wants the trust to extend past the beneficiary's eighteenth birthday, the applicant should check with the court in which the guardianship is pending.

If the minor beneficiary also suffers from a disability that would require the beneficiary to access a government benefits program, the management trust

may be established as a special needs trust. However, some courts still require that the management trust terminate at the age of twenty-five, even though the ward is likely never to regain capacity. In this situation, the trust must be modified prior to the beneficiary reaching the age of twenty-five years, in order to ensure that the beneficiary's government benefits will not be reduced or terminated. *See* TEC Code § 1301.203.

If the trust beneficiary is not a minor, the trust terminates according to the terms of the trust, on the date the court determines that continuing the trust is no longer in the ward's best interests, subject to TEC Section 1301.202(c), which relate to transfers of all trust property to a pooled trust subaccount, or on the death of the trust beneficiary. TEC § 1301.203(b).

B. Final Account. On termination of a Chapter 1301 trust, the trustee must prepare a final account in the same manner as a guardian, pursuant to TEC sections 1204.101 and 1204.102. TEC § 1301.204(a)(1). After the court approves the accounting, the trustee must distribute the remaining trust assets to: the beneficiary when the trust terminates on its own terms; to the successor trustee if one is appointed; or to the personal representative of a deceased beneficiary. TEC § 1301.204(a)(2). The court may not require the trustee of a trust for a person with only a physical disability to prepare and file a final account with the court. TEC § 1301.204(b). See also Forms 11-13 and 11-14 in the State Bar's *Texas Guardianship Manual, 4th Edition* (2016).

C. Application and Order to Discharge. After the order approving the final account is signed and entered, the trustee of a Chapter 1301 trust must deliver any property remaining in the trust to the former ward, a successor trustee, or the representative of the deceased ward's estate. TEC § 1301.204. The trustee should obtain a receipt from the person or entity receiving the property, and file it with the court along with the application and order to discharge the trustee. If the trustee was an individual required to post a personal bond with the court upon creation of the trust, an application and corresponding order should be filed to request release of the bond from the clerk's office. **See also** Forms 11-14 through 11-16 in the State Bar's *Texas Guardianship Manual, 4th Edition* (2016).

Practice Tip #6: Upon termination of a special needs management trust due to the death of the beneficiary, current Social Security regulations permit the trustee to pay some administrative expenses before reimbursing the state Medicaid agency for medical expenses paid on behalf of the beneficiary from governmental benefits programs. For instance, at the death of the trust beneficiary, the trust is allowed to pay taxes owed from the trust due to the death of the beneficiary and reasonable administration fees associated with terminating and wrapping up the trust. Social Security Administration Program Operations Manual SI System 01120.203.B.3.

IX. USE OF MANAGEMENT TRUST IN CONJUNCTION WITH GUARDIANSHIP OF THE ESTATE.

In most instances, the creation of a Chapter 1301 management trust will eliminate the need for a guardianship of the estate, and will serve the needs of the ward's estate in lieu of a guardianship. There may be times, however, when it is in the best interests of the ward to combine the advantages of a trust (e.g., flexibility of investment power and ease of managing the ward's funds without having to gain court approval), with a guardian's hands-on ability to provide for the ward's daily living needs. The special demands of caring for a ward who is profoundly disabled or lives in a remote location may more easily be met by having a guardian of the estate with access to a limited amount of cash available to meet ordinary expenses, and a management trust overseen by an institutional trustee with expertise in managing large portfolios of investments. In such cases, the applicant evaluating options for handling a ward's finances should consider some of the issues discussed below.

A. Availability of Cash for Ordinary Expenses. The advantage of having a guardian of the estate to provide for a ward's immediate and changing needs may best be served by having a checking account in which a balance of cash is maintained, in an amount calculated to provide for the ward's usual monthly needs for food, clothing, medications, and other expenses. That amount would be specified in the order creating the management trust, as the maximum monthly balance allowed to be maintained by the guardian of the estate to provide for the ward's needs. The order would also include a provision directing the trustee to transfer each month into the guardianship checking account an amount of money equal to the difference between the current balance and the maximum monthly balance approved by the court, upon receipt of written documentation that the funds spent from the account in the prior month were for appropriate expenditures on behalf of the ward. For any needs of the ward that are not met with the available funds maintained by the guardian, the

guardian would make a request to the trustee for additional funds to be disbursed for the specific purpose. The trustee would pay creditors and service providers directly from trust assets for other normal monthly expenses of the ward, such as a mortgage, utilities and health insurance.

B. Coordination of Efforts. Meeting a ward's needs through the efforts of a trustee and a guardian of the estate requires good communication and a willingness to collaborate for the benefit of the ward. This means that the trustee must be easily accessible by phone, fax, e-mail or other means of communication, and the guardian and caregivers for the ward must provide oral and written information about the ward's needs and expenses in a timely manner. Both the trustee and the guardian must be willing and able to share information as needed, and to sign any authorizations or other forms required by third parties. Turf wars about who will pay what bills, failure to keep good records, and delays in responding to each other can quickly nullify the benefits provided by the dual trustee/guardian arrangement.

The trustee and guardian also need to cooperate in regard to recordkeeping for tangible assets purchased and maintained by the guardian with funds disbursed from the trust. For example, if the guardian receives distributions of trust assets for purchase of a vehicle or special equipment for the ward, those assets would likely be titled or held under the guardianship, but purchase orders, receipts, or other records showing ownership and value of the asset should be shared with the trustee, so that the trustee can properly document the use of trust funds. Similarly, if the guardian rents a safe deposit box using trust funds, a list of the contents of that box should be provided to the trustee, so that both parties are kept informed of the location of important records related to use of trust assets.

C. Careful Reporting. To keep the court fully informed regarding the funds available to meet the ward's needs, both the trustee and the guardian of the estate must account for the funds held within their respective custody and control. The guardian would prepare and file an annual accounting of the receipts to and expenses paid from the guardianship account, and the trustee would provide the usual annual account for the management trust. The amount of funds transferred from the trust into the guardianship account would need to match the vouchers provided to the trustee, and the trustee would have to show that the funds reportedly transferred to the guardian matched the transaction records for the trust. Information for income tax returns and reporting for receipt of governmental benefits would also need to be coordinated.

D. Coordination of Compensation. To avoid overcharging the ward's estate for fees paid to the guardian and the trustee, the compensation for the guardian and for the trustee should be calculated based on the actual funds received or disbursed by that party. For instance, the guardian should not be entitled to count as a "receipt" for purposes of compensation an amount received as a distribution from the trust, if those funds had already been accounted as "income" to the trust. Otherwise, there would be a likely "double-dipping" between the trustee and the guardian, regardless of intention. This means, however, that the 5% in 5% out rule might have to be adjusted by the court to provide for appropriate remuneration in light of the guardian's actual efforts on behalf of the ward. Likewise, if the trustee is not to be compensated according to a set fee schedule, the court would need to consider whether transfers of funds from the trust to the guardian's checking account would qualify as "disbursements" upon which a commission would be paid. As long as both the trustee and guardian are forthcoming and transparent in their accountings and calculations of requested compensation, the court can easily determine and award an appropriate amount of compensation to each fiduciary.

E. Termination of Guardianship. Upon the termination of the guardianship, due to death or restoration of capacity, the court would need to direct the guardian to return to the trustee, all funds remaining in the guardianship account, so that the balance of the trust assets may be fully distributed, in accordance with the terms of the trust. Thus, the final accounting of the guardianship would be completed and approved, the refund of any guardian's bond premium would be deposited into the trust account, and the guardian would be discharged, before the trustee filed its final accounting for the trust.

X. CONCLUSION

Whether a management trust is used in lieu of or in conjunction with a guardianship of the estate, the attorney serving as an ad litem or representing a guardian or trustee should give careful consideration to all aspects of the options available for managing a ward's finances. The circumstances of each case will dictate the benefit of either a trust or guardianship, and the conditions under which a ward's estate will be administered. Understanding the advantages, opportunities and requirements for handling a management trust is vital to properly provide for the

best interests of a ward or incapacitated person for whom such a trust is established.

Who's Your Beneficiary?

Navigating Potential Issues with Multi-Party Accounts in Texas

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- Draft pleadings, serve and respond to discovery requests, and take and defend depositions.
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I. Introduction

1.1. Multi-party accounts in Texas are the subject of many disputes between heirs and beneficiaries. Laypersons love them because of their perceived simplicity: a client will go to the bank with the intent of opening a new account or adding an owner or beneficiary to an existing account. The bank employee will review the ownership and beneficiary structures of the accounts they offer, which is typically listed on a signature card. Most banks offer the same types of accounts but will include an "other" category on the signature card or agreement, which allows the layperson to fill in the blank and tell the bank the type of account they think they want to open. Laypersons will complete the signature card with little or no guidance and the bank will save the signature card in their electronic database and update the form of the account. This is typically the last time anyone thinks about the signature card until one of the owners on the account dies and survivorship rights are called into question.

1.2. An attorney will be confronted with the following scenario: a potential new client ("**PNC**") walks into your office asking to help probate his mother's Will. PNC gives you the original, self-proved Will, and notes that his mother died a widow and was survived by PNC and his sister, the only heirs. The Will names PNC and his sister as the only beneficiaries, names PNC as independent executor, and divides the estate equally between PNC and sister. PNC tells you he has a "good relationship" with his sister and you begin to discuss the probate process.

1.3. After asking PNC about his mother's assets, you learn that she owned a house, a vehicle, and some modest home furnishings and personal items, but "everything else was supposed to go to PNC." Curious to know what he means by "everything else," you ask PNC whether his mother owned any bank accounts. PNC confirms that his mother owned "three or four" bank accounts, which named PNC as a "joint owner." When you ask about the status of those bank accounts, PNC tells you that he decided to close the accounts and pocket the proceeds upon her death. You ask if PNC has the signature cards for the accounts to establish a proper beneficiary designation or right of survivorship, to which he responds, "the bank told me they're mine."

1.4. Is PNC correct? It depends, and despite more than 170 years of legislation and litigation on the subject of survivorship rights in Texas, there is still much confusion on how to create, and prove, the existence of survivorship rights in financial accounts. This paper will give a brief review the history of survivorship in Texas and the abolishment of the survivorship presumption which was prevalent in the common law. Next, the paper will examine the cases which impacted the codification of the current statutory framework, the statutes themselves, and the leading case on the subject,

Stauffer v. Henderson. The paper concludes with a brief discussion of some ancillary issues to disputes over multi-party accounts.

II. Historical Perspective on Rights of Survivorship

2.1. The scenario presented in the introduction requires us to answer the following question: does joint ownership in a bank account automatically confer ownership in the survivor(s) upon the death of one, or more, of the named owners? Put another way, does a joint tenancy relationship create a presumption of survivorship in a bank account and allow the account to pass outside of probate?

A. Abolishment of the Common Law Principle of Joint Tenancy

2.2. The common law doctrine of survivorship, or *jus accrescendi*, created a presumption of joint tenancy with rights of survivorship. Where land is conveyed to two or more persons, the entire property passed to the surviving owners upon the death of any joint tenant. The presumption continued until the last surviving owner took the entire property.

2.3. In 1848, Texas passed a statute abolishing joint tenancies with rights of survivorship entirely, which stated, "where two or more persons hold an estate, real, personal or mixed, jointly, and one joint owner dies before severance [sic], his interest in said joint estate shall not survive to the remaining joint owner or joint owners, but shall descend to, and be vested in, the heirs or legal representatives of such deceased joint owner in the same manner as if his interest had been severed and ascertained."[1] The language of the statute reversed the presumption of survivorship in Texas and, in effect, required a decedent's interest in jointly owned property to pass via probate. The statute also abolished joint tenancies in Texas and treated joint holders of land as tenants-in-common regardless of how they acquired the property.[2]

B. Early Texas Case Law Interpreting Article 2580

2.4. The earliest cases interpreting the strict language of Article 2580 made two things clear: 1) there is no presumption of survivorship in Texas merely because of joint ownership of land, and 2) Texas law does not recognize the common law distinction

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[1] Act March 18, 1848, p. 129; P. D. 3429; G. L. Vol. 3, p. 129.

[2] *Peterson v. Fowler*, 73 Tex. 524, 527, 11 S.W. 534 (1889) ("The distinctions which existed at common law between estates held by joint tenants, coparceners, and tenants in common, do not obtain in this state. The holders of such estates are tenants in common without regard to the manner in which such estates are acquired."); *Ross v. Armstrong*, 25 Tex. Supp. 354, 366, 1860 WL 5869 (Tex. 1860).

between various forms of joint ownership.[3] The statute remained silent, however, as to whether joint owners may enter a contract to establish rights of survivorship in jointly owned property. The Galveston Court of Appeals considered the issue in *Chandler v. Kountze* and determined that the Texas Legislature did not intend to prevent joint owners from agreeing to create rights of survivorship in jointly owned real property.[4]

2.5. Confirming the holding in *Chandler*, the Texarkana Court of Appeals applied the ruling to jointly held bank accounts and determined that joint account holders are not prevented from creating rights of survivorship in an account by agreement.[5] The language in *Shroff* is the first to refer to an "unambiguous written agreement" as a requirement to establish rights of survivorship in a jointly owned financial account.[6] The Court of Appeals emphasized the importance of a written agreement which is "clear and explicit in creating a joint tenancy with right of

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[3] *See Hagood v. Hagood*, 187 S.W.228, 230 (Tex. Civ. App. 1916, writ ref'd) ("Where two or more persons own an estate jointly and one dies before a severance, his interest in said estate shall not survive to the remaining joint owner or joint owners, but shall descend to the heirs of the decedent in the same manner as if his interest had been severed before his death"); *Smithey v. Shambaugh*, 126 Tex. 396, 399, 88 S.W.2d 475, 476 (Comm'n App. 1935) ("it is to be observed that long before the passage of the 1927 act, the Legislature had enacted statutes which in effect wiped out the distinction recognized by the common law between various cotenancies, and transformed all joint owners of land into tenants in common…By article 2580, the common-law doctrine of survivorship, an essential attribute of joint tenancy, was in effect abolished so far as cases involving inheritance were concerned.")

[4] 130 S.W.2d 327, 329(Tex. Civ. App.—Galveston 1939, writ ref'd) ("While the wording of Article 2580 indicates a legislative intent to abolish the relationship of joint tenancy where it would otherwise have been created by law, including the common-law doctrine of survivorship, there is nothing in the subject matter of the act which would, in our opinion, justify the presumption that the legislature intended to thereby prevent the parties to a contract, a will, or a deed of conveyance, from providing among themselves that the property in question should pass to and vest in the survivor as at common law").

[5] *Shroff v. Deaton*, 220 S.W.2d 489, 492 (Tex. Civ. App.—Texarkana 1949, no writ) ("in *Chandler v. Kountze*, Tex.Civ.App., 130 S.W.2d 327, in which writ of error was refused by the Supreme Court, it was held that where the deed provided that land was conveyed to grantees 'as joint tenants, with all the rights of joint tenants at common law, including the right of survivorship,' there is nothing in the statute to prevent the parties from providing among themselves that the property in question should pass to and vest in the survivor as at common law").

[6] *Id.* ("In 48 C.J.S., Joint Tenancy, § 3, page 919, it is said: 'Whether or not a bank account is held in joint tenancy with right of survivorship depends on the intention of the parties, determined in the light of all the circumstances. It has been held that, where the intention of the parties is evidenced by an unambiguous written agreement, the courts will follow the agreement'").

survivorship," stating that where one exists, "the courts are bound by the agreement."[7]

III. Texas Probate Code § 46(a) (now Texas Estates Code §§ 101.002, 111.001) and Creating Rights of Survivorship

A. Codification of the Holdings in *Chandler* and *Shroff*

3.1. In 1955, the Texas Legislature codified the holdings in *Chandler* and *Shroff* into Section 46 of the Texas Probate Code. The original language of Section 46 confirmed that jointly owned property passed by will or intestacy from the decedent "as if the decedent's interest had been severed," but included language that allowed joint owners to agree <u>in writing</u> to create a joint tenancy relationship with rights of survivorship.[8] The language of Section 46(a) is now found in two separate sections of the Texas Estates Code:

(1). Texas Estates Code § 101.002

> If two or more persons hold an interest in property jointly and one joint owner dies before severance, the interest of the decedent in the joint estate:
>
> 1. does not survive to the remaining joint owner or owners; and
>
> 2. passes by will or intestacy from the decedent as if the decedent's interest had been severed.

(2). Texas Estates Code § 111.001

> (a) Notwithstanding Section 101.002, two or more persons who hold an interest in property jointly may agree in writing that the interest of a joint owner who dies survives to the surviving joint owner or owners.
>
> (b) An agreement described by Subsection (a) may not be inferred from the mere fact that property is held in joint ownership.

[7] *Id.*

[8] Section 46 made clear that there is no inference of rights of survivorship "from the mere fact that the property is held in joint ownership."

B. Cases Following the Codification of Sections 101.002 and 111.001 – Presumptions of Intent and Allowance of Parol Evidence

3.2. The language of Sections 101.002 and 111.001 established the following rules to determine whether jointly held property is a probate or a non-probate asset:

(i) A decedent's interest in jointly owned property passes as part of his probate estate;

(ii) There is no presumption of survivorship in jointly owned property;

(iii) Owners of jointly held property may agree to create rights of survivorship in the property;

(iv) An agreement must be evidenced in writing; and

(v) If such a written agreement exists, the property passes pursuant to the terms of the agreement.

3.3. Following the codification of Sections 101.002 and 111.001, Texas Courts turned their attention to determining the intent of the parties who owned joint accounts and the language necessary to create rights of survivorship. Due to the inconsistency of account agreements and forms used by financial institutions, as well as the lack of guidance from the Legislature, the Courts struggled to make consistent findings with regard to the creation of rights of survivorship. Prior to 1979 and the codification of Chapter 113 of the Texas Estates Code, Texas Courts published the following notable opinions:

(a) ***Weems v. Frost Nat. Bank of San Antonio***, 301 S.W.2d 714, (Tex. Civ. App.—El Paso 1957, writ ref'd n.r.e.) the El Paso Court of Appeals interpreted the language of the decedent's will to determine his testamentary intent and whether any property was made to "survive" to another. The Court held that no ambiguity, either patent or latent, existed in the Will. Citing the holding in *Hagood*: "in the absence of ambiguity in the terms of the will, the intent of the testator whose lips have been closed by death must be determined alone from the words as expressed by him in the solemn instrument (the will) executed under the formalities required by law, and 'must alone afford the light by which the mind is to be guided in the ascertainment of the testators' intent.'" The Court goes on to find that the word "jointly" is not sufficient to create the right of survivorship "in the absence of words of survival, and does not, of itself, create a joint tenancy… where there are no words or survivorship, the devise to a person

predeceasing the testator lapses and becomes part of the testator's undevised estate."

(b) ***Johnson v. Johnson***, 306 S.W.2d 780 (Tex. Civ. App.—Amarillo 1957, writ ref'd): the Amarillo Court of Appeals reviewed the creation of a joint bank account owned by the decedent and her son, in which the son claimed he held rights of survivorship and withdrew the funds on the decedent's death. Pursuant to the written account agreement, the account was styled as a "Joint Account – Payable to either or survivor" and included language indicating that the "account shall become the absolute property of the survivor" upon the death of either joint owner. The Court determined such language was sufficient to establish rights of survivorship in the account and the decedent's son had the right to withdraw the funds remaining in the account.

(c) ***Krueger v. Williams***, 359 S.W.2d 48 (Tex. 1962): **This case has been superseded by statute.** It is important to consider this case in the context of the language considered "sufficient" to create rights of survivorship and as one of many that lead to the Legislature's decision to codify what is now known as Chapter 113 of the Texas Estates Code. The decedent purchased an investment share account during marriage and named his daughter from a prior marriage as the beneficiary. The language on the "receipt card" listed the account as owned by the decedent and/or his daughter "or payable to the survivor of either." The Texas Supreme Court ignored the language of Section 111.001 of the Texas Estates Code because the receipt card was not considered a contract between the decedent and his daughter, but did find that the language was insufficient to "vest an absolute right of ownership of the funds in the survivor. It seems that the analysis should have concluded here, but the Court went on to conclude that the language contained in the receipt created a "rebuttable presumption" that the decedent intended to establish rights of survivorship in the account.

(d) ***Quilter v. Wendland***, 403 S.W.2d 335, 338 (Tex. 1966): **This case has been superseded by statute.** The Texas Supreme Court was presented with a scenario where the decedent opened three accounts and named various beneficiaries as the joint owners with rights of survivorship. The Decedent signed the signature cards applicable to the three accounts but the signature cards were never signed by the joint owners. The Court determined that the requirements of a written

agreement are not applicable where the agreement is between the financial institution and the account owner only. The Court expanded the "rebuttable presumption" created in *Krueger* to find the decedent's intent to create rights of survivorship in the accounts.

(e) ***Griffin v. Robertson***, 592 S.W.2d 31, 33 (Tex. Civ. App.—Texarkana 1979, no writ): **This case has been superseded by statute.** Possibly the most egregious opinion published after 1955, the Texarkana Court of Appeals ignored the general rule that parol evidence may only be considered when an ambiguity exists in the document, stating, "the well settled rule in Texas is that parol evidence is admissible to show the true intention of a depositor in setting up a joint survivorship account, even though such evidence contradicts the express terms of the joint account agreement."

IV. Codification of Section 439 – added by Acts 1979, 66th Leg., p. 1756, ch. 713, Sec. 31, eff. Aug. 27, 1979. (Now TEC 113.151-153, .155)

4.1. In response to the assortment of opinions from the Court of Appeals on interpreting rights of survivorship following the codification Sections 101.002 and 111.001, the Texas Legislature codified what is now known as Chapter 113 of the Texas Estates Code in 1979. The Chapter provides definitions for general terms, defines the types of accounts to which the Chapter applies, and describes to ownership interests of parties to specific types of multi-party accounts both during their lifetime and upon the death of one of the parties. Although it was not added until 1993, Section 113.052 even provides a "Uniform Single-Party or Multiple-Party Account Selection Form," which represents the Legislatures attempt to codify a form that can be relied upon by financial institutions to meet the disclosure requirements of Section 113.053.[9]

4.2. Chapter 113 is applicable to all accounts at financial institutions and defines the specific types of multi-party accounts which may be created at a financial institution. This chapter distinguishes the rights of parties to the accounts during their lifetime from the rights of parties to the accounts following the death of one, or more, of the parties. As you will see in the following section, a party having the right to withdraw funds from a joint account during the lifetime of all parties to the joint account does not automatically grant that party the right claim the sums remaining on

[9] Unfortunately this form is not universally used by financial institutions, which has led to continued litigation over the decedent's intent and whether he received the required disclosures contained in Section 113.053. In the event a financial institution does not use the form provided in Section 113.051, the contract creating the account is "governed by the provisions of this chapter applicable to the type of account that most nearly conforms to the depositor's intent." *See* Tex. Estates Code § 113.051(b).

deposit following the death of one, or more, of the parties to the joint account.[10] Such a distinction is key in determining what rights, if any, a party may have in a multi-party account and whether a party has standing to challenge, or seek to establish, a beneficial ownership interest in a multi-party account.

A. Definitions Applicable to Multi-Party Accounts:

(1). **Account:** a contract of deposit of funds between a depositor and a financial institution.[11] The definition includes checking accounts, savings accounts, certificates of deposit, share accounts, "or other similar arrangements.

(2). **Financial Institution:** an organization authorized to do business under state or federal laws relating to financial institutions.[12] Included in the definition are: banks, trust companies, savings banks, building and loan associations, savings and loan companies or associations, credit unions, and brokerage firms.

(3). **Party**: a person who, by the terms of a multi-party account, has a present right, subject to request, to payment from an account.[13]

(4). **Multi-Party Account**: a joint account, a convenience account, a P.O.D. account, or a trust account.[14]

(5). **Joint Account**: an account payable on request to one or more of two or more parties, regardless of whether there is a right of survivorship.[15] During the lifetime of all parties to a joint account, the account belongs

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[10] Chapter 113 makes clear that its provisions relating to beneficial ownership between parties to a multi-party account "are relevant only to controversies between those parties and those persons' creditors and other successors" and "do not affect the withdrawal power of those persons under the terms of an account contract." Tex. Estates Code § 113.101.

[11] Tex. Estates Code § 113.001(1).

[12] Tex. Estates Code § 113.001(3).

[13] Tex. Estates Code § 113.002(a).

[14] Tex. Estates Code § 113.004(3). Although "convenience accounts" are included in the definition, these types of accounts do not include rights of survivorship or pay on death benefits and pass as part of the last surviving party's estate.

[15] Tex. Estates Code § 113.004(2).

to the parties in the proportion to the net contribution made by each party to the balance of the account unless there is "clear and convincing evidence" of a different intent between the parties.[16]

(6). **P.O.D. Account**: an account payable on request to one, or one or more, person(s) during their lifetime and, on the death of the person, or of all those persons, to one or more P.O.D. payees.[17] The account belongs to the original payee(s) of the P.O.D. account during the original payee(s)' lifetime and does not belong to the P.O.D. payees.[18]

(7). **Trust Account**: an account in the name of one or more parties as trustee for one or more beneficiaries. The relationship between the parties to the account is "established by the form of the account and the deposit agreement." There are no other trust assets other than the sums on deposit in the account, and this term does not include a regular trust agreement or testamentary trust "that has significance apart from the account" or a fiduciary account.[19] A trust account belongs to the trustee during his lifetime unless a different intent is reflected on the terms of the account or the deposit agreement or "other clear and convincing evidence of an irrevocable trust exists."[20] If the trust account is an irrevocable trust account, the account belongs beneficially to the named beneficiary or beneficiaries.[21]

(8). **Establishing Rights of Survivorship in a Joint Account**

4.3. To establish rights of survivorship in a joint account, the interest of the deceased party to the joint account must be "**made to survive** to the surviving party or parties by a **written agreement signed by the party who dies**."[22] Such a written

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[16] *See* Tex. Estates Code § 113.102.

[17] Tex. Estates Code § 113.004(4). A P.O.D. Payee is defined as a person, trustee of an express written trust, or charitable organization designated on the P.O.D. account as "a person to whom the account is payable on request after the death of one or more persons." Tex. Estates Code § 113.001(5).

[18] Tex. Estates Code § 113.103.

[19] Tex. Estates Code § 113.004(5).

[20] Tex. Estates Code § 113.104(a).

[21] Tex. Estates Code § 113.104(c).

[22] Tex. Estates Code § 113.151(a) (emphasis added).

agreement is sufficient to establish "an absolute right of survivorship" to the parties to a joint account ***if*** the agreement uses the magic phrase, or something substantially similar to it, provided by statute: "On the death of one party to a joint account, all sums in the account on the date of the death vest in and belong to the surviving party as his or her separate property and estate."[23] As discussed in more detail in the decision in *Stauffer v. Henderson*, this phrase must be found in the written account agreement extrinsic evidence of the parties "intent" may not be introduced to establish rights of survivorship. It is vital that the phrase, or something "substantially similar" to it, be found in the written account agreement as there is no inference or presumption of survivorship in a joint account or from the fact that an account statement or account agreement uses the phrase "JT TEN, Joint Tenancy, or joint," or other similar language.[24]

4.4. There may be instances where a joint account is owned by three or more parties with rights of survivorship established on the account. Following the death of one party to that joint account, the surviving parties' respective lifetime ownership interests are proportionally determined by their net contributions to the account and "augmented by an equal share for each survivor of any interest a deceased party owned in the account immediately before that party's death."[25] The account will continue to be owned by the surviving parties and they will enjoy rights of survivorship in the account "if a written agreement signed by a party who dies provides for that continuation."[26] Should the surviving parties wish to terminate the joint ownership upon the death of a party they would be entitled to withdraw their proportionate share from the account.

(9). P.O.D. Rights on the Death of the Original Payee

4.5. A P.O.D. Account may also be considered a joint account unless there is only one person (the original payee) entitled to withdraw funds from the account during their lifetime. The requirements of a written agreement which apply to a joint account to establish rights of survivorship also apply to P.O.D. Accounts to establish a beneficial interest in a P.O.D. payee. The Texas Estates Code requires a written

[23] Tex. Estates Code § 113.151(b).

[24] Tex. Estates Code § 113.151(c).

[25] Tex. Estates Code § 113.151(d)(1).

[26] Tex. Estates Code § 113.151(d)(2).

agreement to be signed by all original payees to the P.O.D. Account[27] indicating that the ownership of the account "passes" to the P.O.D. payee(s) on the death of the original payee(s). On the death of the original payee(s), the sums remaining on deposit in a P.O.D. Account will belong to the named P.O.D. payees who survive the original payee(s).[28] If there are two or more named P.O.D. payees who survive all of the original payees, each P.O.D. payee takes his share of the account outright unless the written terms of the account or deposit agreement create rights of survivorship.[29] A P.O.D. payee must survive the original payee in order to receive a beneficial interest in the account.

(10). Beneficial Rights in a Trust Account

4.6. Just like joint accounts with rights of survivorship and P.O.D. Accounts, a trust account must be evidenced by a written agreement which is signed by the trustee(s).[30] Upon the death of the trustee(s), the remaining balance of the trust account belongs to the beneficiary or beneficiaries named in the account agreement.[31] If there are two or more named beneficiaries on the trust account who survive the trustee(s), each beneficiary owns his portion of the account outright unless the written terms of the account or deposit agreement create rights of survivorship.[32] A trust account beneficiary must survive the trustee(s) in order to receive a beneficial interest in the account.

B. Cases Interpreting the Requirements of a Written Agreement to Establish Rights of Survivorship

4.7. The codification of what is now Chapter 113 of the Texas Estates Code corrected the decisions reached in the cases that followed *Kreuger* and made clear that, to establish rights of survivorship in a joint account, there must be:

(i) A written agreement;

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[27] Tex. Estates Code § 113.152(a).

[28] *Id.*

[29] Tex. Estates Code § 113.152(b).

[30] Tex. Estates Code § 113.153(a).

[31] Tex. Estates Code § 113.153(a)(1).

[32] Tex. Estates Code § 113.153(b).

(ii) Signed by the decedent;
(iii) Which makes the interest of the deceased party survive to the other joint owner(s).

The cases that follow demonstrate the Court of Appeals and, eventually, the Texas Supreme Court, adhering to the new statute and overturning precedent to the contrary.

(1). ***Chopin v. Interfirst Bank Dallas N.A.*** 694 S.W.2d 79 (Tex. App.—Dallas 1985, writ ref'd n.r.e.): the decedent used his own funds to create three joint accounts with his wife. The decedent died testate and his wife closed all three accounts the day after his death. Interfirst Bank, as the executor of the decedent's estate, brought suit against the wife to recover the funds as a part of the decedent's probate estate.

The signature cards read as follows:

> If there be more than one depositor upon the endorsement of any depositor the bank is hereby authorized to pay to either of them or upon the death of one to the survivor the funds represented by this certificate. If an account is designated a joint account on the signature card depositors agree and direct that I.F.B.O.C. shall pay the funds in the account to or on the order of any one of such depositors or to or on the order of the duly authorized agent of any of them before or after the death of one of the depositors and after the death of all depositors to the estate of the last depositor to die.

The Dallas Court of Appeals applied the language of Chapter 113 of the Texas Estates Code, which it determine to be a "comprehensive codification of rules dealing with nonprobate transfers at death through account agreements among depositors and financial institutions."[33] The Court required there to be a "(1) a written agreement (2) signed by the

[33] *Chopin*, 694 S.W.2d at 83 ("The Code provisions were adopted for the purpose, among others, of removing the confusion and uncertainty created by the then prevailing case law which had consistently held that parol evidence was admissible to determine the intent of the depositor in setting up a joint account") (citing McLaughlin, Joint Accounts, Totten Trusts, And the Poor Man's Will, 44 TEX.B.J. 871, 871 (1981)).

decedent (3) which makes his interest 'survive' to the other party,"[34] and "as a minimum the agreement must provide that the account 'is held by them as joint tenants with the rights of survivorship' or equivalent language in order to vest ownership in the surviving party."[35] Applying these rules, the Court found the signature cards did not have the requisite survivorship language and determined all three accounts to be a part of the decedent's probate estate.

(2). ***First State Bank and Trust Co., Carthage v. McCarty*****,** 723 S.W.2d 792, 794 (Tex. App.—Texarkana 1987), rev'd sub nom. *First State Bank & Tr. Co., Carthage, Tex. v. McCarty*, 730 S.W.2d 656 (Tex. 1987): Echoing the strict language requirements applied in *Chopin*, the Texarkana Court of Appeals reviewed a signature card on a bank account established in the name of the decent. The signature card made no mention of rights of survivorship and listed no other person as a joint owner of the account. Attached to the signature card was an affidavit which claimed that the decedent wanted to open a joint account with his nephew and which was executed nine days after the signature card.

The Court relied upon the language in Chapter 113 and ruled that the Court must look to the bank records and determine whether the signature card properly creates rights of survivorship. The language of the signature card controls and where the card is silent as to rights of survivorship, no such rights may be inferred. The Court refused to consider the affidavit as extrinsic evidence of intent, which "should be excluded from consideration." "The mere intention of a depositor as to use or ownership of the funds upon his death cannot be considered in determining the disposition of those funds." The review of the signature card supported the Court's finding that no language existed to make the interest of the decedent survive to his nephew.

[34] *Id.*

[35] *Id.* at 84.

(3). ***Stauffer v. Henderson***, 801 S.W.2d 858 (Tex. 1990): in *Stauffer* opinion provides the fundamental analysis for determining whether rights of survivorship exist in a joint account and confirmed that Chapter 113 provides the "exclusive means of creating rights of survivorship in multiparty accounts."[36]

MH used her own personal funds to open a joint account with her sister, MS. The signature card on the joint account was signed by both parties and included the following language:

> We agree and declare that all funds now or hereafter deposited in this account are and shall be our joint property, that either of us shall have power to act in all matters relating to such account, whether the other be living or dead, and that upon the death of either of us any balance in said account or any part thereof may be withdrawn by, or upon the order of the survivor. It is especially agreed that withdrawal of funds by the survivor shall be binding upon us and upon our heirs, next of kin, legatees, assigns and personal representatives.... [The depository] is hereby authorized to act without further inquiry in accordance with writings bearing any [signature of Marian or Mary], and any such payment or delivery or a receipt or acquittance signed by [Marian or Mary] shall be a valid and sufficient release and discharge of [the depository].

MH died testate and named her husband, JD, as independent executor. MS withdrew the funds from the joint account upon MH's death and JD brought suit against MS, alleging that the funds in the joint account were community property and a probate asset of MH's estate.

The *Stauffer* opinion reviewed the legislative and procedural history of rights of survivorship in Texas, confirming that parties may enter into agreements to establish rights of survivorship in joint accounts and there is no inference of survivorship merely by the establishment of a joint

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[36] *Stauffer*, 801 S.W.2d at 862.

account.[37] The Court discussed the irreconcilable holdings in cases such as *Krueger* and *Quilter*, which allowed for the consideration of extrinsic evidence to determine the intent of the parties, and affirmed the holdings in *Chopin* and *First State Bank* by holding that:

(i) Chapter 113 is the exclusive means for creating rights of survivorship in joint accounts;[38]
(ii) The requirements of a written agreement apply to P.O.D. Accounts and Trust Accounts;
(iii) a written agreement is "determinative of the existence of a right of survivorship in a joint account;"[39] and
(iv) language cannot be added to or otherwise inferred from a clear and unambiguous written account agreement or signature card and prior case law to the contrary is overruled.[40]

The Court reviewed the language of the signature card and determined that, although it authorized payment of funds, it did not create rights of survivorship in the account. Although not explicitly stated in the opinion, the ability to "withdraw" funds upon the death of a joint owner has been consistently distinguished from the language of Chapter 113, which requires the funds to be made to survive to a joint owner. This insufficient language is problematic when dealing with banks who rely on forms that do not properly conform with the provision of the Texas Estates Code.[41]

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[37] *Id.* at 861.

[38] *Id.* at 862.

[39] *Id.* at 862-63 ("For proving a right of survivorship in a joint account… the Legislature has determined that clear and convincing evidence is not enough, and **that a written agreement signed by the decedent is <u>required</u>**… The necessity of a written agreement signed by the decedent to create a right of survivorship in a joint account is emphatic.") (emphasis added).

[40] *Id.* at 863-64 ("Furthermore, no presumption can be created to contradict the agreement or to supply a term wholly missing from its provisions. Any such presumption would violate both the parol evidence rule by necessitating admission of extrinsic evidence to rebut the presumption, and the express prohibition of section 439(a) against inferring a right of survivorship from the mere creation of a joint account").

[41] *See Id.* at 863 Footnote 5 ("Of course, in addition to this legislatively drafted 'safe harbor,' banks may also ask in plain language, on their applications, signature cards, or other documentation for joint accounts, whether or not their customers intend ownership of the funds remaining in the account on the death of one joint account holder to go to the surviving joint account holders.")

V. Codification of Sections 113.051-053 of the Texas Estates Code

5.1. In 1993, the Texas Legislature codified what is now known as Sections 113.051-053 of the Texas Estates Code. These sections provide a form, known as the Uniform Single-Party or Multi-Party Account Selection Form, which, if properly executed, will affirmatively establish the type of account selected by the account holder(s) and creates a presumption that a financial institution properly disclosed the information required to establish either rights of survivorship, pay-on-death benefits, or a beneficial interest in a trust account. As noted in *Stauffer* and made clear by the language in the statute[42], financial institutions are not required to use this form and many prefer to use their own form, which has resulted in continued confusion and litigation in this area.

(1). Sample Form: Texas Estates Code § 113.052

UNIFORM SINGLE-PARTY OR MULTIPLE-PARTY ACCOUNT SELECTION FORM NOTICE: The type of account you select may determine how property passes on your death. Your will may not control the disposition of funds held in some of the following accounts. You may choose to designate one or more convenience signers on an account, even if the account is not a convenience account. A designated convenience signer may make transactions on your behalf during your lifetime, but does not own the account during your lifetime. The designated convenience signer owns the account on your death only if the convenience signer is also designated as a P.O.D. payee or trust account beneficiary.

Select one of the following accounts by placing your initials next to the account selected:

___ (1) SINGLE-PARTY ACCOUNT WITHOUT "P.O.D." (PAYABLE ON DEATH) DESIGNATION. The party to the account owns the account. On the death of the party, ownership of the account passes as a part of the party's estate under the party's will or by intestacy.

Enter the name of the party:

____

Enter the name(s) of the convenience signer(s), if you want one or more convenience signers on this account:

____

____

[42] "A financial institution ***may*** use the following form to establish the type of account selected by a party:…" Tex. Estates Code § 113.052 (emphasis added).

___ (2) SINGLE-PARTY ACCOUNT WITH "P.O.D." (PAYABLE ON DEATH) DESIGNATION. The party to the account owns the account. On the death of the party, ownership of the account passes to the P.O.D. beneficiaries of the account. The account is not a part of the party's estate.

Enter the name of the party:

____

Enter the name or names of the P.O.D. beneficiaries:

____

____

Enter the name(s) of the convenience signer(s), if you want one or more convenience signers on this account:

____

____

___ (3) MULTIPLE-PARTY ACCOUNT WITHOUT RIGHT OF SURVIVORSHIP. The parties to the account own the account in proportion to the parties' net contributions to the account. The financial institution may pay any sum in the account to a party at any time. On the death of a party, the party's ownership of the account passes as a part of the party's estate under the party's will or by intestacy.

Enter the names of the parties:

____

____

____

Enter the name(s) of the convenience signer(s), if you want one or more convenience signers on this account:

____

____

___ (4) MULTIPLE-PARTY ACCOUNT WITH RIGHT OF SURVIVORSHIP. The parties to the account own the account in proportion to the parties' net contributions to the account. The financial institution may pay any sum in the account to a party at any time. On the death of a party, the party's ownership of the account passes to the surviving parties.

Enter the names of the parties:

____

____

Enter the name(s) of the convenience signer(s), if you want one or more convenience signers on this account:

____

____

___ (5) MULTIPLE-PARTY ACCOUNT WITH RIGHT OF SURVIVORSHIP AND P.O.D. (PAYABLE ON DEATH) DESIGNATION. The parties to the account own the account in proportion to the parties' net contributions to the account. The financial institution may pay any sum in the account to a party at any time. On the death of the last surviving party, the ownership of the account passes to the P.O.D. beneficiaries.

Enter the names of the parties:

____

____

Enter the name or names of the P.O.D. beneficiaries:

____

____

Enter the name(s) of the convenience signer(s), if you want one or more convenience signers on this account:

____

____

___ (6) CONVENIENCE ACCOUNT. The parties to the account own the account. One or more convenience signers to the account may make account transactions for a party. A convenience signer does not own the account. On the death of the last surviving party, ownership of the account passes as a part of the last surviving party's estate under the last surviving party's will or by intestacy. The financial institution may pay funds in the account to a convenience signer before the financial institution receives notice of the death of the last surviving party. The payment to a convenience signer does not affect the parties' ownership of the account.

Enter the names of the parties:

____

____

Enter the name(s) of the convenience signer(s):

____

____

___ (7) TRUST ACCOUNT. The parties named as trustees to the account own the account in proportion to the parties' net contributions to the account. A trustee may withdraw funds from the account. A beneficiary may not withdraw funds from the account before all trustees are deceased. On the death of the last surviving trustee, the ownership of the account passes to the beneficiary. The trust account is not a part of a trustee's estate and does not pass under the trustee's will or by intestacy, unless the trustee survives all of the beneficiaries and all other trustees.

Enter the name or names of the trustees:

____

____

Enter the name or names of the beneficiaries:

____

____

Enter the name(s) of the convenience signer(s), if you want one or more convenience signers on this account:

____

____

ACKNOWLEDGMENT: I acknowledge that I have read each paragraph of this form and have received disclosure of the ownership rights to the accounts listed above. I have placed my initials next to the type of account I want.

____
Signature

(2). Establishing the Type of Account and Required Disclosures

5.2. Seemingly to further encourage financial institutions to adopt the Uniform Account Selection Form, the Estates Code makes clear that an account agreement containing "provisions substantially the same" as those in Section 113.052 will properly establish the type of account selected by the party or parties.[43] The benefits of using

[43] Tex. Estates Code § 113.051(a).

this form are amplified by the presumption of proper disclosures in Section 113.053, which applies when a financial institution uses the supplied form and the party or parties sign the acknowledgment.[44] Since many financial institutions have not adopted use of the suggested form, problems will continue to arise where a signature card or account agreement either does not conform with Section 113.052 or there is a question as to whether the deceased account owner received proper disclosures from the financial institution.[45]

VI. Miscellaneous Issues Related to Multi-Party Accounts

(1). Liability of Financial Institutions

6.1. The previous sections discuss the suggested form to be used by financial institutions, the consistent reluctance or refusal of financial institutions to adopt the form, and the duty to disclose certain information to a customer when the suggested form is not used by the financial institution. When your client is either challenging or attempting to defend purported rights of survivorship in a multi-party account, they may ask about bringing a claim against the financial institution who opened the account. What sort of liability does a financial institution face for failing to properly disclose the information required by the Texas Estates Code, for improperly paying the sums remaining in an account to a purported party or beneficiary, or for refusing to pay the remaining sums to a purported party or beneficiary?

6.2. The answer is not much, if any. Chapter 113, Subchapter E governs the liability of financial institutions that make payment "as provided by this subchapter" and "the set-off rights of those institutions."[46] A financial institution will not be held liable for:

(i) Payments made to the named beneficiary on a joint account with

[44] Tex. Estates Code § 113.053(a-1).

[45] An account agreement or signature card that does not conform to Section 113.052 will be deemed to create an account "that most nearly conforms to the depositor's intent." Tex. Estates Code § 113.051(b). Given Texas case law requires the depositor's intent to be determined only from an unambiguous account agreement or signature card, it is imperative that a financial institution which varies the format of their signature cards or account agreements properly disclose to the customer the type of account being selected and whether such account will properly create rights of survivorship, a P.O.D. payee, or a trust for the benefit of a properly named beneficiary. *See* Tex. Estates Code § 113.053(b-c). Failure to properly disclose this information will almost certainly result in the creation of an account which does not properly create rights of survivorship or other beneficial interest in the account.

[46] Tex. Estates Code § 113.201.

rights of survivorship pursuant to a written account agreement;[47]

(ii) Payments made to a properly named P.O.D. payee when the financial institution is presented with proof of death of all original payees;[48] and

(iii) Payments made to a beneficiary of a trust account when the financial institution is presented with proof of death of all persons named as trustees.[49]

Payments made in accordance with those sections will discharge the financial institution "from all claims for those amounts paid **regardless of whether the payment is consistent with the beneficial ownership of the account between parties, P.O.D. payees, or beneficiaries, or their successors**."[50] This broad protection is only limited where a party "able to request present payment" provides the financial institution with written notice that "withdrawals in accordance with the terms of the account should not be permitted."[51] When written notice is properly provided to the financial institution and there is a pending lawsuit which disputes present or beneficial ownership rights in the account, it is suggested that the bank interplead the funds and seek to be dismissed from the case.

(2). Electronic Agreements and Proving Authenticity of Signature

6.3. A challenge to the creation of rights of survivorship may involve the question of whether an account holder actually signed the agreement and whether he received the required disclosures prior to signing. We live in an increasingly digital world where contracts and agreements are signed electronically, and you may encounter a case where the deceased account holder never had to step foot inside a bank to sign an account agreement or signature card. How can you verify that 1) the person who signed an electronic agreement is the actual account holder, and 2) the bank provided the signing party with the required disclosures?

6.4. The issue of the enforceability of an electronic contract and the efficacy of an electronic security system used to identify the party signing the contract was

[47] Tex. Estates Code § 113.207.

[48] Tex. Estates Code § 113.204(b).

[49] Tex. Estates Code § 113.205(c).

[50] Tex. Estates Code § 113.209(a) (emphasis added).

[51] Tex. Estates Code § 113.209(b).

recently considered by the Texas Supreme Court in *Aerotek, Inc. v. Boyd.*[52] The case involved a discussion of the electronic hiring process used by Aerotek, Inc. and the efficacy of their security procedures. Aerotek presented testimony and a demonstration of their application process from a program manager at the company and testimony from an administrative assistant who assisted one of the potential employees with the electronic application.[53] The testimony described the step-by-step process used by Aerotek and confirmed 1) that the forms could not be altered after being signed by a candidate and 2) that candidates did not have the capability to bypass any documents before completing the application.[54] The employees offered no evidence, other than their denials, to support their allegations that they did not sign the documents in question and argued that Aerotek did not establish "the efficacy of the hiring application's security procedures."[55]

6.5. The Texas Supreme Court overturned the Dallas Court of Appeals and found in favor of Aerotek. Citing section 322.009(a) of the Texas Business & Commerce Code, which states that "an electronic signature is attributable to a person if it was the act of the person," the Court noted that such an act may be established by showing the efficacy of the security procedure used by the company[56] once the parties agree to conduct the transaction by electronic means.[57] Notably, the efficacy of the security procedure does not have to be proven by expert testimony and may be established by the "clear, direct, and positive" testimony of a witness "sufficiently familiar" with the procedure.[58] As financial institutions begin to use electronic signature cards to open accounts and change ownership or beneficial interests on existing accounts, it will become increasingly important for planners and litigators to understand the ease with which an account may be opened, changed, or closed electronically and the security measures used to determine the identity of an account holder.

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[52] 624 S.W.3d 199 (Tex. 2021).

[53] *Id.* at 202-03.

[54] *Id.* at 203.

[55] *Id.* at 206.

[56] *Id.* ("The efficacy of the security procedure provides the link between the electronic record stored on a computer or in a database and the person to whom the record is attributed. A record that cannot be created or changed without unique, secret credentials can be attributed to the one person who holds those credentials"); Tex. Bus. & Com. Code § 322.002(13)

[57] Tex. Bus. & Com. Code § 322.005(b).

[58] *Aerotek*, 624 S.W.3d at 207.

VII. Conclusion

7.1. Signature cards and account agreements are seemingly simple documents that can complicate a client's estate plan. Texas case law makes clear that a written agreement is required to establish rights of survivorship or create pay-on-death benefits or a trust relationship. The required language is provided by statute and, although not required to be adopted, it seems more financial institutions are using forms that either mirror or closely track the suggest form in the Texas Estates Code. As financial institutions continue to trend towards the almost exclusive use of electronic agreements and signatures, it will be important for planners and litigators to educate themselves on this process to properly advise their clients.

First Comes Love, Then Comes the Marital Deduction

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I. INTRODUCTION

Over the course of the last fifteen years, estate planners have witnessed a lot of changes. The gift, estate, and generation-skipping transfer tax exemption amounts became "permanent" and then doubled,[1] portability[2] and basis consistency reporting[3] were introduced, and more recently, the SECURE Act negated the effectiveness of some tried and true strategies for planning with retirement accounts.[4] One of the few constants has been the marital deduction, which generally allows spouses to transfer unlimited amounts of property to one another, whether during life or upon death, on a tax-free basis.[5]

It is easy enough to master the basic principles of the marital deduction, but knowing how and when to utilize marital deduction planning in order to obtain an ideal result for a client requires a more thorough understanding of those principles. The primary purpose of this article is to revisit familiar marital deduction planning concepts to examine how to most effectively deploy them in the current estate planning environment. This article will also highlight some of the less common ways to qualify for the marital deduction and consider how and when using an unconventional approach may be beneficial.

II. EXAMINING TRADITIONAL MARITAL DEDUCTION PLANNING

The Economic Recovery Tax Act of 1981 ("ERTA") established the unlimited marital deduction and introduced the concept of qualified terminable interest property.[6] Both concepts have been ubiquitous in estate planning for married couples ever since.

Traditional marital deduction planning tends to focus on using the estate tax marital deduction to defer the payment of all federal transfer taxes until the surviving spouse's death. To achieve this result, the deceased spouse[7] will leave all or a portion of his or her estate to the surviving spouse in a manner that qualifies for the marital deduction while relying on a bypass trust or portability to preserve the remainder of his or her estate tax exclusion amount.

All the means of qualifying for the marital deduction have one important thing in common: they all result in an interest passing to the recipient spouse in a manner that will cause estate inclusion, thereby requiring that recipient spouse to use his or her own gift and estate tax exclusion amount to transfer the interest during life or to shield it from tax at death. Put another way, if an interest passing to or for the benefit of a spouse would not be includible in his or her

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[1] American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, 126 Stat. 2313 (2013); An Act To provide for reconciliation pursuant to titles II and V of the concurrent resolution on the budget for fiscal year 2018, Pub. L. No. 115-97, 131 Stat. 2054 (2017).

[2] Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, 124 Stat. 3296 (2010); American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, 126 Stat. 2313 (2013).

[3] Surface Transportation and Veterans Health Care Choice Improvement Act of 2015, Pub. L. No. 114-41, 129 Stat. 443 (2015).

[4] Further Consolidated Appropriations Act, 2020, Pub. L. No. 116-94, 113 Stat. 2534 (2019).

[5] I.R.C. §§ 2056, 2523. As is further detailed in the next section of the article, only certain qualified transfers are eligible for the marital deduction.

[6] Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, 95 Stat. 172 (1981).

[7] All references in this article to the "deceased spouse" shall mean the first of the spouses to die. References to the "surviving spouse" shall mean the survivor of the spouses.

taxable estate, it will not qualify for the marital deduction. The Code and Regulations[8] include a number of other requirements that must be met to qualify for the deduction, particularly with regard to the creation of certain marital trusts, but it is still helpful to keep this key concept in mind when trying to determine whether or not an interest is deductible. The other basic requirements that must be met in order for an interest in property to qualify for the estate tax marital deduction are explored in more detail below.

A. Citizenship and Survival

The marital deduction is only available if the deceased spouse is survived by a spouse who is a U.S. citizen.[9] In most cases it is obvious whether or not the decedent was survived by a spouse, but if the order of the spouses' deaths cannot be determined by proof, then a presumption of survival provided by local law, the decedent's will (or presumably, a testamentary substitute such as a revocable trust), or otherwise will satisfy the survivorship requirement, so long as it results in an interest passing to the surviving spouse that will be includible in his or her gross estate.[10]

The citizenship requirement will be met if the surviving spouse (i) becomes a U.S. citizen before the estate tax return for the deceased spouse is filed and (ii) was a U.S. resident at all times after the deceased spouse's death and before becoming a citizen.[11] For this purpose, an estate tax return filed prior to the due date is considered filed as of the due date (including extensions), while a late return is considered filed as of the actual filing date.[12]

Note that there is an important exception to the citizenship requirement, as a transfer to a qualified domestic trust (a "QDOT") for the benefit of a non-U.S. citizen spouse will qualify for the marital deduction.[13] A QDOT must meet the following requirements:

- At least one of the trustees must be an individual who is a U.S. citizen or a domestic corporation;
- No distribution (other than a distribution of income) may be made from the trust unless a trustee who is a U.S. citizen or a domestic corporation has the right to withhold the tax imposed by Code section 2056A from such distribution;
- The trust must comply with the requirements prescribed by the Regulations to ensure the collection of any taxes imposed by Code section 2056A(b); and
- The executor of the deceased spouse's estate must make a QDOT election.[14]

In addition to the foregoing requirements, a QDOT must independently qualify for the marital deduction, whether as a general power of appointment trust, QTIP trust, charitable remainder

[8] All references herein to the "Regulations" are to the Treasury Regulations promulgated under the Internal Revenue Code of 1986, as amended. All references herein to the "Code" are to the Internal Revenue Code of 1986, as amended.
[9] I.R.C. § 2056(d).
[10] Treas. Reg. § 20.2056(c)-2(e).
[11] I.R.C. § 2056(d)(4).
[12] Treas. Reg. § 20.2056A-1(a).
[13] I.R.C. §§ 2056(d)(2), 2056A.
[14] I.R.C. § 2056A(a).

trust, or estate trust.[15] A more robust discussion of the more technical requirements associated with the administration and taxation of QDOTs is beyond the scope of this article.[16]

B. Interest Must Pass to the Surviving Spouse

To be eligible for the marital deduction, an interest in property must be includible in the deceased spouse's gross estate and pass to the surviving spouse.[17] An interest will be considered to have passed to the surviving spouse if:

- It is devised or bequeathed to the spouse;
- It was jointly owned by the spouses and subject to a right of survivorship;
- It was subject to a power of appointment causing an estate inclusion exercised in favor of the surviving spouse, or alternatively, passed to the surviving spouse in default of the release or non-exercise of the power;[18] or
- It consists of proceeds of an insurance policy on the decedent's life that are received by the surviving spouse.[19]

As this list demonstrates, generally any interest in property that the surviving spouse receives outright from the deceased spouse's gross estate will be considered to have "passed" to the surviving spouse. However, there are other factors that must be considered if the surviving spouse receives an interest in property as a result of a will contest or, more notably, in the form of a life estate or other terminable interest.

The Regulations address whether or not certain interests are considered to "pass" to the surviving spouse as a result of a will contest. If the surviving spouse assigns or surrenders his or her interest under the decedent's will as part of a settlement, that interest will not be considered to have "passed" to the surviving spouse and will not qualify for the marital deduction.[20] Conversely, if an interest under the decedent's will is assigned to the surviving spouse as a result of a bona fide recognition of the surviving spouse's enforceable rights over the estate, that interest will be considered to have "passed" to the surviving spouse and will qualify for the marital deduction.[21]

An assignment made pursuant to court order issued on the merits and following a genuine contest may be presumed to provide the requisite bona fide recognition of the surviving spouse's rights. However, an assignment made pursuant to a family settlement agreement or any other similar arrangement will not necessarily be accepted as a bona fide recognition of the surviving spouse's rights.[22] For an assignment made pursuant to a settlement to qualify for the marital

[15] Treas. Reg. § 20.2056A-2(b)(1).
[16] For a more comprehensive discussion of QDOTs, *see* Michele A. Mobley, *QDOTs: Drafting and Administering Marital Trusts for Non-U.S. Citizens*, State Bar of Texas Estate Planning and Probate Drafting Course, Houston, Texas, October 24-25, 2013.
[17] I.R.C. § 2056(a).
[18] Recall that an interest only qualifies for the marital deduction if is it includible in the deceased spouse's gross estate, so an exercise of a power of appointment over a trust that is not includible will not qualify. An interest that qualifies in this manner will most likely be subject to a general power of appointment.
[19] I.R.C. § 2056(c); Treas. Reg. § 20.2056(c)-2(a).
[20] Treas. Reg. § 20.2056(c)-2(d)(1).
[21] Treas. Reg. § 20.2056(c)-2(d)(2).
[22] *Id.*

deduction, the settlement must have been made in good faith and be based upon an enforceable right under state law.[23]

C. Terminable Interests

Pursuant to Code section 2056(b), only certain terminable interests that pass to or in favor of the surviving spouse qualify for the marital deduction. The Regulations define a terminable interest as any interest in property that "will terminate or fail on the lapse of time or on the occurrence or the failure to occur of some contingency."[24] Some of the most common forms of terminable interests include life estates, annuities, and interests passing in trust.

As a general rule, a terminable interest in property passing to the surviving spouse is nondeductible if any part of that interest passes to another person for less than adequate and full consideration, resulting in that other person (or his or her heirs) possessing or enjoying any part of the property upon the failure or termination of the spouse's interest.[25] Code section 2056(b) provides for five distinct exceptions to this general rule, as detailed below.

1. 2056(b)(3): Interests Conditioned on the Spouse's Survival

If the surviving spouse's right to receive an interest is conditioned on such spouse surviving the decedent for a period of time not to exceed six months, then the interest will qualify for the marital deduction if the spouse so survives.[26] An interest that passes to the surviving spouse on the condition that he or she does not die as a result of a common disaster will also qualify.[27]

2. 2056(b)(5): Life Estate with a Power of Appointment

Code section 2056(b)(5) provides that an interest passing to or for the benefit of the surviving spouse will qualify for the marital deduction if it satisfies two main criteria: (i) the surviving spouse must be entitled to all of the income from the interest for life, payable at least annually, and (ii) the surviving spouse must hold a general power of appointment over the interest, exercisable in favor of the surviving spouse or his or her estate. If for any reason the surviving spouse is only entitled to a portion of the trust income, or if the general power of appointment only applies to portion of the interest, the marital deduction will be limited to smaller of the two portions. Regulations section 20.2056(b)-5 provides a detailed explanation of how to determine the deductible amount if the surviving spouse only has the requisite rights over a partial interest.

a) Power of Appointment Trusts

This exception to the terminable interest rules is most often utilized to create a marital trust for the benefit of the surviving spouse. At a minimum, the trust must provide for the income to be distributed to the surviving spouse at least annually, but the settlor is free to liberalize the distribution provisions to provide for more frequent distributions of income or distributions of principal.

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[23] *Ahmanson Found. v. United States*, 674 F.2d 761, 775 (9th Cir. 1981).
[24] Treas. Reg. § 20.2056(b)-1(b).
[25] I.R.C. § 2056(b)(1); Treas. Reg. § 20.2056(b)-1(c)(1).
[26] I.R.C. § 2056(b)(3); Treas. Reg. §20.2056(b)-3.
[27] *Id*.

Although a trust designed to comply with Code section 2056(b)(5) trust is sometimes referred to as a general power of appointment trust, that name is a bit misleading. If the surviving spouse is given the power to appoint trust property to his or her creditors, or to the creditors or his or her estate, he or she will have a general power of appointment over the trust.[28] Unfortunately this power would not conform with the requirements of Code section 2056(b)(5), which clearly states that the power must be exercisable in favor of the spouse or his or her estate. An inter vivos power of appointment in favor of the surviving spouse, or an unlimited withdrawal right or other power to invade trust principal given to the spouse for his or her lifetime will satisfy this requirement,[29] as will a testamentary general power of appointment in favor of the surviving spouse's estate.[30] So long as the surviving spouse or his or her estate is an object of the power, the settlor may include other permissible appointees, such as descendants or charity, if that is desirable.

Note that the settlor is not required to provide both a lifetime and a testamentary general power to the surviving spouse. So long as the spouse has one form of the requisite power, the settlor may include lesser or more restrictive powers if he or she wishes. For example, if the surviving spouse has a testamentary power to appoint to his or her estate, it is perfectly acceptable if the spouse has only a limited power to withdraw trust property during life.[31] Similarly, if the spouse has an unlimited right of withdrawal during life, he or she may have a more limited testamentary power of appointment.[32]

Whether the general power is an inter vivos or testamentary power, it must be exercisable by the surviving spouse alone and in all events. The exercise of the power cannot require the joinder or consent of any other person, nor can it be terminated by any event other than the surviving spouse's exercise or release of the power.[33] For example, a power that is not exercisable in the event of the spouse's remarriage would not qualify.[34] If the spouse is incapacitated and thus is legally incapable of exercising the general power of appointment, the spouse's practical inability to exercise the power will not affect a trust's eligibility for the marital deduction.[35]

The power must also be exercisable from the moment of the deceased spouse's death, but if the power is exercised during the administration of the deceased spouse's estate, distribution to the appointee may be delayed during the period of administration.[36] Reasonable restrictions regarding the form of the exercise of a power will not affect its qualification. For example, the trust may require that the power be exercised via a document delivered to the trustee during the spouse's lifetime or in a will that makes a specific reference to the power.[37]

A general power of appointment trust may not provide any person (other than the surviving spouse) with the power to appoint any part of the trust property to anyone other than the surviving spouse.[38] As a result, the trustee's distribution discretion may only allow for

[28] I.R.C. § 2041(b)(1).
[29] Treas. Reg. § 20.2056(b)-5(g)(1)(i).
[30] Treas. Reg. § 20.2056(b)-5(g)(1)(ii).
[31] Treas. Reg. § 20.2056(b)-5(g)(5).
[32] *Id*.
[33] Treas. Reg. § 20.2056(b)-5(g)(3).
[34] *Id*.
[35] Rev. Rul. 75-350, 1975-2 C.B. 366.
[36] Treas. Reg. § 20.2056(b)-5(g)(4).
[37] *Id*.
[38] I.R.C. § 2056(b)(5); Treas. Reg. §§ 20.2056(b)-5(a)(5), (j).

distributions to or in favor of the surviving spouse, and no third party may hold any right to appoint, withdraw, or otherwise receive trust property during the spouse's lifetime.

b) *Practical Application of 2056(b)(5)*

Power of appointment trusts were once the most widely used type of marital trust, but following the enactment of ERTA, they were eclipsed in popularity by QTIP trusts (as discussed in more detail in section II.C.4 below). As compared to a QTIP trust, a general power of appointment trust has a number of disadvantages, as follows:

- Control Over Ultimate Disposition. Due to the necessary provision of a general power of appointment in favor of the surviving spouse (or his or her estate), a general power of appointment trust provides that spouse with complete control over the ultimate disposition of the trust assets. This power enables the surviving spouse to completely override the deceased spouse's intended final disposition of the trust property and to potentially direct it to beneficiaries who may be seen as undesirable by the deceased spouse, such as children from a different relationship or a new spouse. The QTIP trust enables the deceased spouse to control the ultimate disposition of the trust assets and therefore is often viewed as a superior option, particularly for spouses who choose to provide for different remainder beneficiaries (as most often occurs with blended families or couples who do not have children).
- Allocation of GST Tax Exemption. By virtue of the general power of appointment, the assets of a 2056(b)(5) trust are includible in the surviving spouse's estate, and he or she will be considered the transferor of the trust assets for generation-skipping transfer ("GST") tax purposes. As a result, there is no opportunity for the deceased spouse to allocate his or her GST tax exemption amount to a general power of appointment trust. Because the GST tax exemption amount does not carry over through portability, it may be lost if there is no bypass trust to absorb it. As is discussed in section V.D below, if a reverse QTIP election is made pursuant to Code section 2652(a)(3), the deceased spouse's executor will be able to allocate the deceased spouse's GST tax exemption amount to a QTIP trust.
- Creditor Protection. In some jurisdictions, the surviving spouse's general power of appointment may expose the assets of a general power of appointment trust to creditors, even if the power is unexercised (although that is not a concern in Texas).[39] Because a QTIP trust will not include a general power of appointment, it may provide a higher level of creditor protection.

Due to these disadvantages, the general power of appointment trust is seldom used as the primary marital trust in modern estate plans, but it is still useful in certain circumstances. For example, estate planners in community property states like Texas sometimes rely on the provisions of Code section 2056(b)(5) to qualify a revocable trust for the marital deduction upon the deceased spouse's death. Unlike in common law states, where spouses often create individual revocable trusts, couples in community property states are more likely to create a joint revocable trust that serves as an asset management vehicle during life and a will substitute at death.

At the first spouse's death, the surviving spouse's one-half interest in the community property and his or her separate property will typically remain in the revocable trust. In some

[39] Tex. Prop. Code § 112.035(f)(2).

cases, the deceased spouse's community and separate property interests may be directed to pass entirely to a bypass trust, QTIP trust, or some combination of the two, but it is not uncommon for some or all of these interests to remain in the revocable trust for the benefit of the surviving spouse. For instance, a couple may decide it is best to retain the deceased spouse's interest in the primary residence, tangible personal property, and other "use" assets in the revocable trust in order to avoid a probate of those assets at the surviving spouse's death (as would be required if held directly by the surviving spouse) or to avoid putting the surviving spouse in the position of co-owing those assets with an irrevocable bypass or QTIP trust (as would be required if the deceased spouse's interests were used to fund one or both of those trusts). Some couples choose to rely on portability to preserve the deceased spouse's exclusion amount and prefer to provide the surviving spouse with unfettered access to the deceased spouse's estate by way of the revocable trust, which removes those assets from the surviving spouse's probate estate and facilitates a transition of the management of those assets in the event the surviving spouse loses capacity.

Whatever the reasoning may be for directing any share of the deceased spouse's property to the revocable trust, it is important to ensure that the trust will qualify for the marital deduction if it will be used for that purpose. Just because the surviving spouse retains the right to revoke the trust in receipt of the deceased spouse's property does not necessarily mean that the trust will qualify.[40] The trust must still meet the requirements under Code section 2056, whether as a general power of appointment trust, QTIP trust, or estate trust. For most couples, the general power of appointment trust provisions will likely be a natural fit, as providing the surviving spouse with full control over trust income and principal during life and at death is often the desired result if the spouses have chosen to keep the deceased spouse's property in the revocable trust.

Before providing for any part of the deceased spouse's estate to remain in the revocable trust, be sure that there is no "spray power" or any other provisions that may jeopardize the availability of the marital deduction. Revocable trusts are often intended to serve as an asset management vehicle in the event of incapacity, so it is sometimes prudent to provide the trustee with the authority to make distributions to the settlors' children, particularly if they are minors or are otherwise dependent on their parents for financial support, in the event of the settlors' incapacity. This is especially true if the trust has been substantially or fully funded by the settlors, meaning that assets would be out of reach for an agent under a durable power of attorney. However, this type of power would prevent the trust from qualifying for the marital deduction. Rather than include a spray power, the trust could authorize the trustee to make distributions to a settlor to provide for the minor children whom the settlor has a legal obligation to support.[41]

If the settlors feel strongly about (i) passing part or all of the deceased spouse's estate to the revocable trust and (ii) including a provision in the revocable trust that would disqualify the trust for the marital deduction, there are a couple of potential solutions. First, the trust could provide for outright disposition of the relevant property to the surviving spouse, who may then

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[40] *See* I.R.S. Tech. Adv. Mem. 200444023 (July 12, 2004). The Service determined that the revocable trust qualified for the marital deduction but relied primarily on the surviving spouse's right to receive all trust income and general power of appointment to make that determination. The survivor's power to revoke the trust does not appear to have been a significant factor.

[41] Treas. Reg. § 20.2056(b)-5(j).

immediately transfer the property back to the revocable trust. Another option is for the trust to provide for an outright distribution to the surviving spouse, but with an instruction to the trustee to fund the assets into the revocable trust absent notice to the contrary from the surviving spouse within a certain period of time following the deceased spouse's death.

A general power of appointment trust may also offer a better income tax result than a QTIP trust for spouses who are unlikely to owe estate tax at either spouse's death. Even though spouses with moderate amounts of wealth have the option of leaving their property outright to one another with minimal risk of estate tax exposure, they may still prefer to use a trust structure to provide some degree of protection against divorcing spouses and creditors and to have the option of management by a co-trustee or successor trustee in the event of the surviving spouse's incapacity or inability to serve. A QTIPable trust would provide all of those benefits during the surviving spouse's lifetime but may ultimately preclude the possibility of a basis adjustment at the surviving spouse's death. This is because in order for a QTIP trust to qualify for marital deduction, the deceased spouse's executor must make the QTIP election on an estate tax return. If the value of the deceased spouse's estate is well below the current estate tax exclusion amount of $12.92 million per person, there will be no need to file an estate tax return (unless the executor wishes to make the portability election). Without the QTIP election, the assets of the QTIPable trust will not be includable in the surviving spouse's gross estate at his or her death and thus will not receive a basis adjustment under Code section 1014.[42]

In contrast, a general power of appointment trust will be included in the surviving spouse's gross estate pursuant to Code section 2041, so the assets in that trust will receive a basis adjustment at the surviving spouse's death.[43] There will be no need to file an estate tax return to achieve that result. Furthermore, if the spouses are willing to sacrifice spendthrift protection, the surviving spouse could be granted an inter vivos general power of appointment over the trust, exercisable in favor of himself or herself, to qualify the trust for grantor trust treatment under Code section 678.[44]

3. <u>2056(b)(6): Life Insurance or Annuity Payments with a Power of Appointment</u>

Certain interests consisting of proceeds of a life insurance, endowment, or annuity contract passing from a decedent to his or her surviving spouse also qualify for the marital deduction.[45] To be deductible, the proceeds (or the interest accruing on the proceeds) must be payable exclusively to the surviving spouse on an annual or more frequent basis, and the surviving spouse must also have a general power of appointment over the interest exercisable in favor of the surviving spouse or his or her estate.[46]

4. <u>2056(b)(7): Qualified Terminable Interest Property</u>

Code section 2056(b)(7) provides that qualified terminable interest property ("QTIP") passing to or for the benefit of the surviving spouse will qualify for the marital deduction. Prior to the introduction of this provision under ERTA, all of the options for passing an interest to the

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[42] *See* I.R.C. § 2044 and the discussion in section VI.B herein.
[43] I.R.C. § 1014(b)(4).
[44] Under Tex. Prop. Code § 112.035(f)(1), spendthrift protection does not extend to a trust subject to a presently exercisable general power of appointment.
[45] I.R.C. § 2056(b)(6); Treas. Reg. § 20.2056(b)-6(a).
[46] *Id*.

surviving spouse in a qualifying manner resulted in the surviving spouse having control over the ultimate disposition of that interest. Because a deceased spouse may direct how assets held in the QTIP trust will pass following the surviving spouse's death, the QTIP trust quickly became one of the most popular tools for marital deduction planning.

In order to be classified as a qualified terminable interest, the property must (i) pass from the deceased spouse, (ii) provide the surviving spouse with a qualifying income interest for life, and (iii) be subject to the election under Code section 2056(b)(7).[47] The first requirement has already been discussed in section II.B above, while the third requirement and the various options for making a QTIP election are discussed in more detail in section V to follow.

With regard to the second requirement, the surviving spouse will be considered to have a qualifying income interest for life if he or she is entitled to all of the income from the interest on an annual or more frequent basis, and so long as no person has a power to appoint any part of the interest to any person other than the surviving spouse.[48] An income interest for a term of years or that will terminate upon the occurrence of some specified event (e.g., the surviving spouse's remarriage) is not a qualifying income interest for life.[49] However, if the surviving spouse's receipt of a qualifying income interest for life is contingent upon the deceased spouse's executor making the QTIP election, or if any part of the interest that is not subject to a QTIP election will pass to or for the benefit of other persons, the interest will still qualify for the marital deduction if the QTIP election is made and the other requirements are satisfied.[50]

Much like an interest that qualifies for the marital deduction pursuant to Code section 2056(b)(5), the mandatory distributions of income to the surviving spouse represent the floor rather than the ceiling. More specifically, if the trustee of a QTIP trust is authorized to make distributions of principal from that trust to or for the benefit of the surviving spouse, that authority will not cause the interest in that trust to fail as a qualifying income interest for life.[51]

The prohibition on any person having the power to appoint any part of a QTIP interest to any person other than the surviving spouse impacts a QTIP trust in two significant ways. First, it means that the trustee, other fiduciaries (such as trust protectors, special trustees, etc.), and other third parties may not have the authority to distribute or direct trust property to anyone other than the surviving spouse. Second, it means that the surviving spouse may not hold an inter vivos power of appointment over the trust.[52] However, the surviving spouse is permitted to hold a testamentary special power of appointment over a QTIP trust.[53]

Although Code section 2056(b)(7) is most often relied upon to create a QTIP trust for the surviving spouse's benefit, it can have other applications. An annuity that is payable solely to the surviving spouse for the remainder of his or her lifetime is treated as a qualifying income interest

[47] I.R.C. § 2056(b)(7)(B)(i).
[48] I.R.C. § 2056(b)(7)(B)(ii).
[49] Treas. Reg. § 20.2056(b)-7(d)(3)(i).
[50] *Id*.
[51] Treas. Reg. § 20.2056(b)-7(d)(6).
[52] Treas. Reg. § 20.2056(b)-7(d)(1).
[53] I.R.C. § 2056(b)(7)(B)(ii). Note that a surviving spouse should not be given a testamentary general power of appointment over a QTIP trust, as that power would qualify the full value of the trust for the marital deduction and would preclude the deceased spouse's executor from having the flexibility to make a partial QTIP election, the so-called "reverse QTIP" election to permit an allocation to the trust of the deceased spouse's GST tax exemption, or no QTIP election over that trust in the event that outcome is desirable.

for life, and the executor of the deceased spouse's estate will automatically be treated as having made the QTIP election for such an annuity unless the executor provides otherwise in the estate tax return.[54]

5. <u>2056(b)(8): Charitable Remainder Trusts</u>

In addition to the QTIP provisions, ERTA also introduced Code section 2056(b)(8), which provides that an interest passing to a qualified charitable remainder trust will qualify for the marital deduction if the surviving spouse is the only non-charitable beneficiary of that trust.

For purposes of this section, a qualified charitable remainder trust means a charitable remainder annuity trust ("CRAT") or a charitable remainder unitrust ("CRUT"), as described in Code section 664.[55] Only the value of the annuity or unitrust interest that passes to the surviving spouse will qualify for the marital deduction, while the remainder interest will qualify for the charitable deduction under Code section 2055.[56] A charitable remainder trust may generally continue for the life or lives of the specified individuals or for a term of years not to exceed 20 years.[57] So long as the other requirements are met, a charitable remainder trust with either type of term will qualify for the marital deduction as long as the surviving spouse is the only non-charitable beneficiary.[58]

A charitably inclined individual who wants to ensure that his or her spouse will be provided for upon death may consider incorporating either a charitable remainder trust or a QTIP trust with one or more charitable organizations as the remainder beneficiaries into his or her estate plan. Both trusts can provide the surviving spouse with a regular stream of payments for the duration of his or her lifetime, and both will qualify for the marital deduction. As a result, an individual faced with such a choice must consider certain other factors.

a) Taxation on Gain

All of the income that is retained by a charitable remainder trust, including capital gains, is generally exempt from income tax.[59] As trust income is distributed to the non-charitable beneficiary, it will be taxable to that beneficiary,[60] but because the income is distributed gradually the resulting tax liability is similarly spread out over time.

In contrast, all the income of a QTIP trust will be taxable to either the surviving spouse or the trust. Because a QTIP trust must distribute all of its income to the surviving spouse on an annual basis, the income is typically taxable to the surviving spouse, but that is not always the case. In this context, the "income" that is subject to mandatory distribution means the income as determined in accordance with the terms of the trust instrument and local law,[61] so fiduciary

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[54] I.R.C. § 2056(b)(7)(C).
[55] I.R.C. § 2056(b)(8)(B)(iii).
[56] Treas. Reg. § 20.2056(b)-8(a)(1).
[57] I.R.C. §§ 664(d)(1)(A), 664(d)(2)(A); Treas. Reg. § 1.664-3(1)(5)(i).
[58] Treas. Reg. § 20.2056(b)-8(a)(2).
[59] I.R.C. § 664(c). Note that a charitable remainder trust that has unrelated business taxable income will be subject to an excise tax on such income.
[60] I.R.C. § 664(b); Treas. Reg. § 1.664-1(d). A discussion of the "tier" system governing the income taxation of distributions from a charitable remainder trust is beyond the scope of this article, but the Regulations contain a number of detailed and helpful examples.
[61] I.R.C. § 643(b).

accounting income and taxable income are not always equivalent. Absent a valid exercise of a trustee's power to adjust between principal and income, capital gains are typically classified as principal for state law purposes, despite being considered income for income tax purposes. As a result, a capital gain incurred by a QTIP trust will likely be taxable to the trust.[62]

The assets passing to a QTIP trust will receive a basis adjustment as of the deceased spouse's date of death,[63] so capital gains may not be a significant concern barring a confluence of events in which a capital asset appreciates significantly in value during the period between the spouses' deaths and needs to be sold by the trustee prior to the surviving spouse's death, when the remaining assets will again have their basis adjusted to fair market value. Nevertheless, a charitable remainder trust may be a more effective vehicle for reducing or deferring income tax liability.

b) Flexibility to Change Course

The settlor of a charitable remainder trust may provide the noncharitable beneficiary with a power of appointment to designate the charitable remainder beneficiaries of the trust.[64] The power must be strictly limited so as to only be exercisable in favor of one or more charitable organizations as described in Code sections 170(c), 2055(a), and 2522(a), but it still provides some degree of flexibility over the ultimate disposition of trust assets.

The settlor of a QTIP trust is free to provide the surviving spouse with a testamentary special power of appointment over the trust. The objects of that power can be limited to a specific class of individuals, such as the settlor's descendants, or they can include any persons or organizations other than the surviving spouse, the surviving spouse's estate, or creditors of the surviving spouse or his or her estate. Under the right circumstances, powers of appointment are an excellent way to add flexibility to a trust's terms. If a married couple's goals are aligned, providing the survivor with a testamentary special power of appointment enables him or her to make adjustments to ensure that those goals will continue to be met despite changes in circumstances or the law.

If a charitably minded settlor has concerns about providing for the needs of children or other family members, or if a settlor would otherwise opt to direct more of his or her estate to family members if not for the associated estate and GST tax liability, a charitable remainder trust may not be a good fit. If the charitable trust is to qualify for the marital deduction, the surviving spouse must be the sole non-charitable beneficiary, so there is no option to divert funds from the trust to any other person if the need or opportunity to do so arises. On the other hand, a testamentary power of appointment over a QTIP trust can give the surviving spouse the flexibility to make adjustments while still providing for charity to be the ultimate taker (and thus secure an offsetting charitable deduction for the surviving spouse's estate to the extent of the amount actually passing to charity) if the surviving spouse determines that an exercise of the power of appointment is unnecessary.

[62] *See*, *e.g.*, Tex. Prop. Code § 116.005(a).
[63] I.R.C. § 1014(a)(1).
[64] Rev. Rul. 76-7, 1976-1 C.B. 179.

c) Distributions

A CRAT will provide the surviving spouse with regular payments of a fixed amount based upon the fair market value of the property that initially passes to the trust, while a CRUT will provide the surviving spouse with regular payments of a fixed percentage of the fair market value of the trust assets, as determined on an annual basis.[65] In either case, the parameters for distributions are set upon the creation of the trust and are not subject to change.

At a minimum, a QTIP trust must provide for the distribution of all of the trust income to the surviving spouse, but the settlor also has the option to provide for distributions of principal, whether for the surviving spouse's health, support, or otherwise. By authorizing the distribution of principal under certain circumstances, the settlor of a QTIP trust can safeguard the surviving spouse against financial insecurity due to an unexpected event such as protracted illness or disability. This degree of flexibility is simply not available with a CRAT or a CRUT. If the annuity or unitrust payment is insufficient to provide for the surviving spouse's needs, he or she will need to look elsewhere for support.

Distributions from a charitable remainder trust cannot exceed the unitrust or annuity amount, even if the surviving spouse has a legitimate need. In the case of a settlor who is concerned about the surviving spouse receiving an excessive amount of trust distributions, the inherent limitations of a charitable remainder trust may be perceived as a strength. In the case of a CRAT, the settlor will know the exact amount of distributions that the surviving spouse will be entitled to receive on an annual basis. In the case of a CRUT, the settlor could fund it with carefully chosen assets that he or she expects will experience only moderate growth, which will allow the settlor to know with reasonable certainty what the distributions may look like over time.

A private letter ruling from 2011 illustrates the potential creative planning opportunities that may exist with charitable remainder trusts. In the request, the taxpayer desired to amend a revocable trust to provide for (among other things) the creation of a CRUT upon taxpayer's death.[66] The terms of the CRUT provided for one-fifth of the unitrust amount to be distributed to the surviving spouse, while an independent trustee was given the discretion to determine the manner in which the surviving spouse and the designated charity were to share in the remaining four-fifths of the unitrust amount. In the event of the surviving spouse's remarriage, the spouse's share of the annual distributions would be limited to one-fifth of the unitrust amount, with the remainder passing to the designated charity.[67] The Service ruled that so long as the other requirements of Code section 664 were satisfied, the terms of the CRUT as proposed would qualify for both the marital and the charitable estate tax deductions.

Presumably, the settlor of a CRUT with terms similar to the one described in the private letter ruling could provide a statement of intent or some other guidelines for the independent trustee to consider when determining how to distribute the discretionary portion of the unitrust amount. This arrangement could be a good solution for a settlor who wants to adequately provide

[65] I.R.C. §§ 664(d)(1)(A), 664(d)(2)(A).

[66] I.R.S. Priv. Ltr. Rul. 201117005 (April 29, 2011). As a reminder, a taxpayer cannot rely on a private letter ruling obtained by another individual. However, private letter rulings do reflect the Service's current position on an issue. A taxpayer who is interested in utilizing this structure should consider obtaining his or her own private letter ruling.

[67] As a caveat, the ruling indicated that the CRUT could not limit the surviving spouse to one-fifth of the distribution in any year (whether remarried or single) to the extent the amount distributable to her would otherwise be considered "de minimis under the facts and circumstances." The Service did not explain what it would consider to be a "de minimis" amount.

for the surviving spouse while still maximizing the amount that will pass to charity. The concept of limiting distributions to the surviving spouse in the event of his or her remarriage is also likely to appeal to many settlors.[68] This degree of flexibility is not available in the case of a general power of appointment trust or a QTIP trust, which must provide the surviving spouse with the required distributions of trust income for the remainder of that spouse's lifetime, regardless of circumstances.

D. The Estate Trust

Aside from the trusts already described above, the only other trust that qualifies for the marital deduction is the estate trust. The estate trust is the only type of martial trust that does not require annual income distributions to the surviving spouse during his or her lifetime. Instead, the income from an estate trust may be paid to the surviving spouse for life or for a term of years (whether on a discretionary or mandatory basis) or accumulated and added to principal so long as the full balance of trust property is paid to the surviving spouse's estate at his or her death.[69]

If the settlor wants to restrict the surviving spouse's right to receive income distributions, or if the settlor simply prefers that income distributions be made pursuant to a discretionary standard, the estate trust will be the settlor's only option for qualifying for the marital deduction. An estate trust may also be a good option if the settlor does not want to subject a non-income producing asset to the power to compel the conversion of unproductive property that would otherwise be granted to the surviving spouse over a general power of appointment trust or a QTIP trust (as discussed in more detail in section III.B below).

The use of an estate trust is subject to some distinct disadvantages. If the estate trust is designed to accumulate trust income, that income will be subject to the compressed income tax brackets for trusts rather than be taxable to the surviving spouse at the individual level. Much like a general power of appointment trust, the estate trust also puts the surviving spouse in control of the ultimate disposition of the trust assets, which is an unacceptable result for many settlors. Finally, because the estate trust assets must be paid to the surviving spouse's estate at his or her death, they will be subject to the claims of creditors at that time.

III. SPOUSAL RIGHT TO INCOME

In order for a general power of appointment trust or a QTIP trust to qualify for the marital deduction, the surviving spouse must be entitled to all of the trust income, on an annual or more frequent basis, for the entirety of his or her lifetime.[70] Satisfying the "all income" requirement may seem simple enough at first glance, but a closer look soon reveals that it is a rule with many facets and a number of potential pitfalls. The remainder of this section will explore the definition of "income," what a trust's terms must provide to fully comply with the requirements established under the Code and Regulations, and how to avoid potential problems with compliance or otherwise.

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[68] Note that the period during which the unitrust amount is payable cannot be subject to termination by a condition subsequent such as remarriage. I.R.S. Priv. Ltr. Rul. 8117098 (Jan. 29, 1981).

[69] Treas. Reg. § 20.2056(c)-2(b)(1)(i) - (iii).

[70] I.R.C. §§ 2056(b)(5), 2056(b)(7)(B). Note that Treas. Reg. § 20.2056(b)-7(d)(2) provides that the principles of Treas. Reg. § 20.2056(b)-5(f) are applicable in determining whether the surviving spouse has a qualifying income interest for life for the purposes of Code section 2056(b)(7).

A. Defining Income

The surviving spouse is considered to have the requisite entitlement to trust income if that spouse has "substantially that degree of beneficial enjoyment of the trust property during her life which the principles of the law of trusts accord a person who is unqualifiedly designated as the life beneficiary of a trust."[71] If the surviving spouse has been designated as the sole income beneficiary of the trust for the remainder of his or her lifetime the trust will typically meet this standard, unless the terms of the trust or the surrounding circumstances "evidence an intention to deprive the spouse of the requisite degree of enjoyment."[72] As is discussed in more detail below, the Regulations imply that the sort of trust terms or "surrounding circumstances" that could be seen as disqualifying include any requirement that income be accumulated or funding the trust with unproductive property without granting the spouse the power to compel the trustee to make that property productive.

A surviving spouse's income interest will generally qualify "if the spouse is entitled to income as determined by applicable local law that provides for a reasonable apportionment between the income and remainder beneficiaries of the total return of the trust."[73] Alternatively, the terms of the trust instrument may supply the necessary terms, whether as a substitute for or in the absence of a state law provision.[74]

The Regulations further require that consideration be given to the allocation of receipts and expenses between income and principal in conjunction with the nature, productivity, and expected receipts of the trust assets.[75] If the terms of the trust represent a significant deviation from the traditional standards of income and principal allocation (e.g., a provision that provides that ordinary income and dividends are principal), the spouse's income interest is unlikely to qualify.[76] That said, even if the terms of the trust use a slightly unconventional approach, the spouse's entitlement to income will still qualify so long as the composition of trust assets coupled with the trust management provisions demonstrate that the spouse will have the substantial enjoyment during his or her lifetime that is required by the Code.[77] In the absence of any terms of the trust instrument to the contrary, the Texas Uniform Principal and Income Act ("UPIA") will govern the allocations to trust income and principal for a Texas marital trust.[78]

1. Income Accumulation and Distributions

The spouse's interest in trust income will fail to meet the standards established by the Regulations if there is any requirement that income be accumulated, or if any person other than the surviving spouse has the discretion to direct the accumulation of income.[79] The practical effect of this provision is that the trustee cannot be given any discretion over the distribution of trust income. This is because any trustee's discretionary exercise of a power to distribute only a

[71] Treas. Reg. § 20.2056(b)-5(f)(1).
[72] *Id*.
[73] *Id*.
[74] Treas. Reg. § 20.2056(b)-5(f)(2).
[75] Treas. Reg. § 20.2056(b)-5(f)(3).
[76] Treas. Reg. §§ 1.643(b)-1, 20.2056(b)-5(f)(1).
[77] Treas. Reg. § 20.2056(b)-5(f)(3). This section of the Regulations uses the example of a trust provision that provides for receipts such as rents, ordinary cash dividends, and interest to be allocated to income and stock dividends and proceeds from the conversion of trust assets being allocated to principal.
[78] Tex. Prop. Code § 116.004.
[79] Treas. Reg. § 20.2056(b)-5(f)(7).

part or none of the trust income would inherently result in the accumulation of trust income.[80] A trust that grants the trustee discretion with regard to income distributions will still fail to qualify if the surviving spouse is the trustee given that there is no guarantee that the surviving spouse will remain the trustee for the duration of his or her lifetime.[81]

Although the trustee may not have any discretion with regard to the distribution of income, the surviving spouse is not actually required to receive the trust income to satisfy the "all income" test.[82] All that is required is that the spouse "have such command over the income that it is virtually hers."[83] For instance, if the spouse has the right to require the trustee to distribute all of trust income to himself or herself, that right alone will satisfy the requirements of Code sections 2056(b)(5) or (b)(7), even if the income that is not demanded by the spouse is accumulated and added to principal.[84] Nevertheless, most practitioners use a more conventional approach in drafting marital trusts and include a requirement that the trustee distribute all of the trust income to the surviving spouse, whether annually or at more frequent intervals.

2. Inception and Termination of the Spouse's Right to Income

The administration of a decedent's estate often takes time, particularly in the case of a taxable estate. Section 20.2056(b)-5(f)(9) of the Regulations provides that an interest will not fail to qualify for the marital deduction "merely because the spouse is not entitled to the income from estate assets for the period before distribution of those assets by the executor," unless the executor is authorized to unreasonably delay that distribution. There is no clear guidance on what constitutes an unreasonable delay, and the standard of reasonableness will likely be highly dependent on the facts and circumstances surrounding a particular estate. In at least one instance, the Service has indicated that a multiyear delay in funding due to the nature of the estate assets and a lengthy estate administration would not affect qualification for the marital deduction.[85]

Absent a provision to the contrary in the trust instrument, for Texas law purposes a surviving spouse's right to receive trust income begins as of the date of the deceased spouse's death.[86] On the opposite end of that spectrum, the surviving spouse's right to receive trust income ends on the day before the surviving spouse dies.[87] In the case of a QTIP trust, an income interest will not be disqualified if the trust instrument does not provide for the distribution to the surviving spouse or to his or her estate of the trust income that accrues between the date of the last distribution and the date of the surviving spouse's death.[88] However, this portion of trust income is included in the surviving spouse's gross estate for estate tax purposes.[89]

B. Spouse's Rights as to Unproductive Property

A trust that consists substantially of unproductive or non-income producing property will almost certainly fail to qualify for the marital deduction if the trustee has an unqualified power

[80] *Davis v. Comm'r*, 394 F.3d 1294 (9th Cir. 2005); I.R.S. Tech. Adv. Mem. 200505022 (Feb. 4, 2005).
[81] *Davis*, 394 F.3d at 1302; *Estate of Ellingson v. Comm'r*, 964 F.2d 959, 962 (9th Cir. 1992).
[82] Treas. Reg. § 20.2056(b)-5(f)(8).
[83] *Id*.
[84] *Id*., I.R.S. Priv. Ltr. Rul. 9030001 (March 3, 1990).
[85] I.R.S. Priv. Ltr. Rul. 9125016 (March 21, 1991).
[86] Tex. Prop. Code § 116.101(b)(2).
[87] Tex. Prop. Code § 116.101(d).
[88] Treas. Reg. § 20.2056(b)-7(d)(4).
[89] Treas. Reg. § 20.2044-1(d)(2).

(or obligation) to retain that property.[90] To prevent that outcome, nearly all marital trusts provide the surviving spouse with the power to compel the trustee to either convert unproductive property into income producing property or to otherwise take such action as will be necessary to ensure that spouse has the requisite beneficial enjoyment of the trust property. A detailed analysis of the Regulations reveals the full breadth of potential options for addressing issues relating to unproductive trust property. Each of these options is discussed in more detail below.

1. Power to Compel the Trustee to Take Action

If a marital trust consists substantially of unproductive property, the trust may still qualify for the marital deduction if the applicable rules governing the administration of the trust require, or permit the surviving spouse to require, that the trustee either make that property productive or convert that property into income producing property within a reasonable time.[91] With that concept in mind, it may be helpful to consider the meaning of the term "unproductive property." The Regulations do not provide a definition, but a few examples of property that the Service has found to be unproductive include artwork,[92] timberland that was unlikely to be harvested,[93] and real estate subject to significant depreciation reserves.[94] It can be reasonably inferred that assets such as undeveloped real estate and stock in a closely held corporation or a limited partnership interest that does not have a history of reliably receiving distributions would also be at risk of being classified as unproductive if held by the trustee of a marital trust.

In some instances, it may be difficult if not impossible for the trustee to make a particular interest in property productive. In the case of a minority voting or limited partnership interest, the trustee is unlikely to have the right to force more distributions. The trustee may be able to make real or tangible personal property productive by leasing it to a third party, but even then, the return on investment relative to the overall value of the property may not rise to a level that would be considered "productive." As a result, assets that have the best potential to be made productive by a trustee are likely cash, marketable securities, and other similarly liquid investments.

If there is no feasible way for the trustee to make the property productive, then the trustee also has the option to convert the property into income producing property. This process would typically involve the trustee selling all or a portion of the unproductive property and investing the sale proceeds in other property that will produce an appropriate level of income. It is a simple idea in theory that can be much more difficult in execution, particularly for the trustee.

Some property, like residential real estate, often has an accessible marketplace where the trustee can find and negotiate with willing buyers with relative ease. There are also avenues available for selling less common assets such as mineral interests, commercial real estate, and high value collectibles, but there are likely to be fewer eligible buyers and it may be more difficult for the trustee to determine what constitutes a fair price. Selling a marital trust asset to the first willing buyer who comes along may not be in the best interests of the surviving spouse if the offered price is not reflective of fair market value. It may be equally or even more

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[90] Treas. Reg. § 20.2056(b)-5(f)(4) – (5).
[91] Treas. Reg. § 20.2056(b)-5(f)(3).
[92] I.R.S. Tech. Adv. Mem. 9237009 (Sept. 11, 1992).
[93] I.R.S. Tech. Adv. Mem. 9717005 (April 25, 1997).
[94] I.R.S. Priv. Ltr. Rul. 9125016 (March 21, 1991).

problematic from the perspective of the remainder beneficiaries who are relying on the trustee to preserve trust principal for their potential future benefit.[95]

In order to ensure that the trustee sells the unproductive property in a manner that is consistent with the fiduciary duties that it owes to the trust beneficiaries, it may be necessary to obtain a third-party appraisal to gain a better understanding of its fair market value. In the case of unique and less marketable assets, another thing the trustee may need is time. It may be impossible to sell the asset in weeks, or even months, without essentially holding a fire sale. The Regulations provide that the trustee is only required to convert the unproductive property "within a reasonable time."[96] The Regulations do not offer any concrete guidance on what a "reasonable" amount of time may be, but presumably any length of time could be perceived as reasonable so long as the trustee acts with an appropriate degree of diligence and haste to sell the asset at a favorable price.

In an even more limited number of cases, the trustee may be tasked with selling an asset that has extremely limited marketability. This situation will most often arise in the case of stock in a closely held corporation or a limited partnership interest. These types of interests are often subject to transfer restrictions that drastically limit the pool of potential buyers. Even in the absence of such restrictions, the reality may be that there are no willing buyers at all, particularly if the other owners are all family members or were long-time associates of the deceased spouse. In this scenario, the trustee may need to rely upon the third option provided by the Regulations.

If the trustee cannot make an asset productive or convert it to income producing property, the Regulations offer a third option: the trustee may provide the spouse with the required beneficial enjoyment by making payments to the spouse out of other assets of the trust.[97] For example, consider a hypothetical trust that consists substantially of a limited partnership interest but also holds publicly traded stocks and bonds. Instead of selling or disposing of the partnership interest, the trustee could potentially sell some of the stock and distribute a portion of the resulting cash to the spouse. Perhaps the trustee could obtain a line of credit secured by the limited partnership interest and use those funds to increase the distributions to the spouse. The trustee could even distribute a portion of the partnership interest directly to the spouse, assuming that the spouse is a permitted transferee.

The trustee will be able to make the most effective use of this option if local law or the terms of the trust provide the trustee with the power to adjust between income and principal. If a trust's portfolio is well invested on the whole but produces either too much or too little income, the power to adjust allows the trustee to remedy that imbalance. If the trustee of a marital trust has this power, the trustee can potentially use it to shift principal to income for distribution to the surviving spouse.

2. <u>The Statutory Solution</u>

If the trust instrument is silent as to the trustee's obligations or the spouse's rights to ensure that the spouse has the requisite degree of beneficial enjoyment from the trust property, the terms of the Texas Trust Code may fill that gap. If a marital trust's assets consist substantially of

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[95] Absent a provision to the contrary in the trust instrument, a Texas trustee generally owes a duty to administer the trust fairly and impartially as to both income and remainder beneficiaries. Tex. Prop. Code § 116.004(b).
[96] Treas. Reg. § 20.2056(b)-5(f)(4).
[97] Treas. Reg. § 20.2056(b)-f(5).

property that does not provide the spouse with sufficient income, and if the trustee's exercise of the power to adjust has proven insufficient to provide the surviving spouse with the beneficial enjoyment required to qualify for the marital deduction, then the spouse may: (i) require the trustee to make property productive of income, (ii) convert property within a reasonable time, or (iii) exercise the power to adjust.[98] The Trust Code further provides that the trustee may decide which action or combination of actions to take.[99]

C. Addressing Potential Problems in Advance

As the prior discussion illustrates, the spousal right to the income can present problems both during drafting and upon administration. By anticipating these potential problems, practitioners may be able to implement solutions that will prevent them from arising in the first place.

1. Marital Deduction Savings Clauses

The Service and the courts have demonstrated a willingness to rely on marital deduction savings clauses to preserve the marital deduction in cases involving the inadvertent inclusion of a trust term that might otherwise jeopardize its availability.[100] It is often prudent to include a clear expression of the settlor's intent that the marital trust shall qualify for the marital deduction,[101] along with a broader statement regarding the construction and interpretation of other trust provisions. For example:

> "Notwithstanding any provision contained in this instrument to the contrary, the trustee shall have no power, right, duty or obligation that will result in the failure of the property passing to the Marital Trust to qualify for the marital deduction allowable under the Code (and shall be obligated to undertake such additional responsibility as shall be necessary to ensure such qualification)."

A savings clause may help ensure that a trust instrument will be construed in the most favorable way possible, and it may (but should not be counted upon to) overcome the inclusion of a trust term that would otherwise disqualify the trust for the marital deduction by giving the trustee a basis for arguing that the inadvertent disqualifying term and the savings clause, when read together, evidence an ambiguity that necessarily must be resolved based upon the clarity of the settlor's objectives for the trust reflected in the savings clause.[102] Even with the inclusion of a savings clause, drafting a marital trust must still be done with the upmost care.

2. Incapacity Issues

Most trusts include a facility of payment clause that authorizes the trustee to make trust distributions to a third party on behalf of a beneficiary who is incapacitated. The clause may allow distributions to be made to an agent, guardian, custodian, or any other person or entity who is well positioned to apply the distribution for the benefit of the incapacitated beneficiary. Revenue Ruling 85-35 confirms that a marital trust may still qualify for the marital deduction if

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[98] Tex. Prop. Code § 116.176(a).
[99] *Id*.
[100] Rev. Rul. 75-440, 1975-2 C.B. 372; *Estate of Ellingson*, 964 F.3d at 960.
[101] In the case of a QTIP trust, it may be appropriate to add that the settlor only intends for the subject trust to qualify for the marital deduction to the extent that the settlor's executor opts to make the QTIP election so as not to create confusion in the event of a partial election.
[102] *See*, *e.g.*, *Davis*, 394 F.3d at 1302; I.R.S. Tech. Adv. Mem. 200234017 (Aug. 23, 2002).

it includes a facility of payment clause that allows the trustee to either distribute trust income to a relative or a court appointed representative for the spouse or spend the income directly for the spouse's benefit in the event of that spouse's legal disability.

Care must be taken when drafting any other trust provision that addresses incapacity. For instance, a trust provision that terminates the surviving spouse's right to mandatory distributions of trust income upon his or her incapacity will disqualify that trust for the marital deduction, even if the spouse never loses capacity.[103] A similar result was reached in the case of a trust that provided the surviving spouse with an unlimited right to withdraw trust property that terminated upon incapacity.[104]

3. Planning for the Blended Family

The QTIP trust is sometimes used as a planning vehicle for blended families because it enables a settlor to provide for his or her surviving spouse for the remainder of that spouse's lifetime while also preserving principal for the eventual benefit of the settlor's descendants from a prior relationship. Even if this planning works well for tax purposes, there may be a heighted potential for conflict between the surviving spouse and the remainder beneficiaries, particularly when it comes to the complexities and nuance involved in satisfying the "all income" test. The spouse and remainderman may disagree as to the allocation of receipts and expenses to income and principal, the investment strategy for trust assets, and whether the amount of income produced by the trust assets is sufficient to provide the spouse with the requisite degree of beneficial enjoyment.

The situation becomes even more complex if the marital trust will hold a concentration in an asset that is important to the family but does not produce much income, such as an interest in a family business or a ranch. Assuming that the surviving spouse has the authority to force the trustee to make the property productive or convert it into income producing property, the end result could be very unpleasant for all involved.

If the spouses recognize that the potential for this type of conflict exists, it may be preferable to pass certain assets directly to the settlor's children and to provide for the spouse in other ways, such as through life insurance. But if the settlor decides to forgo those options in favor of a marital trust, there are steps that the settlor can take during life to maximize the potential for success:

- Adopt Appropriate Regulations on Entity Distributions During Life. To the extent that the settlor has the authority to do so, the settlor could amend the governing documents for any relevant entity to implement a distributions policy designed to ensure that the entity will retain sufficient funds as working capital and for the expansion of operations while also providing an appropriate level of distributions to meet the intended tax planning objectives.
- Use Rights of First Refusal. If the settlor knows that the marital trust is likely to hold a significant interest in an asset that may not produce sufficient income, the trust must provide the surviving spouse with the power to compel the trustee to make that particular interest productive, or to convert it to income producing property. However, the trust

[103] *Estate of Tingley v. Comm'r*, 22 T.C. 402 (1954), *aff'd sub. nom.*, *Starrett v. Comm'r*, 223 F.2d 163 (1st Cir. 1955).
[104] I.R.S. Tech. Adv. Mem. 9644001 (July 3, 1996).

instrument could further provide that in the event that the spouse exercises that power, the trustee is to first provide certain of the settlor's family members, business associates, or any other appropriate parties with the right to purchase the interest at its fair market value, as determined by an independent appraisal.[105] This type of provision must be precisely tailored so that (i) it will only be triggered in the event that a sale is serving a valid administrative purpose, such as ensuring that the surviving spouse's right to income is met, and (ii) the sales price will represent fair market value.[106] Note that a purchase option of this nature could also be made part of an independent buy-sell agreement.

- Be Specific About Settlor's Intent and Spouse's Rights. It is important to include a carefully drafted property conversion clause to ensure that the trustee will have the full range of possible options to remedy a situation in which property is unproductive. Sometimes these clauses focus on the spouse's rights to compel the trustee to make property productive or to convert it to income producing property but neglect to provide the trustee with the option to make payments to the spouse out of other assets of the trust. It may also be helpful to compare the terms of the clause to the statutory provisions of local law to determine the extent (if any) to which the statute may apply in conjunction with the clause.

D. The Unitrust Option

As noted throughout the discussion in this section, the trustee of a marital trust must invest and manage trust assets in a way that ensures that the surviving spouse will receive the requisite income distributions while also maintaining sufficient principal to mollify the remainder beneficiaries. This task often becomes even more challenging if the settlor has a blended family or if the marital trust is funded with a significant concentration in one or more assets of a particular type. Under these circumstances, a marital unitrust may be able to offer a solution.

A surviving spouse's income interest will generally qualify for the marital deduction "if the spouse is entitled to income as determined by applicable local law that provides for a reasonable apportionment between the income and remainder beneficiaries of the total return of the trust and that meets the requirements of § 1.643(b)-1 of this chapter."[107] Section 1.643(b)-1 of the Regulations provides that this standard for "reasonable apportionment" may be satisfied by a state statute providing that the income of a trust can be determined by using a unitrust amount between three and five percent of the fair market value of the trust assets, as determined annually or based upon a multiyear average.[108] As a result, an interest in a unitrust will qualify for the marital deduction if said interest is authorized by local law and all other statutory and regulatory requirements are met.

Section 116.007 of the Texas Trust Code empowers Texas settlors to take advantage of the unitrust option. The statute provides that a distribution of the unitrust amount will be considered

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[105] *See* I.R.S. Priv. Ltr. Rul. 199951029 (Dec. 27, 1999), in which the Service determined that a trust with this type of arrangement for shares of stock in a corporation would qualify for the marital deduction.

[106] *See Estate of Rinaldi v. United States*, 38 Fed. Cl. 341 (1997), *aff'd*, 178 F.3d 1308 (Fed. Cir. 1998). In this case, decedent's shares of stock passed to the marital trust of which decedent's son was appointed the trustee. The terms of the trust provided that if the son stopped being involved in the day-to-day management of the company, the trustee was to sell the shares to son for their book value. The court ruled the trust did not qualify for the marital deduction on account of this arrangement.

[107] Treas. Reg. § 20.2056(b)-5(f)(1).

[108] Treas. Reg. § 1.643(b)-1.

a distribution of all of the trust income.[109] The unitrust amount is defined as "an amount equal to a fixed percentage of not less than three or more than five percent per year of the net fair market value of the trust's assets, valued at least annually."[110] The unitrust amount may be based on the net fair market value of the trust's assets in one year or more than one year.[111]

A unitrust may serve to ease tensions between the surviving spouse, remainder beneficiaries, and trustee. A unitrust essentially eliminates a trustee's distribution discretion, so there should be no disagreements about the amount of distributions to the surviving spouse. A unitrust may also reduce the potential for arguments over the trustee's investment strategy. If the value of the trust property is growing, all of the parties will be happy, regardless of whether that growth is attributable to income or appreciation of principal.

As is the case with any planning option, there are also potential downsides to using a unitrust. First, the trustee will have no way to unilaterally adjust the unitrust amount, even if that amount has become inappropriate in light of changes in the market or surviving spouse's financial needs. It is also important to keep in mind that the unitrust assets will need to be valued at least annually. This may be a difficult (and expensive) task if the trust holds closely held entity interests, commercial real estate, mineral interests, collectibles, or any other assets that may require a third-party appraisal to value. These types of assets will also present a problem if at any point the trustee must begin making distributions of principal to satisfy the unitrust amount. These factors should all be taken into consideration before including a marital unitrust as part of a spouse's estate plan.[112]

IV. PLANNING WITH INTER VIVOS QTIPS

Although it is often overshadowed by its testamentary counterpart, an inter vivos QTIP election is available in conjunction with lifetime marital deduction planning.

A. Basic Requirements

The unlimited marital deduction applies to any interest in property that a donor transfers by gift to his or her spouse so long as (i) that spouse is a U.S. citizen, and (ii) the interest is not a nondeductible terminable interest.[113] Although there is no marital deduction for gifts made to a donee-spouse who is not a U.S. citizen, there is an annual exclusion available to a donor who makes a gift to a non-citizen spouse.[114] This annual exclusion amount is equal to $100,000, as adjusted for inflation.[115] For 2023, the annual exclusion amount is $175,000.[116]

As was previously mentioned in connection with the estate tax marital deduction, a terminable interest is defined as any interest in property that "will terminate or fail on the lapse

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[109] Tex. Prop. Code § 116.007(c).
[110] Tex. Prop. Code § 116.007(b)(2).
[111] *Id*.
[112] For a further discussion of martial unitrusts, *see* Katherine C. Akinc, *Save the QTIPs for your Ears: Drafting Alternative Marital Trusts*, State Bar of Texas Estate Planning and Probate Drafting Course, Houston, Texas, October 26-27, 2017.
[113] I.R.C. § 2523.
[114] I.R.C. § 2523(i)(2).
[115] *Id*.; I.R.C. § 2503(b).
[116] Rev. Proc. 2022-38, 2022-45 I.R.B. 445.

of time or on the occurrence or the failure to occur of some contingency."[117] If the donor gifts his or her spouse a terminable interest in property that will be subject to the possession or enjoyment of any other person (including the donor) upon the failure or termination of that interest, it will generally not qualify for the marital deduction.[118] This general rule is subject to the exceptions that are detailed below.

1. Joint Interests

An interest transferred to the donee-spouse as the sole joint tenant with the donor or as tenant by the entirety will qualify for the marital deduction even though the donor may possess or enjoy the property after the termination of the interest by virtue of being the surviving spouse.[119]

2. Life Estate with a Power of Appointment

Code section 2523(e) provides that an interest that is gifted by the donor-spouse to or for the benefit of the donee-spouse will qualify for the marital deduction if it satisfies two main criteria: (i) the donee-spouse must be entitled to all of the income from the interest for life, payable at least annually, and (ii) the donee-spouse must hold a general power of appointment over the interest, exercisable in favor of the donee-spouse or his or her estate. This provision is essentially the gift tax counterpart of Code section 2056(b)(5). As a result, the same limitations and requirements that are described in section II.C.2 in this article are equally applicable to an inter vivos general power of appointment trust.[120]

3. Inter Vivos QTIP

An interest in property that is gifted by the donor-spouse to or for the benefit of the donee-spouse will qualify for the marital deduction as a qualified terminable interest if that interest (i) is transferred by the donor-spouse, (ii) provides the donee-spouse with a qualifying income interest for life, and (iii) is subject to the election under Code section 2523(f)(4).[121] Code section 2523(f)(3) provides that rules similar to those that apply to clauses (ii), (iii), and (iv) of Code section 2056(b)(7)(b) also apply to an inter vivos QTIP. Most notably, this provision confirms that a "qualifying income interest for life" must meet the same standards for both a testamentary QTIP and an inter vivos QTIP. As a result, the discussions regarding a spouse's income interest in sections II.C.4 and III above are equally applicable to an inter vivos QTIP.[122]

4. Charitable Remainder Trust

Code section 2523(g) provides that an interest passing to a qualified charitable remainder trust will qualify for the marital deduction if the donee-spouse is the only non-charitable beneficiary of that trust. The principles discussed in section II.C.5 of this article regarding the marital deduction under Code section 2056(b)(8) are equally applicable here.

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[117] Treas. Reg. § 25.2523(b)-1(a)(3).
[118] I.R.C. § 2523(b); Treas. Reg. § 25.2523(b)-1(b).
[119] I.R.C. § 2523(d); Treas. Reg. § 25.2523(d)-1.
[120] *See* Treas. Reg. § 25.2523(e)-1.
[121] I.R.C. § 2523(f)(2).
[122] Treas. Reg. § 25.2523(f)-1(b), (c).

B. Various Uses of Inter Vivos QTIP Trusts

The basic structure of an inter vivos QTIP trust is typically the same as its testamentary counterpart. The trustee must distribute all of the trust income to the donee-spouse at least annually but may also be authorized to distribute principal if that is desirable.[123] Upon the death of the donee-spouse, the remaining trust property will be includible in the donee-spouse's gross estate and will pass to the remainder beneficiaries as designated in the trust instrument.[124] Alternatively, if the donee-spouse holds a testamentary power of appointment over the trust, the remaining trust property will pass to the designated appointees to the extent that power is exercised. The remainder of this section discusses the circumstances in which it might be beneficial to create an inter vivos QTIP trust.

1. Equalization of the Spouses' Estates

An inter vivos QTIP trust can be used to effectively equalize the taxable estates of spouses who have disparate amounts of wealth. For example, assume H has assets of $5 million, while W has assets of $15 million.[125] If H were to predecease W, the value of his gross estate would be too low to consume the full balance of his applicable exclusion amount. W could fund an inter vivos QTIP trust with $5 million without using any of her applicable exclusion amount. The inter vivos QTIP trust will be includible in H's gross estate pursuant to Code section 2044, resulting in H's gross estate having a value of $10 million. Thus, the full balance of H's estate is shielded from estate tax by H's applicable exclusion amount.

A similar result could be achieved with an outright gift, but the inter vivos QTIP provides advantages that an outright gift does not. First, the trust structure will allow the donor-spouse to retain a degree of control over the disposition of the trust assets. Aside from the provisions that the donor-spouse must include to qualify the trust for the marital deduction, he or she will be able to dictate the trust terms governing its management and administration, including with regard to principal distributions and the disposition of trust property following the donee-spouse's death.

The donor-spouse can also serve as trustee of the trust (provided that his or her powers in that role do not amount to a general power of appointment) and continue to manage the gifted property for the benefit of the donee-spouse. The trust will also be protected from the creditors of both the donor and donee spouses, although the income distributions will lose that protection as they are made to the donee-spouse. Finally, consider that if the donor-spouse makes an outright gift to the donee-spouse for equalization purposes, that gift will be the donee-spouse's separate property and would not be subject to division in the event of divorce. Conversely, if the gift were made in trust, the donor-spouse may be able to retain some degree of control over the trust assets by continuing to serve as trustee after the divorce, and the trust assets would still pass to the donor-spouse's designated remainder beneficiaries at the donee-spouse's death.

As an alternative to equalizing the value of their estates, spouses now have the option to rely on portability to preserve a deceased spouse's unused exclusion amount. As compared to equalization through an inter vivos QTIP, there are a few disadvantages to relying on portability.

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[123] Treas. Reg. § 25.2523(f)-1(c)(1)(iv).

[124] I.R.C. § 2044(a). See section VI herein for further discussion.

[125] For the purposes of this example, assume that the applicable exclusion amount is equal to $10 million for ease of calculation and illustration.

For instance, the deceased spousal unused exclusion amount (the "DSUE") can sometimes be lost. If the surviving spouse remarries and is later predeceased by his or her new spouse, the surviving spouse will no longer be able to use the DSUE amount stemming from a prior deceased spouse.[126] Another potential problem is that portability does not extend to the GST tax exemption, as is discussed in the next section.

2. Leverage of GST Tax Exemption

An inter vivos QTIP trust can be an effective vehicle for leveraging the GST tax exemption amount of the donor-spouse or the donee-spouse. Consider the example in the prior section. If W never creates the inter vivos QTIP and H dies first, half of his GST tax exemption will simply be lost because his estate will not have enough property to absorb it. By creating the trust, W will have increased the value of H's gross estate so that it will have sufficient property to potentially absorb the full balance of his remaining GST tax exemption. Because portability does not apply to the GST tax exemption amount, an inter vivos QTIP trust is a superior option for GST tax planning.

The donor-spouse also has the option of allocating his or her own GST tax exemption to an inter vivos QTIP trust through a reverse QTIP election, as described in more detail in section V.D below. This option may work particularly well for a donor-spouse who has used all of his or her gift and estate tax exclusion amount but still has GST tax exemption remaining, as it represents a rare opportunity to make a large lifetime transfer of wealth without incurring any gift tax.

3. Donor-Spouse as a Beneficiary

One of the most attractive features of the inter vivos QTIP trust is that the donor-spouse can become a beneficiary of the trust after the donee-spouse's death (assuming, of course, that the donor-spouse is the surviving spouse). This result is typically achieved by providing that upon the donee-spouse's death, an amount of trust property equal to the donee-spouse's applicable exclusion amount will to pass to a bypass trust, with any remaining amount passing to a QTIP trust to avoid estate tax. The bypass trust can provide for the donor-spouse along with descendants or any other appropriate parties. If created, the QTIP trust must comply with the usual requirements and would provide income distributions to the donor-spouse for the remainder of his or her lifetime.

Even though the donor-spouse is the settlor of the bypass trust created in this scenario, the trust will not be included in his or her estate. Code section 2523(f)(1)(B) provides that no part of an inter vivos QTIP trust shall be considered as having been retained by the donor-spouse or transferred to any person other than the donee-spouse. Furthermore, the donee-spouse will be considered the transferor of the trust assets for estate and GST tax purposes due to the inclusion of those assets in his or her estate.[127] In accordance with the foregoing, the Regulations confirm that the donor-spouse's subsequent beneficial interest in the trust is not subject to estate inclusion

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[126] *See* I.R.C. § 2010(c)(4)(B); Treas. Reg. § 20.2010-1(d)(5).

[127] I.R.C. § 2044(c). Note that if the donor-spouse makes a reverse QTIP election in conjunction with the initial gift to the trust, he or she will be considered the transferor for GST tax purposes.

under Code section 2036 or Code section 2038.[128] The Texas Trust Code also confirms that the trust will have spendthrift protection.[129]

It is important to note that it is unclear under the Code and Regulations whether the donor-spouse can have a limited power of appointment over the bypass trust created subsequent to the donee-spouse's death. Code section 2523(b)(2) provides that a terminable interest will not qualify for the marital deduction if the donor-spouse has a power of appointment over the interest.[130] This provision could be construed to encompass a power of appointment that does not take effect until after the donee-spouse's death. If that interpretation is correct, then an inter vivos QTIP trust would not qualify for the marital deduction if the donor-spouse is granted a power of appointment over the bypass trust. A number of commentators contend that the power will not create a Code section 2523(b)(2) issue, and several private letter rulings support that position.[131] Absent further guidance from the Service, the most conservative course of action is to refrain from including a power of appointment over the bypass trust.[132]

4. Disadvantages of Inter Vivos QTIPs

Before making a gift to an inter vivos QTIP trust, the donor-spouse must also consider some of the potential disadvantages of this type of planning. The main disadvantage is that creating an inter vivos QTIP trust requires the donor-spouse to give up all of his or her rights to the trust property for the duration of the donee-spouse's lifetime. The donee-spouse will likely use some or all of the income distributions in a way that is mutually beneficial to both spouses, but those distributions will be the donee-spouse's separate property, so there is no guarantee of that. In addition, the income distributions must continue for the duration of the donee-spouse's lifetime, even if the couple later gets a divorce.[133]

V. MAKING THE QTIP ELECTION

An interest passing to or for the benefit of the surviving spouse in accordance with Code section 2056(b)(7) will only qualify for the marital deduction if the QTIP election is made. This section describes the requirements for making the QTIP election and the various forms that an election may take.

A. General Requirements

Following a spouse's death, the QTIP election can only be made by the deceased spouse's executor on Schedule M of the Form 706 United States Estate (and Generation-Skipping Transfer) Tax Return.[134] In this context, the term executor refers to the person or organization that is appointed, qualified, and acting within the United States within the meaning of Code section 2203.[135] An appointed executor may make the election even if the property subject to that

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[128] Treas. Reg. § 25.2523(f)-1(f), Examples 10 and 11.
[129] Tex. Prop. Code § 112.035(g).
[130] *See also* Treas. Reg. § 25.2523(b)-1(d).
[131] I.R.S. Priv. Ltr. Rul. 200406004 (Feb. 6, 2002); I.R.S. Priv. Ltr. Rul. 9437032 (Sept. 16, 1994).
[132] For a further discussion of this issue and other related concepts, *see* Jonathan G. Blattmachr, Mitchell M. Gans, and Diana S. C. Zeydel, *Supercharged Credit Shelter Trust*, 21 Prob. & Prop. 52 (2007), *available at* https://scholarlycommons.law.hofstra.edu/cgi/viewcontent.cgi?article=1475&context=faculty_scholarship.
[133] Treas. Reg. §§ 25.2523(f)-1(c)(1)(i), 25.2523(e)-1(f), Example 5.
[134] I.R.C. § 2056(b)(7)(B)(v).
[135] Treas. Reg. § 20.2056(b)-7(b)(3).

election is not in the executor's possession.[136] If there is no appointed executor, the election may be made by any person in actual or constructive possession of the property of the decedent, such as the trustee of a revocable trust that is included in the decedent's gross estate.[137]

The election must be made on either the last estate tax return filed on or before the due date (including extensions), or if a timely return is not filed, on the first estate tax return filed after the due date.[138] For example, if the executor files an estate tax return in which the QTIP election is not made three months prior to the due date, that executor could file a subsequent return at any time on or before the due date to make the election. If no estate tax return is timely filed, it is seemingly possible to make the QTIP election on the first late filed return. Once the QTIP election is made it is irrevocable, provided that the election may be revoked or modified on a subsequent return filed on or before the due date (including extensions).[139]

The Regulations permit the executor to make a protective election if the executor reasonably believes that there is an issue as to whether an asset is includible in the decedent's gross estate or as to the amount or nature of the property the surviving spouse is entitled to receive.[140] The protective election must identify the specific asset(s) or trust to which the election applies, and it must also describe the basis for the election.[141]

B. Partial Elections

The executor may make a partial QTIP election with respect to a fractional or percentage share of the trust property.[142] A partial election may be made pursuant to a formula,[143] which will be advisable in most cases. The formula will typically resemble one that might be used to define a bequest to the marital trust under a will or otherwise. Examples 7 and 8 from section 20.2056(b)-7(h) of the Regulations provide two different examples of a formula QTIP election.

If the bulk of the decedent's estate is directed to pass to a QTIPable trust, a partial election can be used to allocate all or a portion of the decedent's remaining estate tax exclusion amount to that trust. In fact, this scenario may arise by design. Now that portability is available to preserve the deceased spouse's unused exclusion amount, some couples may provide for the deceased spouse's entire estate to pass to a QTIPable trust and then rely on the executor to determine whether a full, partial, or no QTIP election will be most beneficial based upon the circumstances that exist at that spouse's death. This type of trust is sometimes referred to as a "one lung trust."

If a partial QTIP election is made, a trust may be divided into separate trusts to reflect the partial election if authorized under the trust instrument or local law.[144] The division of the trust must be done on a fractional or percentage basis, but the separate trusts do not have to be funded

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[136] *Id.*
[137] *Id.*
[138] Treas. Reg. § 20.2056(b)-7(b)(4)(i).
[139] Treas. Reg. § 20.2056(b)-7(b)(4)(ii).
[140] Treas. Reg. § 20.2056(b)-7(c)(1).
[141] *Id.*
[142] I.R.C. § 2056(b)(10); Treas. Reg. § 20.2056(b)-7(b)(2).
[143] Treas. Reg. § 20.2056(b)-7(b)(2)(ii).
[144] Treas. Reg. § 20.2056(b)-7(b)(2)(ii)(A).

with a pro rata share of each asset.[145] A trust may only be divided if the trustee is required to divide the trust based on the fair market value of the trust as of the division date.[146]

So long as it is not expressly prohibited by the trust instrument, the Texas Trust Code authorizes a trustee to divide a trust if the result does not impair the rights of any beneficiary or adversely affect the achievement of the purposes of the original trust.[147] The trustee is further authorized to "allocate trust property among the separate trusts on a fractional basis, by identifying the assets and liabilities passing to each separate trust, or in any other reasonable manner."[148]

C. Clayton QTIP Elections

When the QTIP provisions were initially introduced by ERTA, the Service took the position that if the amount of property passing to the marital trust was contingent upon the executor making the QTIP election, then no marital deduction would be allowed. The Service eventually changed course after several courts of appeals rejected this argument, most notably in the case of *Estate of Clayton v. Comm'r*, 976 F.2d 1486 (5th Cir. 1992). In *Clayton*, the deceased spouse's estate plan provided for any portion of the residuary estate for which a QTIP election was made to pass to a marital trust, while any part of the residuary that was not subject to the QTIP election would pass to a trust for the benefit of the deceased spouse's children.[149] The executor ultimately chose to make a QTIP election as to a portion of the deceased spouse's estate, and the Fifth Circuit agreed that the QTIPed portion of the estate qualified for the marital deduction.[150] After several other courts reached a similar conclusion,[151] the Service conceded defeat and issued Regulations consistent with the decisions in *Clayton* and its progeny.[152]

In accordance with those Regulations, a will or trust may provide that property that is subject to a QTIP election will pass to a marital trust, while property that is not subject to that election will pass to any other beneficiary or trust as designated in the will or trust. In a traditional Clayton QTIP plan, the non-QTIPed property will be directed to a bypass trust, but that is not required.

A Clayton QTIP trust is similar to a one lung trust in the sense that both plans typically result in the creation of a marital trust and a bypass trust for the benefit of the surviving spouse. However, with a one lung trust, both the marital trust and the bypass trust will have the same terms, including the requirement that all income be distributed to the surviving spouse. The only difference is that the marital trust will be included in the surviving spouse's gross estate, while the bypass trust will not. With a Clayton QTIP plan, the bypass trust can have entirely different terms than the marital trust. It can limit the spouse's right to receive income distributions, provide the spouse with an inter vivos power of appointment, and include a spray power that allows for distributions to descendants.

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[145] Treas. Reg. §§ 20.2056(b)-7(b)(2)(ii)(B), 20.2056(b)-7(h), Example 14.
[146] Treas. Reg. § 20.2056(b)-7(b(2)(ii)(C).
[147] Tex. Prop. Code § 112.057(a).
[148] Tex. Prop. Code § 112.057(b).
[149] *Estate of Clayton v. Comm'r*, 976 F.2d 1486, 1488 (5th Cir. 1992)
[150] *Id*. at 1501.
[151] *Estate of Robertson v. Comm'r*, 15 F.3d 779 (8th Cir. 1994); *Estate of Spencer v. Comm'r*, 43 F.3d 226 (6th Cir. 1995).
[152] Treas. Reg. §§ 20.2056(b)-7(d)(3), 20.2056(b)-7(h), Example 6.

1. Surviving Spouse as Executor

Over the years, some commentators have expressed concerns about the surviving spouse serving as the executor tasked with making a Clayton QTIP election. If the surviving spouse declines to make the full QTIP election, that inevitably results in a portion of the deceased spouse's estate passing to a bypass trust (or potentially, other beneficiaries altogether). Assuming that the bypass trust does not entitle the spouse to receive mandatory distributions of income, the concern is that the surviving spouse could be treated as having made a gift by not making a full QTIP election and thus giving up his or her right to the mandatory income distributions that he or she would have otherwise received from a marital trust.

Due to these concerns, the most conservative course of action is to name someone other than the spouse to serve as the executor. Alternatively, the spouse could serve as executor, but an independent third party could be given the sole authority to direct the surviving spouse, in his or her capacity as the executor, to make or not make the QTIP election with regard to the relevant portions of the decedent's estate.

2. Clayton QTIP or Disclaimer?

Disclaimer planning can be used to achieve similar results as a Clayton QTIP plan. The settlor's estate plan could provide for the residuary estate to pass entirely to a QTIPable trust, provided that if the surviving spouse disclaims any part of the residuary, the disclaimed property will pass to a bypass trust. The primary advantage of the disclaimer approach is that it allows the surviving spouse to determine what shares of the estate will pass to the marital and bypass trusts without the risk of there being a gift tax issue. However, a Clayton QTIP plan has several advantages over a disclaimer plan, as follows:

- Time Period to Decide. A Clayton QTIP election must be made on the estate tax return, which will be due 15 months after the deceased spouse's date of death (if an automatic six-month extension is requested). In other words, the executor will have 15 months to make a decision about the QTIP election depending on the value of the decedent's gross estate, the surviving spouse's age and financial situation, current tax laws, and any other relevant factors. In contrast, a qualified disclaimer for federal tax purposes must be made within nine months of the decedent's date of death.[153] While this window still provides the surviving spouse with an opportunity to consider the best course of action, the Clayton QTIP plan provides considerably more time to do so.
- Powers of Appointment. The bypass trust created in conjunction with a Clayton QTIP plan may provide the surviving spouse with a limited power of appointment. A disclaimer to a bypass trust that provides the surviving spouse with a power of appointment will not satisfy the requirements under the Code, so a bypass trust created in a disclaimer plan cannot provide the spouse with such a power.[154]
- Technical Requirements. A qualified disclaimer must be made in conformity with several technical requirements in order to be valid. For example, a qualified disclaimer cannot be made with respect to an interest in property if the disclaimant has accepted the interest or any of its benefits, expressly or impliedly, prior to making the disclaimer.[155] If the

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[153] I.R.C. § 2518(b)(2).
[154] *See* I.R.C. § 2518(b)(4); Treas. Reg. §§ 25.2518-2(e)(2), 25.2518-2(e)(5), Example 5.
[155] Treas. Reg. § 25.2518-2(d)(1).

surviving spouse has inadvertently accepted a benefit of the interest to be disclaimed, the opportunity to make the disclaimer will be lost. Making a Clayton QTIP election has technical requirements as well, but they are relatively easy to meet and are not nearly as likely to fail due to inadvertent acts on the part of the executor or surviving spouse.

D. Reverse QTIP Elections

Code section 2652(a)(3) authorizes the deceased spouse's executor to make an election to treat QTIP trust property as if the QTIP election had not been made for the purposes of the GST tax. The result of this election is that the deceased spouse, rather than the surviving spouse, will be treated as the transferor of the QTIP trust, thereby enabling the deceased spouse's executor to allocate the deceased spouse's GST tax exemption amount to the QTIP trust. This election is known as a "reverse QTIP."[156] Once it is made, a reverse QTIP election is irrevocable.[157]

A reverse QTIP election it not effective unless it is made with respect to all of the property in the trust to which the QTIP election applies.[158] Consequently, it is not possible to make a partial reverse QTIP election, but the executor can sever the QTIP trust into separate trusts and make the election with regard to one of those trusts. This process is often referred to as a "qualified severance" and must be undertaken in compliance with the terms and provisions of section 26.2654-1(b) of the Regulations.

A qualified severance may be made if the trust is severed pursuant to (i) a direction in the governing instrument providing that the trust is to be divided upon the death of the transferor or (ii) discretionary authority granted either under the governing instrument or local law.[159] Section 26.2654-1(b)(1)(ii)(B) of the Regulations provides that the severance must occur prior to the due date of the estate tax return, but that provision is subject to two major exceptions. First, if a local court is required to authorize the severance but has not yet issued an order prior to the filing of the return, then the executor must indicate on a statement attached to the return that a proceeding has been commenced to sever the trust and describe the manner in which the trust is proposed to be severed.[160] Second, if the severance is authorized by the trust instrument or local law, a severance will be treated as meeting the requirements of the Regulations if the executor indicates on the return that separate trusts will be created (or funded) and clearly sets forth the manner in which the trust is to be severed and the separate trusts funded.[161]

E. Inter Vivos QTIP Elections

An inter vivos QTIP election must be made by the donor-spouse on a timely filed Form 709 United States Gift (and Generation-Skipping Transfer) Tax Return.[162] Gift tax returns are generally due on April 15th of the year after the gift was made, but an automatic six month extension of time to file will be granted upon request.[163] If the donor-spouse dies during the year in which he or she made the gift, the gift tax return must be filed on or before the earlier of (i) the

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[156] Treas. Reg. § 26.2652-2(a).
[157] Treas. Reg. § 26.2652-2(a).
[158] *Id.*
[159] Treas. Reg. § 26.2654-1(b)(1).
[160] Treas. Reg. § 26.2654-1(b)(2).
[161] *Id.*
[162] I.R.C. § 2523(f)(4)(A).
[163] I.R.C. § 6075(b)(1), (2). Note that an extension of time to file the donor-spouse's income tax return also extends the gift tax return. Alternatively, the donor spouse may request an extension by filing a Form 8892.

due date of the estate tax return (with extensions) or (ii) the date on which the gift tax return would otherwise be due (with extensions).[164] Once made, an inter vivos QTIP election is irrevocable.[165]

As is the case with a Form 706 QTIP election, partial elections are also permitted for inter vivos QTIPs.[166] However, there are no gift tax Regulations that appear to authorize a Clayton QTIP election for gift tax purposes.

A reverse QTIP election may be made in conjunction with a gift made to an inter vivos QTIP.[167] However, allocating GST tax exemption to an inter vivos QTIP trust may not represent the best and highest use of that exemption. Before making the reverse QTIP election, the donor-spouse should consider the following factors:

- The Potential for Distributions to the Donee-Spouse: At a minimum, the donee-spouse will receive annual distributions of all of the income (or the specified unitrust amount, if applicable) from the inter vivos QTIP trust. The donee-spouse is obviously not a skip person, so each of those distributions will represent an inefficient use of GST tax exemption. If the spouse is also entitled to distributions of principal, this inefficiency is magnified. On the other hand, if the trust does not allow for distributions of principal for the donee-spouse, and if the donor-spouse expects the trust assets to appreciate significantly over time, the use of GST tax exemption may be worthwhile.
- The Remainder Beneficiaries: The identity of the remainder beneficiaries is also important. If the trust assets will pass to the donor-spouse's descendants upon the donee-spouse's death, the inter vivos QTIP may represent an excellent opportunity to allocate GST tax exemption. If instead the trust assets will pass to other family members, or a trust for the benefit of the donor-spouse, it could be years or even decades before the trust assets pass to or for the benefit of a skip person. In that case, the settlor should consider whether it may be preferable to preserve the GST tax exemption for other applications.
- Other Planning Opportunities. The donor-spouse should consider what opportunities exist for allocating GST tax exemption either in conjunction with his or her foundational estate planning documents or future planning transactions. For instance, if the donor-spouse intends to engage in significant gifting for the benefit of descendants, it may be best to preserve the GST tax exemption for use in conjunction with those plans.

None of these factors should be considered determinative on their own, so it will be important for the donor-spouse and his or her advisors to examine them in conjunction with the donor-spouse's overall estate planning goals to determine the best course of action.

F. Making Late Elections and Fixing Mistakes

Sometimes things do not go as planned. Settlors fail to update old estate plans that are no longer appropriate, executors miss deadlines, the wrong election may be made, or perhaps no election is made at all. Fortunately, there are several avenues for potential relief when marital deduction planning goes awry.

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[164] I.R.C. § 6075(b)(3).
[165] I.R.C. § 2523(f)(4)(B).
[166] Treas. Reg. § 25.2523(f)-1(b)(3)(i).
[167] I.R.C. § 2652(a)(3)(B).

1. <u>9100 Relief</u>

9100 relief offers taxpayers the opportunity to request extensions of time to make certain statutory and regulatory elections. This relief is granted under sections 301.9100-1, 301.9100-2, and 301.9100-3 of the Regulations, hence the term "9100 relief."[168]

a) Automatic Extensions

Section 301.9100-2 of the Regulations addresses automatic extensions and has limited application with regard to the QTIP election. In relevant part, the Regulations provide that taxpayers are entitled to an automatic six-month extension for regulatory or statutory elections whose due dates are the due date of the return or the due date of the return including extensions.[169] The extension is only available if the taxpayer filed a timely return, and the extension runs six months from the due date of a return excluding extensions.[170]

For example, assume that W made a gift to a trust for the benefit of H in 2022. W files a gift tax return on April 10, 2023 but fails to make the inter vivos QTIP election. If she follows the requisite procedural requirements, W may file an amended gift tax return to make the inter vivos QTIP election by October 16, 2023, six months from the due date of the return.

As this example demonstrates, the automatic extension is only available to taxpayers who file in advance of the due date (whether with or without the extension). It essentially allows taxpayers to file an amended return to make an election at any time on or before the date that would have been the due date if they had initially requested an extension of time to file the relevant return. Generally speaking, an automatic extension will only be available to make an inter vivos QTIP election on or before October 15th of the year after the gift was made or to make an estate tax QTIP election on or before the date that is 15 months from the deceased spouse's date of death.

b) Other Extensions

Any other requests for extensions of time that do not meet the requirements under section 301.9100-2 may be made if they meet the requirements under section 301.9100-3. Note that extensions under this section are available for regulatory elections but not for statutory elections. As the nomenclature suggests, a statutory election is an election whose due date is prescribed by statute, while a regulatory election is an election whose due date is prescribed by the Regulations.[171]

Code section 2056(b)(7)(B)(v) provides that the QTIP election must be made on the estate tax return, but it makes no mention of a due date. That task was left to the drafters of the Regulations,[172] so the estate tax QTIP election is a regulatory election that is eligible for 9100 relief.

Unfortunately, the opposite situation exists with regard to the inter vivos QTIP election. Code section 2523(f)(4)(A) specifies that the inter vivos QTIP election must be made on a gift tax return filed on or before the due date (with extensions). Because the due date for the inter

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[168] There is no need to go looking for Code section 9100, as it does not exist.
[169] Treas. Reg. § 301.9100-2(b).
[170] *Id.*
[171] Treas. Reg. § 301.9100-1(b).
[172] *See* Treas. Reg. § 20.2056(b)-7(b)(4)(i).

vivos QTIP election is prescribed by statute and not the Regulations, relief under section 301.9100-3 is not available to make a late inter vivos QTIP election. Many commentators find that this arbitrary distinction imposes an undue hardship on taxpayers, and both the American Institute of CPAs and the American College of Trust and Estate Counsel have publicly supported legislation to allow 9100 relief for failure to make an inter vivos QTIP election. For now, practitioners must take extra care to ensure that inter vivos QTIP elections are made properly and on a timely filed gift tax return.

A request for relief under section 301.9100-3 must establish that the taxpayer acted reasonably and in good faith, and that a grant of an extension will not prejudice the interests of the Government.[173] A taxpayer will be deemed to have acted reasonably and in good faith if the taxpayer:

- Requests relief before the failure to make the election is discovered by the Service;
- Failed to make the election because of intervening events beyond the taxpayer's control;
- Failed to make the election because, after exercising reasonable diligence (taking into account the taxpayer's experience and the complexity of the return or issue), the taxpayer was unaware of the necessity for the election;
- Reasonably relied on the written advice of the Service; or
- Reasonably relied on a qualified tax professional who failed to make or advise the taxpayer to make the election.[174]

A taxpayer is deemed not to have acted reasonably and in good faith if the taxpayer:

- Seeks to avoid an accuracy related penalty that has been or could be imposed under Code section 6662;
- Was well-informed regarding the nature and tax consequences of the election and simply chose not to make it; or
- Uses hindsight in requesting relief (i.e. if specific facts have changed since the due date of the return that now make the election advantageous to the taxpayer).[175]

To request relief under section 301.9100-3, the taxpayer will be required to file a letter ruling request under Rev. Proc. 2023-1 (or the relevant Revenue Procedure for the year in question).[176] In the case of a letter ruling request seeking an extension of time to file a QTIP election, the executor and any other parties having knowledge of the events that led to the failure to make the QTIP election and the discovery of that failure must submit detailed affidavits, under penalty of perjury, describing those events.[177] The "other parties" who may be involved include the preparer of the estate tax return, any individual who made a substantial contribution to the preparation of that return, and any accountant or attorney who is knowledgeable in tax matters who advised the executor regarding the QTIP election.[178] Assuming that the executor relied on a tax professional for advice regarding the estate tax return, the executor's affidavit must describe the engagement and responsibilities of that professional and the extent to which the executor

[173] Treas. Reg. § 301.9100-3(a).
[174] Treas. Reg. § 301.9100-3(b)(1).
[175] Treas. Reg. § 301.9100-3(b)(3).
[176] Treas. Reg. § 301.9100-3(e)(5).
[177] Treas. Reg. § 301.9100-3(e)(2), (3).
[178] Treas. Reg. § 301.9100-3(e)(3).

relied on that professional.[179] Finally, the request must also include certain information about the estate tax return, such as whether it is under audit, when it was due and when it was actually filed, and copies of any documents that refer to the QTIP election.[180]

2. Late Reverse QTIP Elections

In certain circumstances, an executor or trustee may be able to request relief to make a late reverse QTIP election without filing a request for a letter ruling. Relief is available under Rev. Proc. 2004-47 if:

- A valid QTIP election was made for the marital trust on the estate tax return;
- The reverse QTIP election was not made on the estate tax return because the executor relied on the advice of counsel or a qualified tax professional who failed to advise the executor of the need, advisability, or proper method to make a reverse QTIP election;
- The decedent has a sufficient amount of unused GST tax exemption, after the application of the automatic allocation rules, to result in a zero-inclusion ratio for the reverse QTIP trust;
- The estate is not eligible for the automatic six-month extension under section 301.9100-2(b) of the Regulations;
- The surviving spouse has not made a lifetime disposition of all or any part of the QTIP trust; and
- The surviving spouse is alive or no more than six months have passed since the date of the surviving spouse's death.

If the above criteria are met, the taxpayer must follow the procedural requirements as set forth in Section 4.03 of the Revenue Procedure to request relief. If relief is granted, the decedent will be treated as the transferor for GST tax purposes and his or her remaining GST tax exemption amount will be automatically allocated to the QTIP trust based on the value of trust property as finally determined for estate tax purposes.[181]

As discussed previously, partial reverse QTIP elections are not permitted, so the decedent must have a sufficient amount of GST tax exemption remaining to cover the entire value of the QTIP trust, as a late qualified severance of the marital trust cannot be authorized under Revenue Procedure 2004-47. In that event, the executor will have to request 9100 relief to make a late reverse QTIP election in conjunction with a late qualified severance.[182]

3. Unnecessary Elections

Revenue Procedure 2016-49 provides that certain QTIP elections will be treated as void if the following requirements are satisfied:

- The estate's federal tax liability is zero, regardless of the QTIP election, based on values as finally determined for federal estate tax purposes, thus making the QTIP election unnecessary to reduce the federal tax liability; and

[179] Treas. Reg. § 301.9100-3(e)(2).
[180] Treas. Reg. § 301.9100-3(e)(4).
[181] Rev. Proc. 2004-47, 2004-2 C.B. 169. Note that relief will only result in the allocation of GST tax exemption to the QTIP trust. It will not extend the time to make an allocation of any remaining GST tax exemption.
[182] *Id.*

- The executor of the estate neither made nor was considered to have made the portability election.

Note that the Revenue Procedure will not treat a QTIP election as being void in cases involving protective elections, formula elections designed to reduce the estate tax to zero, a portability election (even if the decedent's DSUE amount was zero), or when a partial QTIP election was required to reduce the estate tax liability and the executor made the election with regard to more property than was necessary to reduce that liability to zero.[183]

If relief is granted pursuant to this Revenue Procedure, the relevant trust will no longer be subject to the following sections of the Code:

- 2044(a), meaning that the interest will no longer be includible in the surviving spouse's gross estate as qualified terminable interest property;[184]
- 2056(b)(7), meaning that the trust will no longer be subject to the QTIP provisions to the extent that they are not otherwise required by the trust instrument;
- 2519(a), meaning that the surviving spouse's disposition of part or all of the income interest with respect to the property will not be subject to gift tax under this section.
- 2652, meaning that the surviving spouse will not be treated as the transferor for GST tax purposes.[185]

Note that the Revenue Procedure provides that the Service will no longer accept requests for letter rulings for relief relating to unnecessary QTIP elections. Instead, taxpayers must follow the procedural requirements as set forth in Section 4.02 therein.

4. Using Disclaimers

Disclaimer planning can sometimes be used to effectively modify the terms of a trust so that it will qualify for the marital deduction. For example, assume that the deceased spouse's will includes a bequest to a trust that provides all of the income to the surviving spouse for life and authorizes the trustee to make discretionary distributions of principal to the deceased spouse's children. If the children all make qualified disclaimers of their rights to receive principal distributions, the executor will be able to make a valid QTIP election over the trust.[186]

Alternatively, a disclaimer may be able to convert an interest that qualifies for the marital deduction under Code section 2056(b)(5) into an interest that qualifies under Code section 2056(b)(7). A general power of appointment trust will be able to qualify as a QTIP trust if (i) the surviving spouse disclaims his or her general power of appointment and (ii) the deceased spouse's executor makes the QTIP election.

A disclaimer made for federal tax purposes must be made in accordance with Code section 2518 and the associated Regulations as well as applicable state law. Texas disclaimers are

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[183] Rev. Proc. 2016-49, 2016-42 I.R.B. 462.
[184] Provided, of course, that the interest may be subject to estate inclusion under another section of the Code if applicable.
[185] Rev. Proc. 2016-49, 2016-42 I.R.B. 462.
[186] Treas. Reg. § 20.2056(b)-7(h), Example 4; I.R.S. Priv. Ltr. Rul. 199949023 (Dec. 10, 1999).

subject to the Texas Uniform Disclaimer of Property Interests Act, which can be found in Chapter 240 of the Texas Trust Code.[187]

VI. TAXATION OF THE MARITAL TRUST

As was noted earlier in this article, any interest that qualifies for the marital deduction will be includible in the recipient spouse's gross estate. As a result, the disposition of that interest by the recipient spouse will be subject to either gift or estate tax, depending on whether the disposition occurs during life or at death. This section of the article will provide an overview of the taxation of marital trusts in these two situations.

A. Disposition of a QTIP Interest During Life

Code section 2519 provides that if a spouse disposes of all or any part of his or her qualifying income interest in a marital trust, that disposition will be treated as a transfer of the entire trust (except for the income interest) for gift tax purposes. This section is equally applicable to inter vivos and testamentary QTIP trusts.[188]

The application of section 2519 will be triggered whether the disposition of the qualifying income interest is a gift or a sale.[189] If spouse gifts his or her income interest, that gift will be subject to gift tax under Code section 2511 and may be eligible for the gift tax annual exclusion.[190]

The value of the gift under section 2519 will be equal to the fair market value of the entire property subject to the qualifying income interest, determined as of the date of the disposition and including any accumulated income, less the value of the qualifying income interest as of the date of disposition.[191] The gift tax annual exclusion amount will not apply to the gift.[192] If the spouse has enough exclusion amount to cover the value of the gift, that is the end of the story. If gift tax will be due, further calculations may be required.

Code section 2207A(b) provides that the spouse is entitled to recover the amount of gift taxes imposed pursuant to section 2519 from the person receiving the property. The amount of the gift under section 2519 will be reduced by the amount of gift tax the spouse is entitled to recover under section 2207A(b), as determined based on an interrelated computation.[193] Note that if the spouse dies within three years of a gift pursuant to Code section 2519, then the gift tax paid by the transferees may be includible in the spouse's gross estate.[194]

The spouse's failure to exercise his or her right to recovery under section 2207A(b) will be treated as a gift of the amount of the recoverable tax, even if recovery of the tax is impossible.[195] Any delay in the spouse's exercise of his or her rights of recovery will be treated as a below

[187] For a detailed look at this statute, *see* Glenn M. Karisch, Thomas M. Featherston, Jr., and Julia E. Jonas, *Disclaimers Under the New Texas Uniform Disclaimer of Property Interests Act*, State Bar of Texas Estate Planning and Probate Drafting Course, Houston, Texas, October 8-9, 2015.
[188] I.R.C. § 2519(b).
[189] *See* Treas. Reg. § 25.2519-1(g), Examples 1 and 2.
[190] Treas. Reg. § 25.2519-1(c)(1).
[191] Treas. Reg. § 25.2519-1(c)(1).
[192] *Id*.
[193] Treas. Reg. § 25.2519-1(c)(4).
[194] *See*, *e.g.*, *Estate of Morgens v. Comm'r*, 678 F3d 769 (9th Cir. 2012).
[195] Treas. Reg. § 25.2207A-1(b)(1).

market loan subject to gift tax.[196] The spouse may also waive his or her right to recovery before that right becomes unenforceable.[197] If the spouse executes a waiver, a gift of the unrecovered amounts will be considered to be made as of the later of the date of the waiver or the date on which the gift tax was paid.[198]

B. Upon the Surviving Spouse's Death

Each type of marital trust will be included in the surviving spouse's gross estate upon his or her death. A general power of appointment trust is includible pursuant to Code section 2041, while an estate trust is includible pursuant to section 2033. QTIP trusts are includible pursuant to Code section 2044.

1. Inclusion Under Code Section 2044

Code section 2044 applies to any interest in which the surviving spouse had a qualifying income interest for life and for which a deduction was allowed under Code section 2056(b)(7) or 2523(f).[199] If an interest meets both requirements, it will be presumed that the full value of the trust is includible in the surviving spouse's estate.[200] The burden will be on the surviving spouse's executor to prove otherwise, such as by producing a copy of the deceased spouse's estate or gift tax return showing that only a partial election (or no election at all) was made.[201]

The amount included under Code section 2044 is the value of the entire interest in which the surviving spouse had a qualifying income interest for life, determined as of the surviving spouse's date of death.[202] If only a partial QTIP election was made in connection with the interest, the amount includible in the surviving spouse's estate will be equal to the fair market value of the entire interest as of the date of his or her death, multiplied by the fractional or percentage share for which the deduction was taken.[203] If the elective and nonelective shares were not segregated in conjunction with a partial election, note that the applicable fraction or percentage will need to be recalculated if distributions of principal are made from the elective share.[204]

Any property that is included in the surviving spouse's gross estate under Code section 2044 is treated as having passed from the surviving spouse for purposes of the estate tax and the GST tax (unless the interest was previously the subject of a reverse QTIP election by the deceased spouse).[205] As a result, the property may be subject to the charitable deduction, marital deduction (if the surviving spouse has remarried), special use valuation under Code section 2032A, and the installment payment of estate tax under Code section 6166, as applicable.[206] Perhaps most notably, the property will be considered to have passed from the surviving spouse

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[196] *Id*.
[197] Treas. Reg. § 25.2207A-1(b)(2).
[198] *Id*.
[199] I.R.C. § 2044; Treas. Reg. § 20.2044-1(a).
[200] Treas. Reg. § 20.2044-1(c).
[201] *Id*.
[202] Treas. Reg. § 20.2044-1(d)(1). Note that if alternate valuation is elected, the interest will be valued as of the alternate valuation date.
[203] *Id*.
[204] *See* Treas. Reg. §§ 20.2044-1(d)(3), 20.2044-1(e), Example 4.
[205] I.R.C. § 2044(c).
[206] Treas. Reg. § 20.2044-1(b).

for purposes of Code section 1014, meaning that the entire interest will receive a basis adjustment as of the surviving spouse's date of death.[207]

2. Recovery of Estate Tax

Code section 2207A(a) provides that the surviving spouse's estate shall be entitled to recover the estate tax attributable to the inclusion of a QTIP trust from the trust or from the persons who have received a distribution of trust property prior to the expiration of the right to recovery.[208] The amount of estate tax attributable to the QTIP trust is equal to the amount by which the total amount of estate tax paid exceeds the amount of tax that would have been paid if the QTIP trust had not been includible.[209] Interest and penalties attributable to the tax are also recoverable.[210]

The surviving spouse may waive the right to recovery in his or her will or revocable trust by specifically indicating that intention.[211] A waiver may be accomplished by making specific reference to the QTIP trust, Code section 2044, or Code section 2207A, but a general provision specifying that all taxes will be paid by the estate is insufficient to waive the right to recovery.[212]

If the surviving spouse does not waive the right to recovery, then the executor will generally have a duty to enforce its rights to recover the tax. The executor's failure to exercise a right of recovery results in a taxable gift equal to the unrecovered amount from the persons who would benefit from the recovery to the persons from whom the recovery could have been obtained.[213] In other words, the surviving spouse's residuary beneficiaries will have made a gift to the QTIP trust's remainder beneficiaries.

VII. CONCLUSION

While many aspects of gift and estate taxation continue to shift and evolve, the foundational principles of marital deduction planning have remained relatively unchanged for decades. Estate planners must constantly monitor and study changes in the tax laws and new guidance from the Service while also meeting the needs of their clients, so it can be tempting to rely on past knowledge and experience when it comes to more familiar concepts like the marital deduction. However, by periodically revisiting the fundamentals of marital deduction planning and its numerous and versatile applications, practitioners will be better prepared to offer innovative and effective solutions for their clients.

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[207] *Id.*
[208] Treas. Reg. §§ 20.2207A-1(a)(1), 20.2207A-1(d).
[209] I.R.C. § 2207A(a)(1); Treas. Reg. § 20.2207A-1(b).
[210] *Id.*
[211] I.R.C. § 2207A(a)(2).
[212] I.R.C. Priv. Ltr. Rul. 200452010 (Dec. 24, 2004).
[213] Treas. Reg. § 20.2207A-1(a)(2).

Blockchain and Digital Assets 2.0:

Taxation, Reporting, and Planning

2023 North Texas Probate Bench Bar

March 10, 2023

Robert Barton and Jaime Herren, Holland & Knight
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I. Introduction and Overview

Internet-based accounts and applications have grown at an extraordinary rate, with the number of user accounts exceeding billions.[1] Email and paperless online banking are now routine and commonplace, and there are numerous other internet-based communications, accounts, and assets, in part due to the proliferation of social media. Moreover, since the blockchain network came into existence in 2008, thousands of new digital assets, technologies, and cryptocurrencies have emerged. These include, but are certainly not limited to, coins, tokens, tethered currency, and non-fungible tokens ("NFTs"), as well as other cryptography-based mediums of "currency."[2] As developers create new digital technologies and properties daily, fiduciaries and their counsel face a steep challenge to keep up.

The nature of assets classes is changing. Many assets are held entirely online—with no physical indication of the asset's existence. As trusted advisors, trust and estates attorneys along with fiduciaries need to be familiar with the array of digital assets develop skills to recognize them and be equipped to use the underlying technology to access them[3]. Because identifying and marshaling digital assets is not what it used to be, practitioners should take conscious steps to update procedures to account for the new era of digital assets.

This program provides an overview of popular digital assets and the basics of the technology underlying these assets. The program also provides an overview of digital asset legislation, discuss considerations for fiduciaries marshaling and administering digital assets, and previews what might be yet to come for digital assets.

II. Overview of Popular Digital Assets and Technology Basics

A. Email and Internet-Based Accounts

Nowadays, almost everyone has access to or has an electronic email or online account.[4] Transactions that traditionally left behind massive paper trails are becoming a thing of the past.

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[1] *See* https://www.statista.com/statistics/617136/digital-population-worldwide/ (last visited October 22, 2022) (noting 5.3 billion internet user accounts and 4.7 billion social media accounts).

[2] Cryptocurrencies are often referred to as a currency as that term is used to define fiat currency. The Internal Revenue Service has affirmatively stated that a cryptocurrency is property. *See* IRS Notice 2014-21.

[3] *See* MODEL RULES OF PRO. CONDUCT R. 1.1(8) ("[A] lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associates with relevant technology.").

[4] *See* https://www.statista.com/statistics/255080/number-of-e-mail-users-worldwide/ (last visited October 24, 2022).

Digital assets are not only killing the paper trail but also making it obsolete—it is no longer sufficient to look to telephone records to identify communications.[5] More and more, people are electing to use electronic communications, and many operate exclusively by electronic means. In fact, there are companies whose entire platform is predicated on creating a "paperless law firm."[6]

i. Electronic Communications, Including Paperless Billing and Statements from Financial Institutions

Businesses are adapting to (and sometimes prefer) e-commerce to the extent that not only is it possible to communicate one hundred percent electronically, but it is also possible to conduct all financial transactions electronically. Purchases made online or in-store can be completed electronically without a paper receipt. Indeed, many stores and touchless payment stations routinely ask purchasers if they want a receipt at all. Remember when you signed a receipt after you ran your credit-card? No signature needed if your credit card has an EMV chip.[7]

New and established financial institutions offer paperless billing and statements, mobile apps, and purely electronic interfacing. To encourage online and electronic communications and transactions, companies provide incentives to users who sign up for paperless billing or download a mobile app. Of course, the benefit to the company is a reduction in overall overhead and a reduction in their paper trail.

ii. Recurring Subscriptions

The combination of paperless billing and online commerce has resulted in the prevalence of subscription services that do not require any action on the part of the consumer to effectuate the recurring payment. Two-clicks, one swipe, and you are subscribed until cancelled.

Some services actively obscure the existence of recurring payments for subscriptions and make it difficult to cancel. Practitioners should take note of accounts that have recurring subscriptions and address them accordingly, as to not incur further costs to a decedent's estate. Further, clients should take an inventory of their subscription accounts and their family's subscription accounts regularly, but at least annually. Cost is certainly one reason to do these inventories, but moreover annual inventories should be conducted to tighten security and privacy; because, we might be killing the paper trail while creating a very obvious and public one.

iii. Social Media and Rights of Publicity

Cristiano Ronaldo has 491 million followers on his @Cristiano Instagram account. Mr. Ronaldo is a talented Portuguese football player and model. He is recognized globally and because of that he earns almost $1.6 million per a post that he shares for brands on his Instagram account.

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[5] Communications include not only telephonic records, but also emails, text messages, and voicemails. *See Pueblo of Laguna v. United States,* 60 Fed. Cl. 133, 142 (2004) (holding voicemails discoverable as a communication); FED.R. CIV. P. 34.

[6] *See* Peacock, Willie, How to Transition to A Paperless Law Office (https://www.clio.com/blog/going-paperless-law-firm/) (last visited October 24, 2022).

[7] EMV chips mitigate the risk of fraud and reduce the merchant's liability of accepting a fraudulent transaction. According to EMV Co's website 91.94% if global transactions are EMV chip based.

Jack Dorsey, Twitter's co-founder, created an NFT out of his first ever tweet last year - sales price $2.9 million.[8]

Social media is a (relatively) new and stimulating asset that is purely digital. Online social interactions are not only prevalent, but to many can be a lucrative endeavor. Celebrities, politicians, and influencers build online networks that can carry substantial value and income streams. The development of recognition among consumers means that people with successful social media accounts have probably developed trademarks and right of publicity, whether or not they know it. The laws regarding trademarks and rights of publicity are grounded in common law and do not require registration to establish rights.

B. Digital Wallets and Cryptocurrency

i. Google Pay, Apple Pay, PayPal, and Electronic Payment Solutions

Transacting through digital means is not new as we have used credit cards for decades. Transacting through a digital wallet, however, is slowly replacing the use of credit and bank cards. Digital wallets store personal and financial information, enabling access to credit or bank accounts, without the use or even maintenance of a physical credit card. Digital wallets provide convenience, but also come with added security features preventing fraud and fraudulent transactions. Many digital wallets substitute the security of a credit card signature (and corresponding matching of signature by the merchant) with facial recognition, solely controlled by the consumer.

ii. Cryptocurrency, NFTs and the Metaverse

NFTs or non-fungible tokens are the newest digital asset to gain the attention of the public. Originally created with the idea of replacing deeds, NFTs represent ownership of an underlying digital or physical asset. Because NFTs are held on a blockchain, they are most often stored in wallets either cold or hot, as explored and defined in more detail below, along with cryptocurrency. Note, the wallets that hold NFTs should not be confused with the digital wallets discussed in Section II.B.i, above.

The metaverse is digital real property associated with virtual reality. Fortunately, although the property might be as intangible as one can imagine, the blockchain records ownership in a very concrete manner. Like NFTs, virtual reality assets and digital real estate are housed on a blockchain and can be stored in wallets.

Cryptocurrency, NFT and Metaverse ownership are all recorded on a blockchain and are stored in wallets of which there are three types:

Cold Wallets

(1) Cold wallets are physical devices that store encrypted keys; these are the "not your key, not your crypto" wallets. Whoever holds the cold wallet owns the cryptocurrency it unlocks. They offer the ultimate security in cryptosecurity because

[8] *See* https://www.coindesk.com/business/2022/04/13/jack-dorseys-first-tweet-nft-went-on-sale-for-48m-it-ended-with-a-top-bid-of-just-280/ (last visited October 24, 2022).

only the owner can access the underlying asset with little to no possibility of cybertheft. However, cold wallets are physical hardware subject to risk of loss or destruction. Moreover, they are not connected to the internet and moving assets between and among cold wallets is often burdensome and inefficient.

Warm Wallets

(2) Warm wallets are similar to online or hot wallets in that they are typically associated with online banking. While warm wallets are connected to the internet, they offer marginally more security than hot wallets. Warm wallets are often downloadable applications that require human involvement to execute transactions. They typically have a seed phrase, which might assist in the recovery of lost account access. As a result, they are moderately efficient banking tools with a moderate level of risk.

Hot Wallets

(3) Hot wallets are accounts on the internet, often associated with an online bank or marketplace. They compromise the integrity of the cryptocurrency security by compromising the owner himself or herself—the concept being that blockchain security has one point of failure: The owner who holds the private key. If the owner gives the key away or allows duplication or otherwise, it is the owner who is compromised or has chosen to compromise the security of his or her holdings. Owners are giving away their private keys to have the most efficient, easy-to-use banking tool available with the highest potential for recovery of lost account access. Unfortunately, the wallets come with the lowest security and highest risk of cybercrime. Less sophisticated crypto owners might not even realize the low security nature of hot wallet accounts.

C. Intellectual Property Rights Implicated by Digital Assets

i. Rights of Publicity

Rights of publicity are commonly referred to as a person's name, image, and likeness ("NIL"). The affirmative right of publicity arose out of celebrities' affirmative use of their right of privacy. It is a means of exploiting fame and recognition.[9]

Social media directly implicates the right of publicity. A person with any measurable success or a substantial number of followers on a social media platform (or by way of a social media handle) likely has some associated rights of publicity. The simplest example of exploiting one's right of publicity is using one's popularity as a spokesperson or brand ambassador. Depending on the circumstances, social media accounts might be the sole means of accessing, managing, and controlling one's right of publicity.

[9] J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 1:3 (2d ed. Westlaw 2016).

The right of publicity is a state right, typically in the state of one's residence. It is an intangible property right. In both California and Florida, the law provides that a person's right of publicity survives death and lasts 70 years.[10]

ii. Trademarks

Trademarks are words, symbols, phrases, logos, product shapes, and the like that identify a source of goods in commerce. The goal of trademark law is to protect consumers and prevent the likelihood of confusion in the marketplace.[11]

Social media success might also implicate a trademark if the influencer is associated with the sale of consumer goods or has built a brand name.

Trademark protection has a potentially unlimited term (for continuous use) with 10-year renewals.

Trademarks are regulated by the U.S. Patent and Trademark Office ("USPTO") and the Lanham Act (15 U.S.C. §§ 1051 et seq.).

iii. Copyrights

Copyrights are a bundle of intangible rights associated with an original work (created by human beings) and fixed in a tangible medium. Copyrights include writings, music, visual art, software, and the like. Creators obtain rights upon creation regardless of registration or publication status (for post-1977 works). The term of copyright is the life of the author plus 70 years (for post-1977 works).[12]

Copyrights are regulated by the U.S. Copyright Office and the Copyright Act (17 U.S.C. §§ 101 et seq.).

NFTs implicate copyright issues because they are often associated with copyrighted works of art. Also, some NFTs, such as applications, implicate copyright issues in two distinct ways: (1) because they are AI generated art, and (2) because some NFTs purport to deliver ownership of the underlying work.

iv. Patents

A patent provides the right to prevent others from making, using, and selling a protected invention. The term of a domestic patent is 20 years for a utility patent and 14 to 15 years for a design patent. There are other considerations for a patent term, which are not discussed in this presentation.[13]

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[10] Cal. Civ. Code, § 3344.1; Fla. Stat., § 540.08. California in addition to its statutory right of publicity also provides a common law right of publicity. *See Eastwood v. Superior Court*, 198 Cal. Rptr. 342, 347 (Ct. App. 1983).
[11] Qualitex Co. v. Jacobson Products 514 U.S. 159,162 (1995).
[12] Dowling vs. U.S. 473 U.S. 207,216-17 (1985).
[13] *See* Eldred v. Aschcroft, AG 537 U.S. 186, 194-196 (2003).

Patents are regulated by the USPTO and the Patent Act (35 U.S.C. §§ 101 et seq.)

III. Legislation Governing Digital Assets

One of the most critical duties of a newly appointed fiduciary is to find and marshal a decedent's assets. This duty now includes the discovery and marshalling of digital assets, which given their nature, volatility, and value should be done with heist. Marshaling assets, generally, can be challenging - layer in digital assets and the tasks is even more challenging.

Digital assets present a new challenge to fiduciaries because access to them means finding files, discovering passwords, and locating wallets. Coupled with the discovery of assets is the added challenging of accessing the assets. Passwords to online accounts, and encryption on locally stored files or assets impose additional barriers to fiduciary access. Federal privacy and anti-hacking laws further impede fiduciary access.

Accessing electronic communications might be essential to a fiduciary's tasks and so it is important to understand some of the regulations regarding the right to access electronic communications and accounts.

As we discuss these regulations, it is important to consider who is being regulated -- because in some instances it is the content provider or host, rather than the fiduciary or personal representative. A key question is whether a company is required to provide access to a fiduciary or personal representative or whether an electronic account is privately governed by, for example, by a terms and conditions agreement entered into upon creation of the online account.

A. Stored Communications Act as a Part of the Electronic Communications Privacy Act

The Fourth Amendment to the U.S. Constitution provides citizens with a strong expectation of privacy in their homes. When we use a computer network, we may have the same expectation of privacy. However, because the network is not physically located or even being accessed in our computers or in our homes, it is outside the coverage of the Fourth Amendment.[14]

To fill that gap, in 1986 Congress enacted the Stored Communications Act ("SCA") as a part of the Electronic Communications Privacy Act to respond to concerns that internet privacy poses new dilemmas with respect to applying constitutional privacy protections. The SCA prohibits certain providers of public electronic communications services from disclosing the content of its users' communications to a government or nongovernment entity (different rules apply to each) except under limited circumstances that are akin to the warrant required under the Fourth Amendment. The SCA regulates the relationship between the government, internet service providers ("ISPs"), and users in two distinct ways.

[14] U.S. CONST. art. IV § 4.

i. Limitations on Disclosure of Information on Subscribers

First, the SCA establishes limits on the government's ability to require ISPs to disclose information concerning their subscribers. An ISP may not disclose to the government any records concerning an account holder or the content of any electronic communications in the absence of an applicable exception, such as consent by the account holder.

Providers are permitted, but not required, to divulge non-content, such as the user's name, address, connection records, IP address, and account information to a nongovernmental entity. Courts have held that the subject line of an email is content protected by the SCA.[15]

ii. Limitations on Disclosure of Content of Communications

Second, the SCA establishes limits on the provider's ability to voluntarily disclose to the government or any other person or entity the content of communications. All private social media account content (e.g., photos, videos, posts) is protected by the SCA.[16]

A provider of public electronic communications services can voluntarily disclose the content of communications, but only if an exception to the SCA's blanket prohibition against disclosure applies. The relevant exception for fiduciaries permits (but does not require) a provider to disclose communication content if the provider has the "lawful consent" of "the originator," an addressee or intended recipient of the communications, or the subscriber. There is evidence that Congress intended authorized agents to be able to authorize disclosure of the contents of electronic communications. However, some providers refuse to give executors access to the content of decedents' email accounts without the added assurance of a court order stating that the executor has the user's lawful consent.

In 2017, the Massachusetts Supreme Judicial Court ("SJC") issued its long-awaited decision in *Ajemian v. Yahoo!, Inc.* ("Yahoo"), interpreting the SCA to allow Yahoo to divulge the contents of a decedent's email account based solely on the personal representative's consent. Although the decision did not order Yahoo to immediately disclose the emails to the personal representative, it firmly repudiates the position of the industry that the SCA completely bars such disclosure. As such, it represents a huge victory for fiduciaries and families seeking access to protected communications.

The SJC's decision did not mandate that Yahoo disclose a decedent's email account contents to the fiduciaries; it merely holds that the SCA permits the disclosure.

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[15] *See* Optiver Australia Pty. Ltd. & Anor. v. Tibra Trading Pty. Ltd. & Ors., No. C 12-80242 EJD PSG, 2013 WL 256771, at *1 (N.D. Cal. Jan. 23, 2013).
[16] *See* Stored Communications Act § 2702.

However, what if the probate court did not order the disclosure but instead agrees with Yahoo that its terms of service are binding and allows it to destroy or withhold the emails? Chief Justice Gants, writing separately, indicated that if the trial court were to hold that Yahoo's terms of service agreement were binding and permitted it to destroy the decedent's email messages, the SJC "would surely reverse that ruling." Hopefully that strong signal reaches Yahoo and convinces it to finally give the representatives the decedent's email messages, as first requested more 10 years prior to the decision.

Although the decision is a clear victory for the representatives, it still leaves important issues unresolved and important questions unanswered. For example, the representatives are still subject to the probate court's ruling on whether Yahoo's terms of service agreement prevents disclosure. Also, service providers typically interpret the SCA as merely permissive and insist that they are not required to disclose emails, even with the account holder's lawful consent. It therefore will remain critical to our clients to monitor case law throughout the United States as it continues to develop in these areas.[17]

B. Compute Fraud and Abuse Act

The federal Computer Fraud and Abuse Act ("CFAA") criminalizes the unauthorized access of computer hardware and devices and the data stored thereon:

> (a) Whoever— . . . (2) *intentionally accesses a computer without authorization or exceeds authorized access,* and thereby obtains— . . . (C) information from any protected computer . . . shall be punished as provided in subsection (c) of this section.

The CFAA criminalizes two kinds of computer trespass, which can be accessing a computer without authorization and that exceeds authorization. The term "computer" includes desktop computers, laptops, notepads, tablets, and smartphones.

Every state has an analogous statute, which varies in coverage, but typically prohibits unauthorized access to computers.

Even though a fiduciary is authorized by the account holder or state law to use a computer or to act on behalf of an account holder, the fiduciary is not necessarily exempt from CFAA prosecution. There is no question that a fiduciary is authorized, in the normal sense of the word, to access an account holder's computer or system that the fiduciary lawfully possesses, controls, or owns by virtue of the proscribed authority of a fiduciary. The analogy is that a fiduciary using, or even hacking into, a computer is no more illegal than a fiduciary using a locksmith (or crowbar) to get into a building owned by an incapacitated person, principal, or decedent. However, accessing a hard drive is technically

[17] Portions of this section, Section III. B., and III.D were taken from the 53rd Heckerling Institute on Estate Planning 2019 and are reproduced here with permissions from the authors. *See* AUSTIN BRAMWELL, ABIGAIL ROSEN EARTHMAN, BENETTA P. JENSON, & SUZANNE BROWN WALSH, NEW KIDS ON THE BLOCK(CHAIN): PLANNING WITH BITCOIN AND CRYPTOCURRENCY*,* 53 Heckerling Inst. on Est. Plan. 14 (2019).

different from accessing the account holder's digital accounts or assets, which are stored on the provider's server, not the user's. If the fiduciary is violating the account provider's terms of service agreement by accessing the account holder's digital accounts or assets online, the fiduciary may be violating the CFAA.

C. California's Revised Uniform Fiduciary Access to Digital Assets Act

Found in Sections 870 through 884 of the California Probate Code, California adopted its own version of the Uniform Fiduciary Access to Digital Assets Act (discussed below).

It applies to: (1) a fiduciary acting under a will executed before, on, or after January 1, 2017, (2) a personal representative acting for a decedent who died before, on, or after January 1, 2017, (3) a trustee acting under a trust created before, on, or after January 1, 2017, and (4) a custodian of digital assets for a user if the user resides in California or resided in California at the time of the user's death.

The custodian is typically the institution (Google, Apple, Twitter, TikTok, etc.), defined as a person that carries, maintains, processes, receives, or stores a digital asset of a user. The custodian is authorized to disclose digital assets of a user under the Revised UFADAA (see below) to the executor or fiduciary. They may: (i) grant full access to the account, (ii) grant partial access to the account sufficient to perform the tasks with which the fiduciary or designated recipient is charged, or (iii) provide the fiduciary or designated recipient with a copy in a record of any digital asset that, on the date the custodian received the request for disclosure, the user could have accessed if the user were alive and had full capacity and access to the account. The custodian does not have to disclose digital assets that were deleted by the user. Additionally, if a custodian is requested to disclose some, but not all, of a user's digital assets, the custodian need not disclose the assets if segregation of the assets would impose an undue burden on the custodian.[18]

In sum, the executor or fiduciary may obtain authority to access, modify, and delete files and online accounts, including social media accounts, email accounts, banking, file sharing, and other online platforms.

D. Revised Uniform Fiduciary Access to Digital Assets Act

At least 49 states, the District of Columbia, and the U.S. Virgin Islands have now enacted laws addressing access to email, social media accounts, microblogging or other website accounts, or other electronically stored assets upon a person's incapacity or death (Legislation is pending in Massachusetts in 2022).

Of those states, 46 have adopted either the Uniform Law Commission's Uniform Fiduciary Access to Digital Assets Act ("UFADAA") (2014) or the Uniform Fiduciary Access to Digital Assets Act, Revised (2015) ("Revised UFADAA") (the revised version of UFADAA), which gives internet users the power to plan for the

[18] *See* CAL. PROB. CODE § 875.

management and disposition of their digital assets in the same way they can make plans for their tangible property.

The Revised UFADAA gives fiduciaries limited, but much needed, access to digital assets while taking into account the privacy and contractual rights of account holders and compliance with federal and state privacy laws.

Just as with traditional assets, accessing digital assets held by third-party service providers, in general, require fiduciaries to provide a written request, a copy of the will, trust, or power of attorney, and information linking the digital account to the customer (i.e., the decedent or incapable person).

The Revised UFADAA's limited default authority over electronic communications content will penalize those who fail to plan for third-party access to their online accounts and digital assets. Likewise, advisors who fail to discuss digital assets and access with their clients will be hard-pressed to explain that oversight.

Sections 15(d) and (e) of Revised UFADAA confirm that a fiduciary is an authorized user of the decedent, protected person, principal, or settlor's property under applicable CFAA rules and confirm that a fiduciary with authority over devices can access digital assets and files on it and is an authorized user. This clearly authorizes fiduciaries to access private keys stored on electronic devices.

Even when a cryptocurrency owner uses an online wallet instead of storing keys offline in cold storage, access to the account likely will be delayed. Virtual currency wallet/exchange companies are understandably concerned with fraud and theft. Coinbase, the largest commercial online exchange and wallet provider, has posted procedures requiring a death certificate, last will, probate certificate, government-issued photo ID of the fiduciary, and a letter of instruction before fiduciary access will be granted.

As yet, no virtual currency wallet service has created online tools (which are akin to designations) by which the user can grant third-party access.

IV. Fiduciary Considerations for Digital Assets

It is vitally important, at the planning stage, to ask clients if they own digital assets. Typically, a lawyer cannot provide adequate estate planning advice without sufficient information regarding the nature, value, and manner in which the client's assets are held. It is incumbent on the estate planner to ask about cryptocurrency and discuss access to it. Access can be provided through a technology-based plan, multi-signature wallets, or a smart contract triggered by death, for example.

Access can also be provided through a non-technology-based plan that relies on private key information that is printed and stored offline in a safe-deposit box or another secure location. For those with large holdings, it would be far better to convince the client to identify a trustee or corporate custodian willing to provide custodial services, assuming one is available. Family members may not understand that without access to the private key there is no one who can be

compelled by court order to turn the asset over to the fiduciary and that cryptocurrency cannot become unclaimed property. Conversely, if the owner has provided his or her private key and file information to someone other than the fiduciary, probate by computer (the modern version of probate by truck) may be a risk.

Adequate planning can assist in identifying assets in the next stages of administration. Note that cryptocurrency holders are generally under age 40 with some particular characteristics that make them difficult to plan for. While it seems unlikely that a cryptocurrency owner will fail to provide for access to his or her private keys, we all know that some people steadfastly avoid considering their own mortality. Beyond their youthful perspective, they also simply like the liquidity that digital assets offer. Thus, their assets are likely to change more often than many other types of estate planning clients.

Regardless of the planning situation left behind after death, it is of paramount importance to ask fiduciaries and family members if a there is any evidence or reason to suspect that the decedent or incapable person owned digital assets.

A. Identifying Digital Assets

Identifying digital assets is arguably the most important part of this presentation. Intake and initial investigation protocols of old are not necessarily going to indicate that a valuable asset exists.

There are two principal strategies for locating digital assets: (1) physical search; and (2) inquiry into the trustor's or decedent's activities.

i. Physical Searches for Digital Assets

First, apply a standard method of looking at tangible sources; that is, searching documents and embodiments of digital assets or intellectual property. Items that might indicate intellectual property assets are:

- Laptops, computers, external devices and hardware;
- USB drives or other cold storage means;
- Mining equipment;
- Schedule A and trust transfers;
- Research files and notes;
- Correspondence with university technology transfer offices;
- Patent applications;
- Licenses and assignments;

- Records of lawsuits;
- U.S. Copyright Office or USPTO records;
- Correspondence with attorneys; and
- Registrations of business, trademark, copyright, patents, or rights of publicity.

ii. Inquiry into Activities That Might Reveal Digital Assets

The second is to assess the client or decedent's activities.

- Is the client an actor, artist, celebrity, or influencer?
- Is the client a miner or do they have virtual reality equipment that would allow access to the metaverse?
- Is the client an inventor or otherwise involved in inventive activity?
- Does the client have active social media accounts? Are they income-generating? Do the accounts have creative or recognizable content?
- Does the client have applications such as financial applications, warm/hot wallet applications, or crypto marketplace applications?
- Does the client work in a research lab or tinker in their garage?
- Is the client engaged in online commerce?
- Does the client report royalty income or other income that needs to be sourced? For example, mining is subject to self-employment tax. (*See* IRC §§ 1401 et seq.)

Beyond that knowledge, accessing laptops or smartphones of a decedent might be the only way to locate his or her digital assets. Fiduciaries should look at both internet browser history and applications to fully capture the potential universe of digital assets and social media footprint.

iii. Particular Considerations for Identifying Patents

A U.S. patent secures the national exclusive rights of an inventor to make, use, and sell his or her invention for a specified duration of time, after which time the invention belongs to the public. The nature of a patent asset is rarely uncertain. Patent ownership records of the USPTO are well kept and easily searchable. One can conduct an online search by inventor or assignee using PatFT (Patent Full-Text and Image Database) or AppFT (Application

Full-Text and Image Database).[19] A search can quickly and conclusively identify the inventor's interests.

iv. Particular Considerations for Identifying Trademarks

Whereas the patent world implicitly tracks ownership and expiration of patent rights, the trademark world is concerned with distinctiveness and use from the consumers' perspective. Trademarks are the brand, image, look, and feel of a maker or business and can include service marks and trade dress. Trademarks touch the public domain in the form of signage, website names, logos, social media handles, etc. If the decedent owned a business, it is always important to consider if a trademark is in use and who owns it.

Unlike the definitive nature of patent searches, an online trademark search with the USPTO will be incomplete because trademarks do not require registration (rather, a registration perfects and adds to the rights of ownership). The USPTO only maintains databases of registered marks and assignments.[20] In the basic word mark search of the Trademark Electronic Search System, it is possible to search by owner of registered marks, but the results will not include those marks in use but not registered (referred to as common law marks). When a fiduciary encounters a decedent who was engaged in commerce, he or she needs to look for associated trademarks. Only trademarks being actively used in commerce can carry common law rights, whereas registered marks expire only after three years of non-use. Whether trademarks are owned by the decedent or his or her business is an important factor that will determine the depth of the fiduciary's role. Where the business entity owns the trademark, the fiduciary is likely only concerned with the estate's interest in that business rather than the trademark itself.

B. Marshaling Digital Assets

In the past, fiduciaries could easily marshal, collect, and manage most assets. Often, the biggest nuisance was convincing a recalcitrant financial institution to honor a power of attorney, and personal representatives and conservators—armed with court decrees—encountered few problems. That landscape has changed with the advent and popularity of digital assets and accounts.

i. Particular Considerations for Marshaling Electronic Accounts

Taking possession of digital assets might not be as easy as it seems. Many online accounts have their own terms of service. Examples are Facebook's Legacy Contact, Google's Inactive Account Manager, Twitter, TikTok, etc.

[19] Also of use, the Assignment on the Web ("AOTW") system goes back to 1980 and offers search of patent assignments by several input fields.
[20] The AOTW system includes registered trademark assignments back to 1995.

a. **Apple**.

According to Apple's support guidelines, the proper action is to request access to a decedent's Apple ID and the data stored with it or request Apple to delete the account. Apple requires and verifies legal documentation before assisting with a deceased person's account. Such document generally includes a death certificate "and may also require a court order or other documentation."

Newer versions of Apple software allow Apple users to "add a legacy Contact" for their Apple ID, which allows someone to access a decedent's data stored in their Apple account after they pass away[21]

b. **Google.**

Google approaches the issue of a decedent's account similarly. Google allows a user to "share parts of their account data or notify someone if they've been inactive for a certain period of time." The account holder can specify a "trusted contact" who will receive any data the account holder selected to share after the account becomes "inactive." Google will examine several factors to determine whether an account is "inactive" such as sign-ins, usage of Gmail, and Android check-ins.[22]

c. **Meta.**

Meta/Facebook approaches this issue a bit differently. After being notified that a user has passed away, Facebook's policy is to "memorialize the account" which allows "friends and family to gather and share memories after a person has passed away." Memorialization automatically prevents anyone from logging into the account.[23]

However, like Google and Apple, Facebook gives users the option of designating someone who can control the account as a "legacy contact." The legacy contact is able to essentially act as the user of the account and can download any user information from Facebook.[24]

d. TikTok.

TikTok's user guidelines do not appear to directly address the issue of a decedent's account. Instead, there is a policy in place for the username associated with an inactive account to reset to a randomized numeric username after 180 days. The username may also be reset if the app receives "a valid request, such as a trademark infringement notice."[25]

[21] *See* https://support.apple.com/en-us/HT208510 (last visited October 24, 2022).
[22] *See* https://support.google.com/accounts/answer/3036546 (last visited October 24, 2022).
[23] *See* https://www.facebook.com/help/275013292838654/?helpref=related_articles (last visited October 24, 2022).
[24] *See* https://www.facebook.com/help/150486848354038
[25] *See* https://support.tiktok.com/en/safety-hc/account-and-user-safety/inactive-account-policy (last visited October 24, 2022).

e. Twitter.

Twitter"s guidelines allow a person authorized to act on behalf of the estate of a deceased user or a verified family member to request that the account be deactivated. Twitter requires documentation such as the ID of the person making the request and a death certificate. Unlike Apple and Google, Twitter states that it is "unable to provide account access to anyone regardless of their relationship to the deceased." [26]

ii. Particular Considerations for Marshaling IP

Some IP assets have written transfer requirements. Patents are fully transferable personal property (35 U.S.C. § 261) but require that a written assignment of ownership is filed with the USPTO. Patent assignments must be in writing and recorded with the USPTO within three months of the date of assignment (35 U.S.C. § 261). Assignments are recorded using the USPTO's Electronic Patent Assignment System and will be maintained in the AOTW. When patent rights are identified, a fiduciary must record the change in ownership with the USPTO. The fiduciary must assign the patent to himself or herself as the trustee or the personal representative of the estate, and a second assignment will be required for distribution of the asset. This federal requirement for recording the assignment is in addition to applicable state probate laws governing assignments of a decedent's interests since IP assets pass according to state law. Patent applications are governed by a different and specific set of rules that must be considered and complied with.

Similarly, a change in copyright ownership must be "full," in writing, and signed by the owner.[27] Copyrights have unique considerations with regard to estate "bumping." Bumping refers to the priority right of statutory heirs to "bump" the ownership of copyright assignees, effectively taking back copyrights upon the creator's death under certain circumstances. Bumping is federal law. (*Top Gun* is an example.) Copyrights are interesting in the context of NFTs that include at least some rights to an underlying work of art that are inherently copyrighted.

There are no express requirements to transfer trademarks, trade secrets, or rights of publicity. However, each has unique considerations.

Trademarks must generally be owned by or along side a business since they protect the consumer and are generally measured in brand recognition and goodwill. For trademarks, the USPTO advises that assignments or name changes be recorded by submission of an online form[28] on the Electronic Trademark Assignment System). This should be completed in a timely manner and will be maintained in the AOTW. Thus, where a patent assignment must be recorded, a

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[26] *See* https://help.twitter.com/en/rules-and-policies/contact-twitter-about-a-deceased-family-members-account#:~:text=In%20the%20event%20of%20the,of%20a%20deceased%20user%27s%20account (last visited October 24, 2022).

[27] 17 U.S C. § 201

[28] The USPTO offers manual paper submissions as well.

trademark should be recorded. Accordingly, a fiduciary should record assignment with the USPTO to properly identify the estate as the owner of the trademark and then record the trademark assignment upon distribution.

Trade secrets are difficult to identify and they have an ongoing requirement to protect them from disclosure.

Rights of publicity are typically held individually. Because they are not tangible personal property, some catchall clauses in estate plans do not capture rights of publicity, which must then be probated if there is no basis to believe that they are a trust asset. Rights of publicity must also be registered in some states, and they have specific terms.

C. Mechanics and Risks of Holding Digital Assets

Most digital assets are unique and high risk, especially cryptocurrencies. The volatile nature of cryptocurrencies and NFTs might lead to immediate liquidation by a fiduciary; many corporate trust companies and professional fiduciaries have bright line rules against holding such assets. They will not even consider doing so if the governing documents do not give them both the power and directive to hold high-risk digital assets. The other possibility of alleviating the risk is immediate in-kind distribution, but that is not always a possibility.

i. Prudent Investor Considerations for High-Risk Assets

Several acts come into consideration for fiduciaries holding digital assets.

The Uniform Prudent Investor Act. The Uniform Prudent Investor Act ("UPIA") was approved in 1994 and has been enacted in 44 states (but not in Florida, Georgia, Kentucky, Louisiana, New York, and Pennsylvania). The UPIA specifies a trustee's duties to manage trust assets, eliminating all categorical restrictions on investments, so it does not mention virtual currency or any other type of asset class. Trustees must comply with the UPIA unless excused in the trust. The UPIA reflects one of the main themes of modern investment practice: sensitivity to the risk/return curve.[29]

(1) Prudent Investor Rule. A trustee shall invest and manage trust assets as a prudent investor would; that is, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.

[29] This Section was taken from the 53rd Heckerling Institute on Estate Planning 2019 and is reproduced here with permissions from the authors. *See* AUSTIN BRAMWELL, ABIGAIL ROSEN EARTHMAN, BENETTA P. JENSON, & SUZANNE BROWN WALSH, NEW KIDS ON THE BLOCK(CHAIN): PLANNING WITH BITCOIN AND CRYPTOCURRENCY*,* 53 Heckerling Inst. on Est. Plan. 14 (2019).

(2) Management. Under the UPIA, "management" includes the duty to monitor the trust investments.

(3) Duty to Diversify. "A trustee shall diversify the investments of the trust unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying."

The Uniform Prudent Management of Institutional Funds Act. The Uniform Prudent Management of Institutional Funds Act ("UPMIFA") was approved in 2006 and has been enacted in all states except Pennsylvania.

(1) Like the UPIA, the UPMIFA applies prudent investor standards for the management and investment of charitable funds and for endowment spending.

(2) As under the UPIA, there are no prohibited investment classes under the UPMIFA, so institutions generally may invest in any kind of property or type of investment, unless prohibited by law other than the UPMIFA. However, their duties under the UPMIFA require institutions to dispose of unsuitable assets.

(3) While in theory a gift instrument or the governing instruments of an institution can modify most of the UPMIFA's duties, the charitable purpose doctrine limits the extent of the modification.

(4) The UPMIFA requires institutions to diversify investments, unless due to special circumstances the purposes of the fund are better served without diversification.

(5) In making decisions about whether to acquire or retain an asset, the institution should consider its mission, its current programs, and the desire to cultivate additional donations from a donor, in addition to factors related more directly to the asset's potential as an investment.

Authority to Hold Unique Assets. Although access provisions sometimes have little to no utility, estate planning documents still should address authority over cryptocurrency in addition to the dispositive provisions that apply to it. Trustees who will be asked to retain the cryptocurrency for some reason will probably want to use a directed trustee for this purpose, although it may not be prudent to continue to hold cryptocurrency in a trust. At a minimum, estate plans should include clear authority to retain the cryptocurrency and exonerate the fiduciary for doing so.

ii. Intellectual Property Assets: Patents

Intellectual property owners must be attentive to their assets.

Maintenance Fees. Patents have maintenance fees due at 3.5 years, 7.5 years, and 11.5 years after issuance. Missing a patent maintenance fee or allowing ongoing infringement can result in inadvertent loss or degradation of rights, which might subject a fiduciary to claims for breach of fiduciary duty and/or waste.

Infringement. Patent owners have an affirmative duty to protect their rights from infringers. Infringers can gain rights if knowingly allowed to continue infringing activities without being put on notice of infringement or sent a demand to desist. The statute of limitations on infringement is three to six years. It is an IP owner's duty to monitor the world for infringers and act affirmatively to protect his or her rights. That duty is assumed by the fiduciary. Monitoring infringement is fact-specific, and there are different levels of engagement, which vary from simply being in business among competition to hiring firms that seek out illegal use of your IP. Upon discovery of infringement, a fiduciary needs to seek advice on cease-and-desist letters, which carry an inherent threat of litigation. The distinction between implied and express threat of litigation is of consequence in patent litigation because an express threat of litigation may expose you to suit by the alleged infringer and relinquish choice of forum, if any, that may have been available. Timing is also an important consideration because laches is an affirmative defense to infringement. In some situations, obtaining an opinion letter from knowledgeable counsel may be all that is necessary.

Even where an IP asset has been licensed, the fiduciary licensor—and not the licensee—typically retains the right to sue infringers. Licensees without the right to sue have low risk and high potential gain from litigation. Thus, licensees often insist on moving an infringement situation more quickly toward confrontation. An interesting element of the proprietor's situation is his or her joint ownership. All joint owners must participate in patent enforcement litigation. If any joint owner refuses to join suit, that party will have effectively blocked enforcement of the patent. Thus, a fiduciary needs to actively participate in enforcement actions by joint owners or he or she will have effectively consented to infringement and lost the estate's right to enforce the patent.

Patent Applications. Patent applications present a whole different set of considerations. Where a patent application is pending or was yet to be filed, the decedent's personal representative may step into his or her shoes to complete the process. (35 U.S.C. § 117.) Although the process of stepping in has been simplified and only requires filing of a declaration, the patent prosecution process is complex, lengthy, and expensive. In the hypothetical, if the proprietor's cup is patent pending, the fiduciary will need to step in and work with the coinventors to secure patent rights. Applying for a patent is a process in which time is of the essence as office actions must be responded to in timely fashion to ensure that the application does not inadvertently become abandoned or finally rejected. Thus, delay can result in lost rights.

A fiduciary needs to determine whether the estate should continue patent prosecution or whether it has assigned or abandoned its rights. The great expense and inherent riskiness of investments in patents can conflict with California's prudent investor standard.[30] The fiduciary is confronted with the cost-risk analysis: Considering the duties and limited resources of the estate administration, is

[30] The UPIA, Cal. Prob. Code §§ 16045 et seq.

prosecuting the patent economically feasible? Are there alternative solutions available? If the estate cannot bear the expense of patent prosecution, the fiduciary should consider best alternative: Is quick distribution to heirs or beneficiaries possible? Are there coinventors that can be potential buyers of the trust's or estate's interest? The resolution options will be fact-specific.

Terminal Disclaimer. If the fiduciary determines that preserving an IP asset is no longer prudent, a patent can be abandoned at any time by filing a terminal disclaimer (35 U.S.C. § 253(b).) A disclaimer is an irreversible dedication to the public.

iii. Intellectual Property Assets: Trademarks

Renewal Fees. Similarly, trademarks have use requirements and renewal fees. Trademark owners need to use the mark in commerce and the mark must be used continuously. That means a fiduciary might need to continue to run a business without interruption if it is associated with a valuable trademark. Like patent rights, inaction can result in loss or degradation of rights. Renewal fees are due between year 5 and 6 and between year 9 and 10 after issuance.

Continuous Use. Where a fiduciary becomes a trademark owner, he or she must proactively own it, use it, and protect it. In addition to monitoring for infringement of a trademark, a fiduciary must ensure uninterrupted use since the strength of a trademark may be significantly weakened or lost without continuous use. Thus, a fiduciary owning an unincorporated business with trademarks needs to immediately ensure that marks are being used and must ensure continuous operation of the business for the full duration of the fiduciary's ownership. One instance of tension between fiduciary duties and a trademark owner's duties arises in this situation because, where a business entity is unincorporated, a personal representative of a decedent needs court authorization to continue the operation of the business beyond an initial six-month period. (Cal. Prob. Code § 9760.) The fiduciary must be proactive in obtaining court authorization if he or she is not certain distribution of the trademark will occur within the initial six months.

Another hazard is that a fiduciary has a duty not to continue any infringing activity that he or she inherits and, if he or she becomes aware of infringement by the decedent or estate, he or she must provide proper notice to the would-be creditors pursuant to applicable state law.

Intent to Use. There is also something known as an intent-to-use trademark. If a decedent had future business plans, he or she may have secured trademark rights on an "intent to use" basis. (15 U.S.C. § 1051(b).) Such applications must be followed up with proof of use. (15 U.S.C. § 1051(c).) Intent-to-use trademark applications cannot be assigned to a fiduciary or beneficiary until after proof of use

is made.[31] That means that potential rights under such applications will be lost unless there is sufficient use and the necessary steps are taken to perfect trademark registration with the USPTO. A fiduciary does not want to inadvertently abandon a mark that was on the verge of use because it may have been the result of considerable investment. If the proprietor had an intent-to-use application for the cup trademark, the fiduciary needs to prove use of the mark in commerce before he or she will even be able to assign it to the estate. If the cups being used at the café are already marked, then the fiduciary may simply be able to submit proof of the proprietor's use. If not, then he or she will have to take an active ownership role and invest in the trademark. This is conceptually similar to a fiduciary's role with respect to real property that is not move-in ready where the fiduciary considers investment in remodeling to increase value of the asset prior to sale. For intent-to-use trademark rights, the fiduciary must consider investment in use (i.e., advertising) to secure the asset. The monetary investment in use may not be as high as remodel costs and the asset is a loss without it, but can the estate afford such an investment?

Abandonment. If the fiduciary determines that preserving an IP asset is no longer prudent, a trademark can be abandoned at any time by written request for abandonment. (37 C.F.R. § 2.68.) Abandonment is irreversible.

iv. Intellectual Property Assets: Copyrights

Copyrights have no use requirements or regular fees.

Copyright Term Extension. For all post-1977 works of art, the basic copyright term is life of the author plus 70 years. However, copyright has changed over the years and in some instances copyrights have been extended beyond the original term of rights. That means copyrights dated between 1964 and 1977 may exist even if copyright certificates state that the rights have expired.

Recapture Rights or Estate Bumping. Copyrights are also subject to a unique right of recapture. Recapture rights are embodied in the Copyright Act at 17 U.S.C. § 203. They are unique to U.S. copyright law. Under certain circumstances, recapture rights allow an author to give notice of the termination of an exclusive or nonexclusive grant of a transfer or license of copyright if it was executed by the author on or after January 1, 1978, effectively recapturing the rights the creator previously contracted away. Recapture rights are not applicable to works created pursuant to the work-for-hire doctrine or transfers by will. (17 U.S.C. §§ 201 (b), 203, 304(c).)

Where an author does not assign or license his or her copyright by will, the associated termination right passes by statute. (17 U.S.C. § 203.) It passes 100% to the author's widow or widower, unless there are surviving children or grandchildren, in which case the widow or widower owns a 50% interest, and the

[31] There is an exception for business succession (15 U.S.C. §1060(a)(1)).

other 50% interest is divided equally among surviving children and per stirpes among any surviving child of a deceased child of the author. If no widow, widower, child, or grandchild is surviving, termination rights pass to the executor, administrator, personal representative, or trustee.

Termination may only be exercised by a person or persons holding more than 50% interest in the termination right. (17 U.S.C. § 203(a)(1).)

A statutory heir or majority of owners, as the case may be, may terminate the grant of transfer or license by following strict statutory requirements. The termination may be effected "at any time during a period of five years beginning at the end of thirty-five years from the date of execution of the grant; or, if the grant covers the right of publication of the work, the period begins at the end of thirty-five years from the date of publication of the work under the grant or at the end of forty years from the date of execution of the grant, whichever term ends earlier." (17 U.S.C. § 203(a)(3).)

This recently occurred with the second *Top Gun* movie, where the heirs of the author filed a complaint on June 6, 2022, against Paramount Pictures Corporation in an attempt to recapture the copyright that had been granted to it in 1983.

Open Source Copyright License. Some copyrighted materials are dedicated to the public by open source licenses. The concept is to limit liability of the creator while allowing public use and creation of derivative works.

v. Intellectual Property Assets: Rights of Publicity

Rights of publicity have no use requirements or regular fees. However, some states do require registration.

Access and monetization of postmortem NIL might only be by way of social media accounts, which a fiduciary will need to secure access to and control.

D. Consideration of Valuating Digital Assets[32]

Valuation of digital assets can be very complex and speculative.

i. Valuating IP Will Typically Require Expert Assistance

Is there a License? Does the IP generate income or royalties? Does it have the potential to create income? Is there a non-income benefit such as excluding competition? Is there goodwill associated with the IP/trademark/right of publicity?

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For example, Michael Jackson's estate tax case, Tax Court Memo 2021-48 filed on May 3, 2021, was a 271-page decision that largely focused on valuation of his music copyrights and his right of publicity.

ii. Basis of Virtual Currency Acquired from a Decedent

(a) IRC § 1014(a) generally provides that the basis of property acquired or passing from a decedent is equal to its fair market value at the decedent's death, or the alternate valuation date if an alternate valuation date election is made under IRC § 2032.

(b) A decedent's ability to initiate blockchain transactions using his or her private keys passes to whoever becomes entitled to the decedent's wallets at death. The wallet should be considered the property that is acquired or passes from the decedent.

(c) A wallet typically contains multiple private keys. In that case, each private key should obtain a separate basis under IRC § 1014(a). In this view, the wallet is not one item of property but many items for IRC § 1014(a) purposes.

(d) Wallets may be subject to valuation discounts to reflect security risk, as discussed below. Any discount reduces IRC § 1014 basis.

iii. General Valuation

(a) Notice 2014-21 provides that if virtual currency is listed on an exchange and the exchange rate is established by market supply and demand, the fair market value of virtual currency is determined "for U.S. tax purposes" by converting the virtual currency into dollars at the exchange rate "in a reasonable manner that is consistently applied."

(b) Presumably, the position in Notice 2014-21 on valuation also would apply for U.S. gift and estate tax purposes.

(c) Note that, because the conversion of virtual currency into dollars may be made at the exchange rate in "any reasonable manner that is consistently applied," the high/low averaging method that applies to publicly traded securities does not need to be used, although presumably it may be used. Treas. Reg. § 25.2512-2(b)(1) (requiring publicly traded securities to be valued using the average of the high and low publicly quoted trading prices on the date of the gift).

(d) It is possible that cryptocurrency should be valued at a security discount, as discussed below.

iv. Security Discount Planning with Cryptocurrency

(a) Suppose Father holds two copies of the same private key, both stored in the form of paper wallets.

(b) Under the willing-buyer-willing-seller test, "[t]he value of the property is the price at which such property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell, and both having reasonable knowledge of relevant facts." Treas. Reg. § 25.2512-1(a).

(c) A willing buyer who is aware of the existence of a second copy of the same private key presumably would pay less for one copy. After all, the value of one copy is only as good as the holder's ability to outrace the other holder to exploit the value of the private key.

(d) Now suppose that Father simultaneously gives one copy of the private key to Son and the second copy to Daughter. The two copies should not be aggregated for valuation purposes. *Cf.* Rev. Rul. 93-12 (holding that, where the donor makes a gift of 20% of the shares in the same corporation to each of five children, the gifts are not aggregated for valuation purposes and each gift may qualify for a discount for lack of control).

(e) Thus, it seems that multiple copies of private keys could be used as a discount planning device. That Son and Daughter may be able to agree on the use of the private key (e.g., by splitting the cryptocurrency between them), and thereby together receive the entire value of the private key, should not deprive Father of valuation discounts. *Cf. Estate of Bright*, 658 F.2d 999, 1001 (5th Cir. 1981); *Propstra v. United States*, 680 F.2d 1248 (9th Cir. 1982) (rejecting the "unity of ownership" principle of valuation).

v. Considerations re Tax Fraud

Blockchain technology, because it permits anonymous transactions, also facilitates tax fraud. Perhaps every estate tax attorney has been asked whether one can give valuable tangible property to children just before death so that nobody will know about it. Cryptocurrency makes similar fraud easy and difficult to detect through anonymous transfers on the blockchain. Other frauds involve failing to report gain, compensation, and other income.

The Internal Revenue Service ("IRS") has successfully obtained information on Coinbase customers using a John Doe summons. *United States v. Coinbase, Inc.*, 120 AFTR 2d 2017-6671 (U.S. Dist. Ct. N.D. CA 2017). In the litigation, the IRS revealed that fewer than one thousand taxpayers reported cryptocurrency gain or loss in each of 2014 and 2015. Stepped-up tax enforcement efforts will continue.

V. Previewing the Future of Digital Assets and Watching Out for New Planning Techniques

On March 9, 2022, President Joseph R. Biden issued his Executive Order on Ensuring Responsible Development of Digital Assets (the "Order"). It sets policy for advancing digital and distributed ledger technology for financial services. The Order states: "The United States has an interest in responsible financial innovation, expanding access to safe and affordable financial service and reducing the cost of domestic and cross-border funds transfers and payments, including through the continued modernization of public payment systems."

The Order directs multiple U.S. departments and agencies to collaboratively conduct with the "highest urgency" research and development on design and deployment options for a U.S. Central Bank Digital Currency. The first round of reports is due to President Biden on September 5, 2022, with further research and development efforts continuing for many months thereafter. By all accounts, the Order is a bold indication that the United States recognizes that blockchain technology, cryptocurrency, and all digital assets are here to stay in both our domestic and the global financial systems.

The Order contains specific directives aimed at cybersecurity: "Cybersecurity and market failures at major digital asset exchanges and trading platforms have resulted in billions of dollars in losses. The United States should ensure that safeguards are in place and promote the responsible development of digital assets to protect consumers, investors, and businesses; maintain privacy; and shield against arbitrary or unlawful surveillance, which can contribute to human rights abuses."

The White House instructs that "[w]e must mitigate the illicit finance and national security risks posed by misuse of digital assets. Digital assets may pose significant illicit finance risks, including money laundering, cybercrime and ransomware, narcotics and human trafficking, and terrorism and proliferation financing."

The Order mandates interagency cooperation in investigating, developing, and reporting to the White House in tiers, with various deadlines set at 180 days (September 5, 2022), 210 days (October 5, 2022), and one year (March 9, 2023).

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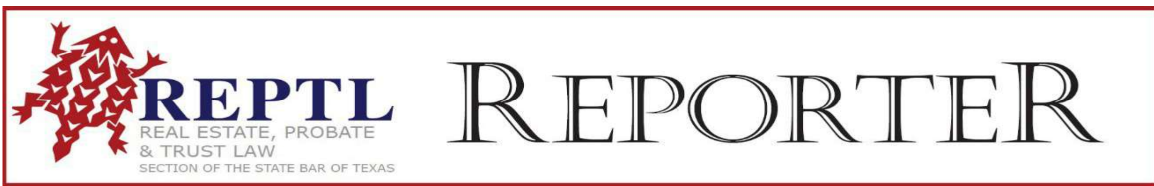

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The REPTL Reporter is the official journal of the Real Estate, Probate, and Trust Law Section of the State Bar of Texas (REPTL). It is published by REPTL to provide education and information for REPTL members in the areas of real estate, probate, trust, guardianship, tax, and water law. A copy of each issue is furnished to the members of REPTL as part of their section dues.

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My Two Cents: Two Provisions to Include in Trusts Governed by the New Texas Rule Against Perpetuities Period

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I. Introduction

The current environment of federal tax law uncertainty and the increased focus on our own mortality amid the COVID-19 pandemic has unquestionably had an effect on how wealthy individuals and families approach estate and trust planning. Not only has there been a significant surge in will drafting due to COVID-19, any estate planning professional will attest that in years of increased tax law uncertainty there is generally a correlation of increased interest in the creation of irrevocable trusts.[5]

A fundamental determination that must be initially addressed in creating an irrevocable trust is *the appropriate duration of the trust*. In some instances, it may be fitting for a trust agreement to contain "age-terminating" distributions to the beneficiary. A common and simplistic example would require the trustee of a trust to distribute one-third of the fair market value of the trust to the beneficiary outright once the beneficiary reaches age twenty-five, one-half at age thirty and the remaining trust estate at age thirty-five, at which time the trust would terminate.[6] In other situations, the best practice would be to have the trust last for the lifetime of the primary beneficiary, or for as long as state law allows.[7] For many decades, Texans relied upon the common law rule against perpetuities (RAP) period contained in the Texas Property Code, and could draft trust agreements based on the understanding that remaining trust assets would pay out to those beneficiaries who were living twenty-one years after the death of the last designated life in being at that time.[8] If Texas settlors desired a longer period, they would have to look to other states for that option.

With Texas's new RAP period, as it applies to non-charitable trusts, the duration of Texas trusts that became irrevocable on or after September 1, 2021, will now have a fixed 300-year time limit.[9] While a detailed discussion of the new RAP period is beyond the scope of this article, it is difficult for parents, grandparents, or any settlor to fathom creating a trust that will exist for 300 years.[10] At the end of the RAP period, trust assets will ultimately distribute to descendants so remote the settlor will not have personally known the beneficiary, or even the beneficiary's grandparent. At this point, the attorney is

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* The author does not represent JPMorgan Chase & Co., or its affiliates, in a legal capacity.

[5] Rachel Ripp*, More West Texans Drafting Wills Due to COVID-19*, NEWS WEST 9, Sept. 10, 2021.

[6] A discussion regarding factors to consider when choosing an age-terminating trust or a trust with a longer duration is beyond the scope of this article, but questions to consider are size and asset composition of the trust, maturity and financial sophistication of the beneficiaries, need for protection from creditors or divorce, and general intent of the settlor.

[7] Allowing the trust estate to stay intact for as long as possible generally provides the beneficiary with optimal protection from creditors, and may preserve a settlor's transfer tax exemption amounts for future generations.

[8] *See* TEX. PROP. CODE § 112.036.

[9] TEX. PROP. CODE § 112.036; *see* Catherine Bright Haws & Ashley E. McMillan, *A New Texas Rule Against Perpetuities for Trusts*, 59 REAL ESTATE PROB. & TR. L. REP. 3, 2021.

[10] *See* Howard Zaritsky, *The Rule Against Perpetuities: A Survey of State (and D.C.) Law*, AM. COLL. OF TR. AND EST. COUNSEL 1 (last visited Oct. 6, 2020).

not merely drafting for conventional "unforeseen" family circumstances (such as a child's hidden substance addiction) but is drafting for a trust that will not terminate until some time after the year 2300.

This creates challenges for practitioners and families alike because it becomes unrealistic to have expectations about one's lineage so far into the future. How can a settlor properly plan for all possible contingencies? What is a proper balance of restriction, flexibility, access, and control for beneficiaries born a couple hundred years from now? If there is a need to change, amend or modify the irrevocable trust, what is the path of least resistance to avoid the need for judicial intervention? This article addresses two highly effective strategies that will provide future trustees and beneficiaries the means to manage and administer trusts that may now exist for 300 years. Practitioners should consider whether their current drafting style or forms should be modified to include these provisions in light of the new extended Texas RAP period.

II. Discretion to Decant

Since September 1, 2013, the ability to "decant" an existing trust has been an extraordinarily powerful tool in the Texas estate planner's toolbox.[11] To decant a trust, an "authorized" trustee distributes some or all of the principal from an existing trust to a new trust that has different and more favorable terms.[12] This was a welcomed addition to the Texas Trust Code because modification or alterations to a trust can now be accomplished through the trustee's own action, including providing the required notice to the beneficiaries in compliance with the governing statutes.[13] Prior to enactment, an irrevocable trust could generally only be modified by techniques such as non-judicial settlement agreements, judicial modifications, or trust mergers; each method having its own limitations.[14]

Decanting can be used to modify an existing trust agreement to achieve a variety of goals. Some goals are as follows: to correct drafting errors, build out fiduciary succession provisions, change the situs of the trust to a friendlier jurisdiction, allow state income tax flexibility, add or change trust beneficiaries, provide beneficiaries with the power to redirect trust assets, change certain distribution provisions, extend the duration or terminate a trust or change a trust to qualify for special needs trust treatment.[15] This example list is by no means exhaustive.

In light of the extended Texas RAP period, it may make sense to draft a trust agreement in a way that maximizes the trustee's ability to decant. With a trust agreement that clearly paves the way to decant, the latitude of a future trustee's options for modifying the trust appreciably expands. To accomplish this, the trust agreement itself can contain explicit provisions drafted by the attorney permitting decanting, or the drafting attorney may rely on TEX. PROP. CODE §§ 112.071–87. These

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[11] TEX. PROP. CODE § 112.071.

[12] TEX. PROP. CODE §§ 112.071–73. An authorized trustee is a person, other than the settlor, who has authority under the terms of a first trust to distribute the principal of the trust to or for the benefit of one or more current beneficiaries. PROP. §112.071(1).

[13] TEX. PROP. CODE §§ 112.071–87.

[14] For additional reading on decanting and other modification options, *see* Toby Eisenberg, *Uncontested Trust Modifications: Tips and Techniques*, 45 STATE BAR OF TEX. ANN. ADVANCED REAL EST. & PROB. (2021).

[15] A discussion of decanting and potential transfer tax issues is beyond the scope of this article. For a detailed discussion, see William R. Culp, Jr. & Briani Bennett-Mellen, *Trust Decanting—State Law and Federal Tax Considerations*, BLOOMBERG LAW PRORTFOLIO 871-2ND T.M. (last visited Oct. 15, 2021).

statutes contain the authority for decanting. Notably, the statutes contain a critical distinction between "full discretion" trustees and "limited discretion" trustees. The trustee's level of discretion, whether full or limited, gives rise to the scope of its authority in making modifications to the existing trust agreement.

"Full discretion" means that the trustee of the existing trust has a power to distribute principal to or for the benefit of one or more of the beneficiaries of a trust, and that the trust is not a trust with limited discretion. Conversely, "limited discretion" means either (1) a power to distribute principal according to mandatory distribution provisions under which the trustee has no discretion, such as the age-terminating example referenced in the introduction; or (2) a power to distribute principal to or for the benefit of one or more beneficiaries of a trust that is limited by an ascertainable standard, including the health, education, support, or maintenance of the beneficiary.[16]

Trustees with either full or limited discretion may decant to modify administrative provisions such as fiduciary succession provisions. The disparity in authority between full discretion trustees and limited discretion trustees becomes apparent when modifying the more substantive provisions of an existing trust. Should a trustee wish to decant in order to change the original beneficiaries of the first trust, the trustee must have full discretion to do so. Section 112.072(a) of the Texas Property Code provides that a trustee with full discretion may distribute trust principal to a second trust for the benefit of one, more than one, or all of the current beneficiaries of the first trust and for the benefit of one, more than one, or all of the successors or presumptive remainder beneficiaries of the first trust. A trustee with full discretion may also alter the class or objects of a power of appointment granted under the first trust.[17] These options are not available to trustees with limited discretion.

It should be noted that a trustee cannot use the decanting statute to extend the RAP period of the existing trust, eliminate certain vested rights of a beneficiary, or make certain changes to benefit himself. The decanting trustee cannot eliminate a right of removal for his position, decrease his fiduciary duties, reduce liability for breach of those duties, or solely change trustee compensation provisions.[18]

Granting full discretion to a trustee in a trust agreement will ensure maximum flexibility to decant under current Texas law. Although, as one might imagine, a settlor may not want to provide the trustee with the power to distribute trust principal in absence of an ascertainable standard, as this course of action could be contrary to the settlor's intent in creating an irrevocable trust. A variety of personal or delicate reasons may come into play. Additional considerations arise when a beneficiary or related party is also serving as a trustee with full discretion. In this situation, distributions must be limited to an ascertainable standard, generally health, education, maintenance, and support. This is so that the trust not only retains its integrity as an asset protection vehicle, but also retains any favorable transfer tax characteristics.

To guard against these concerns, the trust agreement could allow for the appointment of an independent trustee. The independent trustee is generally authorized to make distributions to the beneficiary above and beyond an ascertainable standard, while still maintaining asset protection and transfer tax benefits.[19] The independent trustee could then decant with the expanded powers enumerated in the statute or as described in the existing trust agreement. As such, the drafting attorney

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[16] TEX. PROP. CODE § 112.071(5), (6).

[17] TEX. PROP. CODE § 112.072(b)–(d).

[18] TEX. PROP. CODE § 112.085.

[19] TEX. PROP. CODE §112.079.

should carefully consider and build out the following provisions relating to the role of an independent trustee: (i) scope of authority (that could include powers beyond non-discretionary distributions); (ii) fiduciary duties; (iii) standard of care; (iv) liability; (vi) indemnity, if any; (v) compensation; (vi) succession, removal and vacancy; and (vii) provisions describing what happens if there is no independent trustee ready and willing to serve.

Though including an independent party will allow the trust agreement to be pliable, this option requires the settlor to entrust a certain level of control to someone other than their partner, descendants, or other related individuals that are not qualified to serve as an independent party under state or federal law. Additionally, if the settlor considers appointing a bank or trust company as an independent trustee, the settlor should speak with the trust department prior to the appointment as some institutions may not be keen to accept appointment only to exercise the authority to decant. Similar to institutions, individuals might be hesitant to serve because of the exposure to liability, as well as difficulty navigating thorny income and transfer tax issues.

Despite potential challenges in executing a decanting, it may make sense to draft the trust agreement to leave the door open for the future trustee to consider whether decanting helps meet the needs of the trust's beneficiaries. The trustee's level of discretion in the trust agreement is a vital consideration in the decanting analysis. In fact, drafting a trust agreement in such a way as to utilize the Texas decanting statute to its fullest may serve as a savings mechanism if other more flexible provisions are not contained in the trust agreement, because the decanting statute could later be used to modify the existing trust to include such provisions.

III. Power to Redirect Trust Assets

The ability of a beneficiary (or another individual generally called a powerholder) to direct the trustee to distribute trust assets to other individuals, entities, or to one's self is undoubtedly one of the most significant tools for creating the elasticity a trust agreement may require to stand the test of time. A "power of appointment" allows the beneficiary to adapt to family changes, changes in tax laws and other situations that cannot be contemplated at the time a trust agreement is executed. A power may be "exercised" or used during a beneficiary's lifetime, or at her death through her testamentary documents. Testamentary documents usually include a will or codicil that recite facts regarding the power and provide instructions for the redirection of the trust property.

A power of appointment can be extremely broad, permitting a beneficiary to give property held in trust to an appointee (which can be any person or entity). This is referred to as a general power of appointment, and this type of power may cause unintended consequences such as loss of spendthrift protection or estate tax inclusion.[20] For example, suppose Mom creates an irrevocable trust for Child, with a general power that allows Child to redirect trust assets to anyone upon Child's death. All of the assets subject to the power are included in Child's estate for federal estate tax purposes, which in most cases is not the intended result.[21] Despite the potential adverse tax consequences, in some specific situations estate planning practitioners will use a general power to achieve certain transfer tax benefits. For example, a general power may be "triggered" in circumstances such as to obtain a "step-up" in income tax basis at a beneficiary's death or to allow a beneficiary to use her own generation-skipping transfer (GST) tax exemption on the trust property. As one can see, general powers can have quite

[20] I.R.C. §§ 2041 & 2514.

[21] I.R.C. § 2041.

serious income, gift, estate, and GST tax consequences.[22]

Use of a non-general power may avoid some of these potential tax pitfalls.[23] A non-general power limits the scope of appointees to whom a beneficiary may redirect trust assets. Non-general powers are often referred to as limited or special powers of appointment. Structured properly, this type of power should not give rise to loss of creditor protection or estate tax issues, as long as the beneficiary did not create the power herself and cannot direct trust property to (i) herself, (ii) her estate, (iii) her creditors or (iv) the creditors of her estate. A popular example is the following scenario: Dad creates an irrevocable trust for Child and gives her lifetime and testamentary limited power of appointment. Child may only redirect trust property to her own descendants, the spouses of her own descendants in trust and to charitable organizations as defined in the Internal Revenue Code. If Child chooses not to exercise this power, the remaining trust property will be distributed to the Child's own descendants at her death. This means during her lifetime and in her will, Child may distribute the trust property only to her descendants, the spouses of those descendants, and to charity, but in any amounts as she sees fit and either in further trust or outright. Should one of her children not need as much due to his or her own success, she can redirect trust property to her other children. Should Child need to alter the plan to fit her own circumstances, such as creating a trust at her death for the benefit of her partner to help maintain the household, Child is able do so. Exercising a lifetime power of appointment, however, may cause adverse gift tax consequences depending on the specific distribution provisions of the trust agreement and other factors.[24]

Powers of appointment provide a unique opportunity for modifying the original distribution of trust assets by allowing a beneficiary to change the ultimate disposition of trust property. Years, decades, perhaps centuries after a trust is created, a beneficiary may be in a better position than the settlor to determine who should ultimately benefit from the trust assets, based on their current family situation. Instead of outright transfers, trust assets could be funneled to a new trust with more favorable terms given the current needs and current laws in effect. Similar to decanting though, a power of appointment cannot be used to extend the original RAP period of the original governing document.

Powers of appointment may produce similar concerns to decanting. A settlor may not be enthusiastic about granting such a potentially broad power to a non-fiduciary powerholder. For added protection, the settlor could include a provision requiring the consent of an independent party to exercise the power. This may hedge against a settlor's fears regarding the ultimate use of the property, but again, the drafting attorney should fully augment the appointment utilizing any other relevant provisions to the intended scope of this role.

IV. Conclusion

The new fixed 300-year time limit for non-charitable irrevocable trusts requires a shift in perspective on the way that trusts have been traditionally drafted for the last few decades. Practitioners

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[22] Additionally, an inter vivos exercise or release of a general power of appointment is a transfer of property that may be subject to gift tax under I.R.C. §2514. A general power may also inadvertently trigger the grantor trust rules in I.R.C. §§ 671–79.

[23] The exercise of a limited power can also result in a taxable transfer if a donee has the right to trust income and also has the power to direct income distributions to another. For a detailed discussion, *see* Christopher P. Cline, *Powers of Appointment—Estate, Gift, and Income Tax Considerations*, *Bloomberg Law Portfolio 825-4th T.M.* (last visited Oct. 15, 2021).

[24] *Id.*

should invest the time to research decanting and powers of appointments and revise their form language in accordance with best practices. Practitioners should also place a higher emphasis on the settlor's understanding of the duration of an irrevocable trust and the settlor's views on the potential need to modify, amend, or alter the trust. Engaging in conversations regarding decanting, powers of appointment, and other techniques will lead to the best result for the settlor and the many future generations of trust beneficiaries.

IT'S ALL GREEK TO ME: EXPLAINING TAX-DRIVEN TRUST PROVISIONS FOR NON-TAX ATTORNEYS

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I. ACKNOWLEDGMENTS

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II. INTRODUCTION

Not long ago, I was assisting another lawyer at my firm with a litigation matter. Our client was suing a trustee for breach of fiduciary duty. Among other misdeeds, the trustee had made improper distributions to himself. One day, the other lawyer called and asked me to turn to a particular section in the trust instrument. "Look," said the other lawyer, "he's not allowed to distribute property to himself. We've totally got him. I didn't notice this before because it's way back in the boilerplate."

I turned to the section and immediately saw what my colleague was looking at. "That doesn't say what you think it says," I hold him. "This says a beneficiary can't appoint property to himself, his creditors, his estate, or the creditors of his estate."

"Right, and that's what he did. He violated the trust."

"No, he distributed property to himself, he didn't appoint property to himself."

"Is there a difference?"

"Yes, several. But most importantly, he distributed property to himself in his capacity as trustee. If he had appointed property to himself, he would have done so as a beneficiary."

"Look, they must have put this language in the trust for a reason. It says he can't give himself property. At the very least, it shows that [the grantor] didn't want him to have any of this property. That helps us, right?"

"It was put in the trust agreement for a very good reason. It prevents a big tax problem. This is savings language to keep beneficiaries from having a general power of appointment that would cause the entire trust corpus to be includible in their estates. It doesn't prevent him, as trustee, from making distributions to himself."

"I just don't understand all this tax stuff. It's all Greek to me!"

The fact is, most lawyers shy away from tax. Most lawyers find tax mystifying and are content remaining blissfully ignorant on the subject. Many law firm representation agreements require clients to expressly exclude all tax advice from the representation. And yet, tax pervades much of what we, as estate planners and probate attorneys, do on a daily basis. Much of the

language in modern American trust instruments is there to prevent various tax problems. There are even non-tax statutes that have been crafted to track language in the IRC.[1] So, why do so many attorneys ignore something that is so fundamental to their work?

This paper seeks to expose and explain some of the tax-driven provisions that are regularly found in trust instruments. It is premised on the notion that planners and litigators will serve their clients better if they have some background information. It is also drafted for practitioners who do not consider themselves tax attorneys. Although by no means comprehensive, this paper is intentionally broad and shallow, intended to provide a high-level perspective on many of the most influential rules in a manner that is easily digested by seasoned attorneys who do not wish to practice tax law, as well as, novice attorneys who are just starting to learn about trusts. If this describes you, I hope you find the information below helpful. Enjoy!

III. HISTORY AND SOURCES OF TRUST LAW IN TEXAS

The law of trusts in Texas comes from a confusing array of sources. In order to better understand this patchwork, a brief review is in order.

A. History

The concept of a trust relationship is hundreds, if not thousands, of years old. Scholars theorize that the ancient Romans utilized a rudimentary form of a trust relationship to circumvent laws preventing the devise of property to certain incompetent individuals. Other writers attribute the first traces of trust law to unique features of the German Lex Salica, or law of the Salian Franks, that appeared in the fifth century. Still others point to the seventh century Muslim tradition of charitable endowments called *waqfs* as the origins of modern trusts.

However, there can be no denying the preeminence of English common law in developing and furthering the widespread use of trusts. Beginning in the 1320s, English landholders would transfer legal title in real property to a group of individuals who would hold the property for the initial benefit of the original landholder and, eventually, for the benefit of whoever the landholder designated in his Will. This practice conveniently sidestepped feudal laws regarding forced heirship and wardship by the Crown. Legal scholars have since coined this early social practice as the *feoffment of uses*. Over the succeeding centuries, the disputes between *feoffors* and the *feoffees* eventually became a mainstay of the ecclesiastical and chancellors' courts. Thus, a cohesive body of law developed that became known as the feoffees' fiduciary duty and the modern trust was effectively born.

B. The Texas Trust Code

The Texas Trust Code (herein, the "**TTC**") is contained within Title 9 of the Texas Property Code, specifically, §§ 111.001 *et seq*. The TTC contains most (but not all) of the statutory provisions relevant to the day-to-day activities of trustees. Most of the TTC provisions are default

[1] See e.g., TTC § 112.035(f)(1)(A)(ii), providing spendthrift protection where a trust's beneficiary is also its trustee but is subject to an ascertainable distribution standard.

provisions which may be overridden in a trust instrument.[2] In practice, many of the statutory provisions, which are designed to be especially conservative, are regularly overridden by standard provisions in trust instruments to more effectively achieve the goals behind the trusts they govern. The provisions of the TTC which may not be waived, overridden, or otherwise limited by a trust instrument are found in § 111.0035.[3]

C. Common Law

Where the TTC is silent, the next source of authority is the common law. TTC § 113.051 provides that "[i]n the absence of any contrary terms in the trust instrument or contrary provisions of [the TTC], in administering the trust, the trustee shall perform all of the duties imposed on trustees by the common law."[4]

Very few trust litigation cases are reported, making it hard to find caselaw that is both biding and on point for a given fact pattern. Given the small number of cases on point, practitioners may be forced to look to extra-jurisdictional authority when seeking guidance for a given position. When doing this, practitioners in Texas should note the wide variation in trust rules adopted by the various jurisdictions. Where lawyers wish to rely on (or distinguish) extra-jurisdictional precedent, they are well-advised to examine the other rules applicable in such jurisdiction and compare them to those applicable in Texas. In other words, if you think a certain rule should be adopted in Texas, you are more likely to win your argument if the law you want to copy here comes from a state with other rules that are similar to ours.

D. Secondary Sources

Although not precedential, an array of secondary sources is both available and frequently relied on by practitioners. While there are many treatises, hornbooks, supplements, outlines, websites, and other sources available, the most important secondary sources are the Restatements of Trusts and the Uniform Trust Code.

The Restatement (Third) of Trusts was promulgated in 2003 and followed the Restatement (Second) of Trusts, which dates to 1959. Texas has not adopted either of these Restatements, but they are nonetheless valuable here for context and guidance. On the other hand, certain provisions in the Restatements are in direct conflict with the TTC, so caution is advised when relying on them. Furthermore, several key differences relate directly to the duty to inform.

The Uniform Trust Code (the "**UTC**") was approved by the National Conference of Commissioners on Uniform State Laws in 2000. Since then, a majority of US states has adopted the UTC. Texas, however, is not one of them, and legislative history indicates that certain UTC

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[2] *See* TTC § 111.0035(b) (West 2019).
[3] *Id.*§ 111.0035(b)(4)(A).
[4] *Id.*§ 113.051.

provisions were specifically rejected in the TTC. However, many provisions of the UTC have been brought into the TTC on a piecemeal basis.[5]

IV. SOURCES OF TAX LAW APPLICABLE TO TEXAS TRUSTS

The various sources of tax law and related guidance is also confusing to those who do not deal with it regularly. Therefore, a short description is once again in order.

A. The IRC

Since no state income or transfer taxes (i.e., estate tax, gift tax, and generation-skipping transfer tax) are imposed in Texas, nearly all taxes applicable to trusts here are federal. Most federal tax laws are found in the Internal Revenue Code of 1986 (the "**IRC**"). The IRC is part of Title 26 of the United States Code. The IRC is complex, and its provisions should always be read in the context of related treasury regulations, as well as court decisions interpreting it.

Trusts (as well as related parties such as grantors and beneficiaries) can be impacted by both income taxes and transfer taxes. Subtitle A of the IRC addresses income taxes and Subchapter J of Chapter 1 (§§ 641 to 692) deal specifically with income taxation of trusts and estates. Subtitle B of the IRC (§§ 2001 to 2704) addresses transfer taxes.

B. Treasury Regulations

The treasury regulations (the "**Regs.**") provide the Department of the Treasury's official interpretation of the IRC and give directions to taxpayers on how to comply with its terms. Although not technically binding, the Regs. are given great deference by tax courts. The Regs. can be found in Title 26 of the Code of Federal Regulations.

C. Other Guidance

In addition to participating in the issuance of Regs., the IRS publishes other forms of official tax guidance, including revenue rulings, revenue procedures, notices, and announcements. These too are generally nonbinding but should be given significant deference.

D. Tax Courts

The United States Tax Court is a federal trial court. It is an independent judicial forum that is not controlled by or connected with the IRS. Congress created the Tax Court as an independent judicial authority for taxpayers disputing certain IRS determinations. The Tax Court is composed of 19 presidentially appointed members. Although the Court is physically located in Washington, D.C., the judges travel nationwide to conduct trials in various designated places of trial.

[5] See Kara Blanco, *The Best of Both Worlds: Incorporating Provisions of the Uniform Trust Code into Texas Law*, 38 TEX. TECH L. REV. 1105 (2006) Note 8, at 1106.

Tax Court judges issue memorandum opinions and Tax Court opinions. Generally, a memorandum opinion is issued in a regular case that does not involve a novel legal issue. A memorandum opinion addresses cases where the law is settled or factually driven. A memorandum opinion can be cited as legal authority. On the other hand, a Tax Court opinion is issued in a regular case when the Tax Court believes it involves a sufficiently important legal issue or principle. Tax Court opinions can also be cited as legal authority.

V. ESTATE AND GIFT TAX ISSUES

A. The Annual Exclusion

(1). Background

The annual exclusion from gift tax ($17,000 per donor per donee in 2023) is an essential estate planning tool, but its rules are not as straightforward as one might think. Although each of us takes advantage of these rules all the time, most people don't realize that, in the US, all gifts are generally taxable. The annual exclusion is merely an exception to this general rule under which *de minimis* gifts can be made without any tax consequence. But for the annual exclusion, most birthday, holiday, and other gifts would require a gift tax return. Even the United States government recognizes how absurd that would be!

But the annual exclusion applies only to present interests and not to future interests.[6] A "**present interest**" is an unrestricted right to the immediate use, possession or enjoyment of the property or the income from property (such as a life estate or a term certain).[7] Most gifts in trust are classified by the Regs. as future interests,[8] so the annual exclusion does not apply to them. In order to make a gift in trust qualify for the annual exclusion, it must first qualify as a present interest, so one or more beneficiaries must be given an unrestricted right to the immediate possession and enjoyment of the gifted asset.

The easiest way to take advantage of the annual exclusion is with outright gifts. Indeed, the vast majority of gifts made by US taxpayers are outright and covered by the annual exclusion. But sometimes, gifts need to be made in trust for one reason or another. For example, gifts to minor or incapacitated beneficiaries are often made in trust. Similarly, it may be desirable to hold life insurance in trust and pay the premiums with regular gifts. Finally, many of the more sophisticated trusts used for tax planning and wealth transfer can benefit from the annual exclusion. In these situations, a special tool is often deployed.

(2). Crummey Rights

A so-called "**Crummey right**" is a tool by which a gift in trust, which would otherwise be a future interest, is instead turned into a present interest. This is done by granting one or more trust beneficiaries the right to withdraw contributed property for a period of time. Crummey rights

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[6] IRC § 2503(b).
[7] Regs. § 25.2503-3(b).
[8] See definition in Regs. § 25.2503-3(a).

get their name from the seminal case, *Crummey v. Commissioner*[9] which cured a split in law[10] and left taxpayers with two definitive rules: First, by including Crummey withdrawal rights in their trust instruments, settlors can create trusts into which present interest gifts can be made. Second, such rights can even be granted to minors to be exercised, waived, or allowed to lapse, by their parents or other guardians, even if those *de facto* powerholders are also the donors of a particular gift.[11]

Importantly, for a Crummy right to function properly, the beneficiary must be given a realistic and meaningful right to withdraw property.[12] This means the beneficiary must be given sufficient time to consider his or her options and conclude all formal prerequisites for making the withdrawal. For this purpose, two days' notice is insufficient.[13] Similarly, where beneficiaries prospectively and irrevocably waive their Crummey rights, annual exclusions will not be allowed.[14] In response to creative planners' attempts to maximize tax-free gifting by providing unborn beneficiaries with Crummey Rights, a further limitation has been placed on beneficiaries with a "remote contingent interest."[15] After *Crummey*, one additional case really solidified the rules with regard to withdrawal rights and annual exclusion gifts. In *Estate of Cristofani v. Commissioner*,[16] the Tax Court confirmed that a fifteen-day notice period was sufficient to create a present interest in trust gifts.

Although modern Crummey language can appear a bit complicated at first glance, most of the reasoning and logic behind it is in reaction to the evolution of our understanding of present interests as described above. Practitioners may differ in some of the specifics, however. For example, many drafters prefer to give beneficiaries a thirty-day notice period, while others prefer to close the notice period on December 31st of the calendar year in which a particular gift is made.

B. Powers of Appointment

(1). Generally[17]

The tax treatment of trust assets is heavily impacted by powers of appointment. At first glance, this may seem like a simple concept. If a person can appoint property to themself, they might as well own the property outright…and be taxed accordingly. But numerous permutations

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[9] *Crummey v. Commissioner,* 397 F.2d 82 (9th Cir. 1968).
[10] Compare generally *Kieckhefer v. Commissioner*, 189 F.2d 118 (7th Cir. 1951) with *Stifel v. Commissioner*, 197 F.2d 107 (2d Cir. 1952).
[11] *Id.*
[12] *Id.*
[13] Rev. Rul. 81-7, 1981 C.B. 474.
[14] I.R.S. Tech. Adv. Mem. 9532001
[15] I.R.S. Tech Adv. Mem. 8727003
[16] 97 T.C. 74, acq. 1992-1 C.B. 1.
[17] This paper considers only powers of appointment created after October 21, 1942. Powers of appointment which were created earlier operate under grandfathered rules, however, these have become so rare that they are not addressed in this paper. See IRC § 2514(c)(2) and related Regs.

in the way powers of appointment can be structured quickly lead to a mind-bending quagmire of complex rules, exceptions, and grey areas.

A power of appointment is a nonfiduciary, power to control the disposition of trust property. Usually, the power can be exercised to override the trust's default provisions for the disposition of trust property. To establish a power of appointment, a "**donor**" (usually the trust's settlor) conveys the power upon a donee or "**powerholder**" using language that stipulates various relevant details. A power of appointment may, *inter alia*, be exercisable immediately, upon the occurrence of some specified event (including the powerholder's death), or upon the satisfaction of some ascertainable standard. A power of appointment may be exercisable in favor of a broad number of appointees, or only in favor of a small group or individual.

The power to alter, amend, or revoke a trust instrument or to terminate a trust is a power of appointment.[18] On the other hand, A power to amend only the administrative provisions of a trust instrument, which cannot substantially affect the beneficial enjoyment of the trust property or income, is not a power of appointment. The mere power of management, investment, custody of assets, or the power to allocate receipts and disbursements as between income and principal, is not normally a power of appointment, but that can change if the powerholder has the power to enlarge or shift any of the beneficial interests in the trust assets.

A power of appointment is not always conveyed from one individual to another. Sometimes, an individual conveys property and withholds a power of appointment. As described in more detail below, retained powers of appointment are treated differently than those which are received from someone else.

Following the general rule that state law creates property rights and federal law determines how those rights are taxed,[19] for federal transfer tax purposes, a power of appointment includes any power that has the effect of conferring (or withholding) dispositive control as described above.[20] Thus, no specific wording is required to create a power of appointment for federal tax purposes. Indeed, this fact alone is the source of great confusion among many attorneys and their clients.

Importantly, when a power of appointment is granted, one of three things will happen: The power will either (i) be exercised, (ii) be released, or (iii) lapse. Respectively, each of these possibilities may trigger different tax consequences.

(2). General and Limited Powers of Appointment Distinguished

a) Definition and Background

The IRS lumps all powers of appointment into one of two categories. First, a "**general power of appointment**" is any power of appointment that is exercisable in favor of (i) the

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[18] Regs. § 25.2514-1(b)(1).
[19] *Aquilino v. United States*, 363 U.S. 509 (1960); *Morgan v. Commissioner*, 309 U.S. 78 (1940).
[20] Regs. § 25.2514-1(b).

powerholder, (ii) the powerholder's estate, (iii) the powerholder's creditors, or (iv) the creditors of the powerholder's estate.[21]

Any power of appointment which is not a general power of appointment is classified as a "**limited power of appointment**" (sometimes also referred to as a non-general power of appointment). This distinction, which is incredibly important for tax purposes, is deceptively simple. General powers of appointment can spring up unexpectedly and produce disastrous tax consequences. In addition, there are several situations which might appear to deserve treatment as a general power of appointment, but which the rules treat only as limited powers of appointment.

On a more abstract level, the holder of a general power of appointment has so much control over appointive property that he or she should be treated as the outright owner of the property. Thus, where a powerholder can appoint property to satisfy legal obligations, the tax rules seek to treat that property in the same way as other property which may be used in that manner. Conversely, where property cannot be used to satisfy a powerholder's obligations, it is treated more favorably.

b) Basic Tax Treatment

Ferreting out general powers of appointment is important because general powers of appointment generally trigger tax. For estate tax purposes, all appointive property which is subject to a general power of appointment is includable in the powerholder's estate.[22] This is a draconian rule because it usually triggers inclusion of all the assets of a given trust. Clients will often be confused by the fact that the exercise of a general power of appointment is not needed to trigger inclusion. Merely holding the power at death is sufficient.

If holding a general power of appointment at death triggers inclusion, one might think it a good idea to get rid of the power before dying. Unfortunately, this too can be a problem. For gift tax purposes, the exercise or release of a general power of appointment is a taxable transfer.[23] Additionally, the lapse of a general power of appointment is also treated as a taxable transfer to the extent the value of the property subject to lapse in a given calendar year exceeds the greater of $5,000 or 5% of the aggregate value of appointive property.[24]

(3). Special Rules

a) Pitfalls

Sometimes, general powers of appointment creep up unexpectedly. For example, a beneficiary's power, without limitation, to remove and replace the trustee of a given trust will be treated for transfer tax purposes as a general power of appointment.[25] Under this so-called

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[21] IRC § 2514(b).
[22] IRC § 2041(a)(2).
[23] IRC § 2514(b); Regs. § 25.2514-3(a).
[24] IRC § 2513(e).
[25] See PLR 9735023; see also PLR 8916032

"**revolving door theory**," the beneficiary can continue removing and replacing trustees until he or she simply appoints him- or herself or finds a trustee—usually someone who is close or somehow beholden to the beneficiary—who will do whatever the beneficiary wants, regardless of the fiduciary duties imposed by the trust. In other words, according to the IRS, the unfettered power to remove and replace trustees is equivalent to a power of appointment which is exercisable in favor of the powerholder and, thus, a general power of appointment.

Similarly, where a trustee is empowered to distribute property in a manner which would lessen or discharge a legal duty of support, the trustee is considered to hold a general power of appointment over trust property[26] because, from an economic standpoint, this power is the equivalent of allowing the trustee to distribute power to him- or herself or to his or her creditors. Consider, for example, a situation where a parent acts as trustee for a minor child. Texas law imposes a legal obligation on parents to support their minor children by providing them with clothing, food, shelter, education, and medical and dental care.[27] Thus, if the trustee can distribute property to cover these types of expenses, he or she is deemed to hold a general power of appointment over the property of the trust at issue.

A power of appointment exercisable for the purpose of discharging a legal obligation of the powerholder or for the powerholder's pecuniary benefit is considered a power of appointment exercisable in favor of the powerholder or the powerholder's creditors.[28]

Even limited powers of appointment can trigger tax if the circumstances are right. For example, the exercise or release of a limited power of appointment may result in a transfer tax consequence where the exercise or release has a dispositive effect on any other interests the powerholder may have in a given trust. If, for example, a powerholder is entitled to receive the entire trust income and also holds the power to appoint trust property to another party under a limited power of appointment, a gift of the present value of the income interest will occur if and when the power is exercised because doing so will necessarily deprive the powerholder of that income. In other words, the trust cannot distribute income to the powerholder after the assets are appointed out of the trust, so the powerholder is treated as having made a gift of that income stream. Thus, while limited powers of appointment will usually keep taxpayers safe, there are some situations where this may not be the case.

b) Exceptions

The rules above illustrate some of the circumstances in which a general power of appointment might arise unexpectedly. There are a few instances when one might expect a general power of appointment to be present, but which are excepted for one reason or another.

First, a power of appointment is not treated as a general power of appointment merely by reason of the fact that the set of appointees may, in fact, include a creditor of the powerholder or

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[26] Regs. 20.2041-1(c)(1).
[27] TEX. FAM. CODE § 151.001.
[28] *Upjohn v. U.S.,* 30 A.F.T.R. 2d. 72-5918 (W.D. Mich 1972).

the powerholder's estate.[29] Although confusing, this is a necessary rule because without it, every power of appointment would be a general power of appointment. Consider the very common case of a power of appointment exercisable in favor of the grantor's descendants. This is a textbook power of appointment, and the fact that the powerholder might have borrowed money from one of the his or her descendants should not cause the power to be treated as a general power of appointment.

Jointly held powers can be another exception. A power of appointment that is exercisable only in conjunction with another person is subject to some special rules. First, a power of appointment is not considered a general power of appointment if it is not exercisable by the possessor of the power except with the consent or joinder of the creator of the power.[30] Additionally, a power of appointment is not considered a general power of appointment if it is not exercisable by the possessor of the power except with the consent or joinder of a person having a substantial interest in the property subject to the power that is adverse to the exercise of the power in favor of the possessor, his estate, his creditors, or the creditors of his estate.[31] An interest adverse to the exercise of a power is considered substantial if its value in relation to the total value of the property subject to the power is not insignificant.[32]

Yet, another exception applies in the context of certain restrictions on the exercise of a power of appointment. A power to consume, invade, or appropriate income or corpus, or both, for the benefit of the possessor that is limited by an ascertainable standard relating to the health, education, support, or maintenance of the possessor is not a general power of appointment.[33] Ascertainable distribution standards are addressed in more detail below.

c) Retained Powers and IRC §§ 2036 & 2038

The rules above relate generally to powers that are conferred upon a powerholder by a grantor. But what if the power is withheld by the grantor? That is, what if a grantor transfers property in trust, but retains a power of appointment over the property. In such cases, it is more likely that appointive property will be treated as being owned by the grantor/powerholder.

IRC §§ 2036 and 2038 are designed to address situations where a transferor has gratuitously transferred property but withholds (or, in some instances, later regains) some control over it. These statutes function to bring such property back into the gross estate of the transferor for estate tax purposes.[34] As one commentator has put it, these sections function like strings which the IRC attaches to transferred assets and uses to draw the assets back into the donor's estate after death.[35]

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[29] Regs. 25.2514-1 to 25.2514-3.
[30] IRC § 2514(c)(3)(A); Regs. § 25.2514-3(b)(1).
[31] IRC § 2514(c)(3)(B); Regs. § 25.2514-3(b)(2).
[32] *Id*.
[33] IRC § 2514(c)(1); Regs. § 25.2514-1(c)(2). (gift tax); IRC § 2041(b)(1)(A) (estate tax).
[34] IRC §§ 2036, 2038.
[35] Matthew A. Reiber, *Untangling the Strings: Transfer Taxation of Retained Interests and Powers*, 48 AKRON L. REV. 455, 456 (2015).

Sections 2036 and 2038 can apply unexpectedly when applicable law permits a trust settlor to modify or terminate a trust. These might occur where, for example, a grantor retains (i) power to revoke or terminate the trust,[36] (ii) the power to add new beneficiaries or to change the beneficial interests under the trust,[37] (iii) unrestricted right to accumulate trust income,[38] or (iv) discretion to direct distributions of trust corpus for the beneficiaries.[39]

The above rules impact trust drafting significantly. Consider, for example, a trust protector or committee[40] with broad dispositive powers. If those powers are exercisable by a trustee, inclusion might be triggered. As a result, prudent drafters should consider withholding triggering powers and/or forbidding settlors from serving as trust protectors or trust committee members. Similarly, TTC § 112.059 allows for the termination of uneconomical trusts. If a settlor is serving as trustee at the time of his or her death, this statute could likewise trigger inclusion under IRC §§ 2036 or 2038. Fortunately, however, the Texas statute is only triggered where the total value of trust property is less than $50,000, so even where inclusion is triggered, its magnitude is *de minimis*. However, many trust instruments allow trustees to terminate trusts whenever the trustee determines them to be uneconomical, or once the value of trust property crosses some higher threshold. In such cases, inclusion may be more of a problem.

For gift tax purposes, a donor cannot reserve a power of appointment.[41] This makes sense because the reservation of a power necessarily contradicts the present intent to give something away. By its very nature, a reserved power of appointment implies the intent to fully manifest a gift at a later time.

(4). Drafting Implications

a) Don't Forget Those Mother's Day Cards

Clients often want to vest members of a senior generation with rights that approach unfettered access to trust assets as nearly as possible without giving up creditor protection or triggering transfer tax. Such clients may wish for their primary trust beneficiaries to be untroubled by the complaints of other, more remote beneficiaries, so the clients will often allow primary beneficiaries to appoint trust assets among junior beneficiaries (and sometime other permissible appointees, such as charities). By doing this, clients can give their primary beneficiaries virtually unlimited discretion to divert trust assets away from remaindermen if and when they make trouble or otherwise fail to please the primary beneficiary. This is particularly effective where the senior

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[36] IRC § 2038(a)(1); note also that trusts are revocable by default in Texas under TTC § 112.051(a).
[37] *Estate of Craft v. Comm'r*, 608 F.2d 240 (5th Cir. 1980).
[38] *Estate of Nichinello v. Comm'r*, 36 T.C.M. 1599 (1977); Treas. Reg. § 20.2038-1(a).
[39] *Estate of O'Connor v. Comm'r*, 54 T.C. 969 (1970); *Comm'r v. Holmes*, 326 U.S. 480 (1946).
[40] Note that, as a general matter, IRC §§ 2036 and 2038 to not include exceptions similar to those found in IRC § 2514(c)(3)(B) which prevent inclusion where a power is only exercisable with the consent of an adverse party, so trust committees remain a problem.
[41] Regs. § 25.2514-1(b)(2).

beneficiary is also serving as trustee of a given trust. To paraphrase the late, great Dallas probate attorney Ed Smith, remainder beneficiaries are well-advised to send Mother's Day cards.

b) The Upjohn Clause

Many trust instruments contain a so-called "**Upjohn clause**." Named after the case of *Upjohn v. U.S.,*[42] the clause prohibits the trustee from acting in such a manner as to relieve themselves of a legal duty under applicable law. As mentioned above, if a trustee has the power to distribute property in a way which would lessen or discharge a legal duty of support, the trustee is considered to hold a general power of appointment over trust property,[43] which, in turn, triggers inclusion of all such appointive property.

There are several support duties that might be implicated in an Upjohn clause, but the most common is the duty owed by a parent to his or her child. Under Texas law, a parent has a legal obligation to provide a child with clothing, food, shelter, and medical and dental care.[44] This obligation of support exists without the need for a court order.[45] Thus, an Upjohn clause will come into effect in situations where an individual is trustee of a trust for the benefit of their child. In such a situation, the trustee/parent may not, for example, use trust funds to pay the child's health insurance premiums. Paying the beneficiary/child's health insurance premium in a situation such as this may require some machinations. For example, if the trustee/parent is also a trust beneficiary, he or she may be able to distribute the funds to him- or herself and then pay the premiums out of a personal account. This, of course, exposes the funds to the claims of trustee/parent's creditors. Alternatively, if an independent trustee can be appointed, they should be able to pay the premium directly because they will not owe the beneficiary/child the same parental duty of support. This is one reason why "**independent trustees**," as described in IRC § 674(c), are sometimes permitted in trust instruments.

Of course, the prohibition is not limited to situations where the trustee is also the parent of a minor beneficiary. The legal duty might arise if the trustee is also the guardian of an adult, but otherwise incapacitated beneficiary. Spouses also have support obligations to each other which can come into play. In Texas, each spouse "has the duty to support the other spouse and [a] spouse who fails to discharge the duty of support is liable to any person who provides necessaries to the spouse to whom support is owed."[46] In any event, the duty referenced in an Upjohn clause has nothing to do with the trustee/beneficiary relationship, so it may be better to say that the prohibition

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[42] *Upjohn v. U.S.,* 30 A.F.T.R. 2d. 72-5918 (W.D. Mich 1972).
[43] Regs. 20.2041-1(c)(1).
[44] *See* TEX. FAM. CODE § 151.001*; See also Daniels v. Allen*, 811 S.W.2d 278 (Tex. App.—Tyler 1991, no writ) (overruled on other grounds); *Tucker v. Thomas*, 419 S.W.3d 292, 299 (Tex.2013) (parent has obligation to support his minor children and provide necessities).
[45] *See In ref A.D.E.*, 880 S.W.2d 241 (Tex. App.—Corpus Christi 1994, no writ) (father has duty to support child, even when not ordered by trial court to make payments of support); *Boriack v. Boriack*, 541 S.W.2d 237 (Tex. App.—Corpus Christi 1976, writ dism'd) (mother, as well as a father, has duty to support her minor children).
[46] TEX. FAM. CODE § 2.501(a) & (b).

is invoked where an individual who happens to be trustee of a given trust also owes a legal duty of support to the individual who happens to be a beneficiary of the trust.

Legal support prohibitions are often contained in the boilerplate of a trust instrument which individual trustees are unlikely to bother reading and even less likely to understand. These trustees can be caught off guard, so planners are well advised to discuss such provisions with their clients in detail. Litigators who specialize in breach of fiduciary duty claims also know to look for these clauses and point out violations when doing so might further their clients' cases.

c) 5 & 5 Powers

Clients sometimes wish to create a trust under which a beneficiary holds an annual, noncumulative right of withdrawal over a portion of the trust corpus that is equal in amount to the annual gift tax exclusion. This technique is frequently seen with irrevocable life insurance trusts, where gifts are made each year to cover insurance premium payments and keep the policy in force. These gifts are typically made subject to Crummey rights because donors seek to take advantage of the annual exclusion to avoid gift tax when making them. Most of the time, the beneficiaries of these trusts allow their Crummey rights to lapse each year, but because the annual exclusion exceeds $5,000, there may be gift tax consequences when this happens. If the annual exclusion amount is greater than five percent of the trust's corpus in a year in which the beneficiary's power of appointment over the annual exclusion amount is permitted to lapse, the failure to exercise the power of appointment will be considered a taxable transfer.[47] Thus, a donor may wish to limit the amount by which a Crummey right lapses in a given year to $5,000 or 5% of the trust's corpus.

d) Ascertainable Distribution Standards

As mentioned above, a power to consume, invade, or appropriate income or corpus, or both, for the benefit of the possessor that is limited by an ascertainable standard relating to the health, education, support, or maintenance of the possessor is not a general power of appointment.[48] Ascertainable standards lie on a spectrum between mandatory distributions, on the one hand, and unfettered distribution at a trustee's discretion, on the other. Distributions for health, education, maintenance, or support ("**HEMS**") form the boundary at which point a trust beneficiary holds a legally enforceable interest in trust property that a court can determine, and on which it might ultimately rule. That is, if a beneficiary's right is any less ascertainable than HEMS, then it is unascertainable and a court cannot compel a distribution. On the other hand, a beneficiary's right may be more ascertainable than HEMS. In such an instance, a court may be able to compel a distribution, but as with HEMS itself, the court should only compel the distribution if it falls within the given standard.

Also, the lapse or other release or exercise of such a power limited by an ascertainable standard will not be a taxable gift for federal gift tax purposes by the beneficiary which held the power.[49] Similarly, where a trust beneficiary holds a fiduciary power during his or her lifetime to

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[47] PLR 9804047.
[48] IRC § 2514(c)(1); Regs. § 25.2514-1(c)(2). (gift tax); IRC § 2041(b)(1)(A) (estate tax).
[49] IRC § 2514(c)(1); Treas. Reg. § 25.2514-1(c)(2).

make distributions to or for the benefit of another beneficiary of the same trust, and the power is limited by an ascertainable standard relating to the other beneficiary's health, education, support, or maintenance, such beneficiary/fiduciary will not be deemed to have made a taxable gift for federal gift tax purposes upon exercising (or failing to exercise) such power.[50]

HEMS limitations are pervasive in trust planning. Many planners simply see the HEMS standard as a safe harbor from tax, and deploy it universally. This practice fails to grasp the nuance of the HEMS standard as a concept. For tax purposes, at least, the HEMS limitation is only meant to prevent a trustee/beneficiary's enjoyment of trust property from too closely approaching outright ownership. Thus, where the trustee of a given trust is not also a beneficiary of the trust, HEMS language will not bring any tax benefit and may result in an undue burden.

On the other hand, a trust instrument may seek to achieve maximum flexibility by limiting distributions to a HEMS or other ascertainable standard when a beneficiary is serving as trustee and allowing more liberal distributions when the trustee qualifies as an independent trustee under IRC § 674(c).

Note however, that the limitation of an ascertainable standard (HEMS or otherwise) does not prevent general power of appointment treatment with regard to a trustee's power to distribute property in a way which would lessen or discharge a legal duty of support as contemplated under Regs. 20.2041-1(c)(1). This is why most trust instruments often include both ascertainable distribution standards as well as Upjohn clauses.

C. Marital Deduction Planning

Generally, an unlimited deduction from estate and gift tax is allowed for gifts (during life or at death) from one spouse to another.[51] There are some limitations on this deduction, however. For example, the receiving spouse must generally be a US citizen.[52] Also, the transfer must not be of a nondeductible terminable interest.[53] A terminable interest in property is an interest that terminates or fails because of the lapse of time or the occurrence of an event.[54]

Generally, transfers of terminable interests (such as life estates, terms of years, annuities, etc.) do not qualify for the marital deduction.[55] However, there is an exception for so-called qualified terminable interest property ("**QTIP**") property. Under this exception, if certain conditions are met, a life estate or an interest in trust which is granted to a surviving spouse will not be treated as a terminable interest. Instead, the entire property subject to such an interest will be treated as passing to the spouse and allow the entire value of the transferred property to qualify for a marital deduction.

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[50] Regs. § 25.2511-1(g)(2).
[51] IRC § 2056.
[52] IRC § 2056(d); Note that a qualified domestic trust may provide a viable solution to the citizenship rule.
[53] IRC § 2056(b).
[54] IRC § 2056(b)(1), (3); Regs. §20.2056(b)(3).
[55] See IRC § 6645 for a detailed discussion of the terminable interest rules.

Thus, in order to obtain the unlimited marital deduction for gifts in trust, the trust must meet all the requirements of a QTIP trust. These requirements include the following:

- The surviving spouse must be entitled to receive all the income from the trust for life, payable at least annually in the year earned. [56]
- The accumulated or accrued income at the surviving spouse's death must either be paid to the estate of the surviving spouse or be subject to the surviving spouse's testamentary general power of appointment.[57]
- The surviving spouse must be the only beneficiary of the trust during his or her lifetime.[58]
- An irrevocable election must be made on the deceased spouse's estate tax return opting into QTIP treatment.[59]

Many trust forms contain provisions which track the requirements above. The purpose of this language is to qualify for the unlimited marital deduction between spouses and avoid estate tax on assets that are not covered by a deceased spouse's lifetime exclusion.

VI. INCOME TAX ISSUES

A. Individual Retirement Accounts[60]

A full discussion of individual retirement accounts ("**IRAs**") is beyond the scope of this paper but the special rules which apply to them bears out in the standard language found in many trust instruments, so some discussion is nonetheless warranted here. As a general rule, trusts and IRAs don't mix, and where possible, planners should seek to avoid situations where IRA's might be held in trust. Sometimes, however, mitigating factors come into play. For example, in the context of a blended family, a plan participant may wish to allow a surviving spouse limited access to IRA funds, while also providing some degree of protection for children. Similarly, a plan participant may wish to allow minor children to benefit from an IRA. Under normal circumstances, these goals are well-served by trust planning, but the rules imposed on IRAs make this more difficult than it is with other assets. Furthermore, the Setting Every Community up for Retirement Enhancement Act (the "**SECURE Act**") has made the planning even more complicated.

At the heart of IRA planning are so-called required minimum distributions ("**RMDs**") set out in IRC § 401(a)(9). Under these rules, certain beneficiaries are required to take all assets out

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[56] IRC § 2056(b)(7)(B)(ii).
[57] *Estate of Rose D. Howard, Deceased, Roger W. A. Howard, Volney E. Howard III, Alanson L. Howard, Robert L. Briner, Trustees v. Commissioner*, U.S. Tax Court, CCH Dec. 45,002, 91 T.C. No. 329, 91 T.C. No. 26, (Aug. 23, 1988).
[58] IRC § 2056.
[59] *Id.*
[60] This paper addresses traditional IRAs. Other retirement vehicles, including 401(k)s, 403(b)s, and Roth IRAs may follow different rules.

of an inherited IRA within five years,[61] while other beneficiaries get an extension to ten years.[62] Still other beneficiaries get to stretch their RMDs out over an even longer period.[63]

Whatever the period, tax must be paid on the distributed assets when they come out, so the goal is t structure the distributions in a way that minimizes tax by spreading the distribution out over the longest possible timeframe. In pursuit of this goal, trust instruments usually treat IRA assets differently than other assets. Effectively, IRA's are cordoned off from other trust assets and treated differently, at least for most purposes. Probate attorneys and planners alike are well advised to take careful stock of where these differences do and don't apply.

B. S-Corp Stock

Only certain types of trusts can own s-corp stock.[64] These include (i) a grantor trust treated as owned by an individual who is a U.S. citizen or resident, (ii) a grantor trust before the death of the grantor that continues in existence after the grantor's death, but only for two years after the grantor's death, (iii) electing small business trusts (ESBTs), and (iv) qualified subchapter S trust (QSSTs).[65] As a general rule, most trust forms carve out s-corp stock and treat it specially. They require that s-corp stock be put into either an ESBT or a QSST. Failure to do this can cause the loss of the corporation at issue's s-election, which, in turn, can have major tax ramifications. This is particularly problematic because losing s-corp status impacts the entire corporation at issue and all its shareholders, not just the shares owned by the particular trust and its beneficiaries.

The nuances of ESBTs and QSSTs are beyond the scope of this paper, but suffice to say that every trust form should address s-corp stock, usually by calling for a carveout as described above. If a trustee winds up owning s-corp stock in a trust that does not have appropriate savings language, he or she should explore mitigating strategies. For example, it may be possible to distribute the shares to a permissible s-corp shareholder. Alternatively, the trust may have to be judicially modified to add the requisite language retroactively.

C. Basis Adjustment

Assets which are includable in a taxpayer's gross estate receive a basis adjustment to fair market value.[66] This is typically measured at the decedent's date of death, but it may also be measured on the so-called "**alternate valuation date**," which is the day that is exactly six months after the date of death or, if earlier, the date on which property is sold.[67] This basis adjustment can be up or down, but it is generally thought of as being a "**step-up,**" meaning that the basis of a given asset is increased such that less capital gains tax is due on a subsequent.

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[61] Regs. § 1.401(a)(9)-3.
[62] IRC § 401(a)(9)(B)(ii), as modified by new IRC § 401(a)(9)(H)(i)(I).
[63] IRC § 401(a)(9)(E)(ii).
[64] IRC § 1361(c)(2), (d).
[65] *Id.*
[66] IRC § 1014.
[67] *Id.* See also IRC § 2032.

If a taxpayer is wealthy enough that tax will actually be due upon his or her death, planners will usually do what they can to keep assets out of the taxpayer's estate, even if doing so means forgoing the step-up in basis. For smaller estates, however, estate tax inclusion might actually be desired because it will trigger the step-up. With the lifetime exclusion currently much higher than it has ever been before, more and more taxpayers are seeking to include certain assets in their gross estates so that they can take advantage of the basis adjustment.

One way to achieve the step-up in basis on assets in an otherwise excludable trust is by giving a beneficiary a general power of appointment. For example, a beneficiary might be given the power to appointment trust property equal in value to the beneficiary's remaining lifetime exclusion to the creditors of his or her estate which is. Note that, in the foregoing example, the power is only exercisable in favor of the creditors of the beneficiary's estate. This is because the beneficiary is unlikely to exercise such a power. If, on the other hand, the beneficiary were given the power, during life, to appoint property to him- or herself, then there is a significant danger that the beneficiary would do just that and thwart all of the grantor's careful planning.

The discussion of IRC §§ 2036 and 2038 above focuses on tax traps which can crop up to cause estate tax inclusion unexpectedly. However, these provisions can likewise be leveraged to achieve a basis adjustment of trust assets upon the settlor's death.[68] This tool can be deployed to cause inclusion of the trust and its assets in the gross estate of the settlor.[69] Where applicable, this is a particularly attractive methodology because, unlike other inclusion-triggering methods, it can avoid potential creditor exposure, the need for further cooperation of beneficiaries and others, and the risk that trust beneficiaries and distribution methods may be changed by others.

D. Grantor Trusts

Grantor trusts are a favorite tool of the estate planner. But what are they and how do they differ from other trusts? In a nutshell, a grantor trust is a trust that doesn't pay its own income tax. As with just about everything tax-related, there is some nuance involved, but that's the important part.

To better understand the concept, a little history may be helpful. Grantor trust rules were first adopted in the Internal Revenue Code of 1954. At the time, Congress felt that wealthy taxpayers were setting up trusts to shift income away from themselves. To combat this practice, rules were put through under which trust income is shifted back to certain individuals in certain circumstances. For a while, grantor trust status was perceived as something to be avoided, but by the mid-1980's, planners began to figure out ways to make these rules work to their clients' advantage.

The current grantor trust rules are found in IRC §§ 671-678. These rules cause a grantor to be treated as the *owner* of trust property if he or she retains too much control over a given trust's income, principal, or both.[70] Under the rules, retained control can take several forms, including

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[68] IRC § 1014(b)(1).
[69] *See* Rieber, *supra* Note 2 and accompanying text.
[70] IRC §§ 671-678, 679.

(i) reversionary interests,[71] (ii) retaining the power to control beneficial interests,[72] (iii) retaining the power to borrow trust property without adequate interest or adequate security,[73] retaining the power to vote stock,[74] (iv) retaining the power to control investments,[75] (v) retaining the power to reacquire the trust corpus by substituting other property of an equivalent value,[76] (vi) retaining the power to revoke the trust,[77] or (vii) retaining the right to income.[78] Admittedly, the above rules may seem like a long list of potential problems for unwary drafters, but they all underscore the simple concept that there are tax consequences of failing to give away enough of the proverbial sticks of property ownership.

At this juncture, it is worth reiterating a rule mentioned above and noting that revocable trusts are grantor trusts.[79] This is convenient for the millions of Americans who use revocable trusts not so much for tax planning but rather for straightforward estate planning. For most of these taxpayers, filing a trust tax return, year in, year out, would be a tremendous burden. Fortunately, they don't have to worry about this. For all intents and purposes, their revocable trusts are ignored for federal tax purposes thanks to the grantor trust rules.

Where more sophisticated tax planning is desired, the grantor trust rules provide some helpful planning opportunities. First, grantor trusts offer transfer tax benefits. By saddling grantors with the tax burden of a given trust, the trust assets themselves are relieved of that same burden and, effectively, allowed to grow tax free. Stated another way, every tax payment made by a grantor has the same economic effect as a contribution to the trust, but it carries no transfer tax consequence. Second, grantor trust status can sometimes reduce income tax. Of course, this requires the grantor's tax bracket to be lower than the trusts would otherwise be. Third, a grantor can transact with a grantor trust without recognition for income tax purposes. Generally, the sale of property between two taxpayers is a taxable event which triggers tax, but because the grantor is treated as the owner of trust property, for tax purposes, there is no second party involved in a transaction between a grantor and a related grantor trust. This allows the grantor, for example, to sell property to a trust without having to recognize gain.

With all these available benefits, it should come as no wonder that clients regularly use grantor trusts for their planning. This is why many trusts instrument include special language triggering grantor trust status. Most often, planners accomplish this by deploying the administrative powers found in IRC § 675, such as the power to substitute assets, or the power to borrow without adequate interest or security.

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[71] IRC§ 673.
[72] IRC § 674.
[73] IRC § 675(2).
[74] IRC § 675(4).
[75] *Id.*
[76] *Id.*
[77] IRC § 676.
[78] IRC § 677.
[79] IRC § 676.

VII. GENERATION-SKIPPING TRANSFER TAX ISSUES

A. 90-Day Survivorship Provisions and Generational Assignment.

Generation-skipping transfer tax ("**GSTT**") seeks to prevent wealthy people from thwarting the estate and gift tax regimes by making gifts to more remote generations. To accomplish this, the GSTT rules assign people to a certain generation relative to a given grantor.[80] Often, this is a straightforward process. The grandchild of a given donor is generally assigned to a generation which is 2 or more generations below that of the donor, resulting in the grandchild being labeled a "**skip person**" for GSTT purposes.[81] However, if the intervening parent of the grandchild (i.e., the donor's child) has died, then the grandchild is treated as if he belongs to the parent's generation.[82] In this circumstance, the grandchild does not qualify as a skip person, so GSTT does not apply.

A corollary to the generational reassignment rule of IRC § 2651(e) is that any individual who dies within 90 days after a transfer occurring by reason of the death of the transferor is treated as having predeceased the transferor.[83] This means that, in the example above, if the gift occurs as a result of the donor's death and the child/parent outlives the donor by less than 90 days, then he or she is still treated as having predeceased the donor, allowing the grandchild to be assigned to a generation which is less than two generations away from the donor such that he or she does not qualify as a skip person and preventing the application of GSTT. Many practitioners track this rule by providing in their Will and trust forms that beneficiaries must outlive decedents by 90 days in order to be treated as having survived them.[84]

B. Resetting GSTT

GSTT only applies to the extent trust assets are excluded from estate tax. With the increased estate tax threshold, it is possible to include significant assets in a taxpayer's estate without the actual imposition of tax. As mentioned above, appointive property subject to a general power of appointment is includable in the relevant powerholder's estate for estate tax purposes.[85] For GSTT purposes, the individual with respect to whom property was most recently subject to estate or gift tax is the transferor of that property.[86]

In other words, GSTT can effectively be reset by triggering estate tax inclusion in a beneficiary's estate. For this reason, many trust forms include language—often found deep in the boilerplate—conferring upon a beneficiary some general power of appointment to accomplish exactly this. This often makes sense even in a situation where the estate tax threshold is relatively

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[80] IRC § 2651.
[81] IRC § 2613(a).
[82] IRC § 2651(e).
[83] Regs. § 26.2651-1(a)(2)(iii).
[84] Note that, TEC § 121.052 a survival period of only 120 hours. There is no analogous default rule relating to trusts.
[85] IRC § 2041(a)(2).
[86] Regs. § 26.2652-1(a)(1).

low because given the choice between paying estate tax and paying GSTT, estate tax is almost always the lesser evil.

C. Inclusion Ratios

The procedure for calculating GSTT can be daunting. First, a taxable amount must be multiplied by an applicable rate.[87] The applicable rate is equal to the maximum federal estate tax rate times a so-called "**inclusion ratio**."[88] This inclusion ratio is a number between 0 and 1 which, generally speaking, is calculated based on the amount of GSTT exemption that is applied to a given transfer relative to the value of the gift.[89] In other words (and at the risk of greatly oversimplifying the process), if a donor gives a skip person $100 and allocates $100 worth of GSTT exemption to the gift, then the inclusion ratio is 0 and no GSTT is paid. Conversely, if a donor gives a skip person $100 and allocates no GSTT exemption to the gift, then the inclusion ratio is 1 and GSTT must be paid at the full rate. However, if a donor gives a skip person $100 and allocates $50 worth of GSTT exemption to the gift, then the inclusion ratio is 0.5 and GSTT must be paid, but only at half of the normal rate. This complicated process is used because GSTT only applies with respect to trust when assets are distributed or trusts are terminated,[90] not necessarily when gifts are actually made. Therefore, some sort of mechanism is required to equitably apply the tax to assets that have appreciated in value between time that they are contributed to a given trust and the time that they are subsequently distributed from the trust.

We refer to trusts with an inclusion ratio of 0 as being GST-exempt because they will never owe GSTT. Those are easy to deal with. A trustee of a GST-exempt trust can distribute property to a skip person without having to pay GSTT. But where a trust is not GST exempt, it is preferable for it to have an inclusion ratio of 1 (and therefore be fully taxable for GSTT purposes) than it is for the trust to have an inclusion ratio that is between 0 and 1 because GSTT mitigation strategies are more effective when this is the case. Therefore, a trustee is allowed to sever a trust with an inclusion ratio between 1 and 0 into two separate trusts, one with an inclusion ratio of 1 and another with an inclusion ratio of 0.[91]

Making this split allows the trustee to create one GST-exempt trust and another trust that is fully non-exempt for GSTT purposes so that GSTT mitigation strategies can be focused on the non-exempt trust. For example, if the original trust allows for distributions to both skip persons as well as non-skip persons, then the trustee can spend down the non-exempt trust by making distributions to non-skip persons before assets from the GST-exempt trust are used. Similarly, if a beneficiary is given a general power of appointment over a non-exempt trust, only those assets which end out in that trust will be included in the beneficiary's estate and subject (potentially) to his or her creditors. The assets which are allocated to the GST-exempt trust in the severance escape this treatment.

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[87] IRC § 2602.
[88] IRC § 2641(a).
[89] IRC § 2642(a).
[90] See generally IRC §§ 2611, 2016.
[91] IRC § 2642(a)(3).

Many trust instruments contain language which tracks IRC § 2642(a)(3) and allows trustees to sever a given trust if and when appropriate. The language can be a bit complicated, but the general concepts can be boiled down to a more digestible point.

VIII. STATE TAX ISSUES

For Texas trusts, the primary state tax issue is whether homestead, over 65, and other tax exemptions will apply to a primary residence held in trust. Texas Tax Code § 11.13(j) allows real property held in trust to qualify for these exemptions. Most modern, Texas forms cite this statute directly, and their purpose is to allow trust beneficiaries to obtain these types of exemptions for property which would otherwise qualify for the exemptions if the beneficiaries owned the property outright.

Taxing authorities regularly review trust instruments for language that closely tracks the statute and deny exemptions if they do not find what they're looking for. However, where a trust instrument is silent on this issue, for example, because it predates Texas Tax Code § 11.13(j), all may not be lost. One option for obtaining the exemptions may be to distribute a life estate to the qualifying beneficiary. Under Texas law, a life estate should transfer enough rights in the property to qualify for all personal residence exemptions. Of course, this is only possible if and when the trust agreement permits such distributions.

IX. TAKEAWAYS

Trust language and structuring is highly influenced by a variety of different taxes. Without a basic understanding of these taxes and how they apply, much the language of many trust forms may seem nonsensical. Practitioners may be tempted to alter form language in an effort to simplify provisions, but doing this could result in an adverse tax consequence. For this reason, planners are well advised to seek out quality forms and leave tax-triggering provisions intact. Additionally, practitioners in both the planning and probate realms may also wish to seek out seasoned co-counsel to help further elaborate on the more granular details of these rules.

CONVERGENCE OF WORLDS:
FAMILY, PROBATE AND ESTATE LAW

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I. Introduction

The fields of family law, probate law, and estate planning share a common theme of helping clients manage the legal and financial futures of their families. Family lawyers generally do this in the context of the breakup of a marriage and/or between co-parents, whereas probate and estate planning attorneys work frequently in the context of someone's death. It is no surprise, then, that the worlds of family law, probate law, and estate planning frequently collide. This is especially true when estate planning and probate attorneys encounter marital property agreements (including premarital and partition agreements), trusts involved in a divorce matter, and guardianship matters within suits affecting the parent-child relationship. This paper will cover these situations and provide an overview of the family law considerations for probate and estate planning attorneys to remember. A special thanks to Kathryn Murphy, Keith D. Maples, Sarah Pacheco, and Warren Cole for allowing us to build upon works they have written on these topics.

II. Marital Property Agreements

There are three types of agreements that can govern property rights during and on dissolution of a marriage – premarital agreements, post-marital agreements, and conversion agreements.

a. <u>Premarital Agreements</u>

1) Purpose

Under the Texas Family Code, a premarital agreement is an agreement between prospective spouses made in contemplation of marriage and to be effective on marriage. Tex. Fam. Code 4.001. In addition to the Texas Family Code, Article XVI, section 15 of the Texas Constitution also governs premarital and marital agreements. Premarital agreements allow persons about to marry to confirm and modify the characterization of property. Premarital agreements can also be used to award alimony, address earnings or income during marriage, designate or waive homestead interests and provide for the choice of law to be applied in any future dispute.

2) Uniform Premarital Agreement Act

Texas adopted the Uniform Premarital Agreement Act (the "Uniform Act") as set forth in Subchapter A of Chapter 4 of the Texas Family Code. In addition to Texas, the Act has been adopted by 26 other jurisdictions.

3) Contents and Formalities

Generally, a premarital agreement can cover any matter as long as it does not violate public policy or a statute imposing criminal penalties, adversely affect a child's right to support or defraud a creditor. See Tex. Fam. Code 4.003(a)(8), (b), 4.106(a). The following matters may be addressed in a premarital agreement:

1. the rights and obligations of each of the parties in any of the property of either or both of

them whenever and wherever acquired or located;

2. the right to buy, sell, use, transfer, exchange, abandon, lease, consume, expend, assign, create a security interest in, mortgage, encumber, dispose of, or otherwise manage and control property;
3. the disposition of property on separation, marital dissolution, death, or the occurrence or nonoccurrence of any other event;
4. the modification or elimination of spousal support;
5. the making of a will, trust, or other arrangement to carry out the provisions of the agreement;
6. the ownership rights in and disposition of the death benefit from a life insurance policy;
7. the choice of law governing the construction of the agreement; and
8. any other matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty. Tex. Fam. C. Ann. 4.003(a); see *Williams v. Williams,* 569 S.W.2d 867 (Tex. 1978)(homestead rights may be waived in a premarital agreement); *Dokmanovic v. Schwarz*, 880 S.W.2d 272 (Tex. App.–Houston [14th Dist.] 1994, no writ)(premarital agreement which provided income from all separate property to remain separate property precluded creation of any community property during marriage); Winger v. Pianka, 831 S.W.2d 831 S.W.2d 853 (Tex. App.–Austin 1992, writ denied)(prenuptial agreement may partition future earnings of persons about to marry); *Scott v. Scott*, 805 S.W.2d 835 (Tex. App.–Waco 1991, writ denied)(premarital agreement may provide for "excess" income to be separate property).

b. Partition Agreements

The Texas Family Code authorizes a partition agreement between existing spouses. At any time, the spouses may partition or exchange between themselves any part of their community property, then existing or to be acquired, as the spouses may desire. Courts generally refer to these agreements simply as "partition agreements." Property or a property interest transferred to a spouse by a partition or exchange agreement becomes that spouse's separate property. Tex. Fam. Code 4.102; *Robertson v. Robertson*, 2015 WL 7820814 (Tex. App.—Corpus Christi 2015, no pet. h.) (mem. op.) (partition agreement could not partition personal injury settlement because those were separate property, not community assets). The purpose of a partition agreement is to allow spouses to convert their interest in community property into separate property. Tex. Fam. Code 4.102; Tex. Const. Art. 16, Section 15. A partition agreement can also be drafted so that all existing and future community property will be separate property. Tex. Fam. Code 4.102.

1) ***Future Earnings****:* The partition or exchange of property may also provide that future earnings and income arising from the transferred property shall be the separate property of the owning spouses. Tex. Fam. Code 4.102. If this specific designation is not made, future earnings and income generated by the partitioned property will remain community property. See Dewey v. Dewey, 745 S.W.2d 514 (Tex. App. Corpus Christi 1988, writ denied)(since husband's earnings were not expressly listed in the premarital agreement and it was apparently acquired during marriage, it was community property).

2) ***Agreement Between Spouses Concerning Income or Property from Separate Property:*** Spouses may further agree that income or property arising from the separate property that is owned by them at the time of the agreement, or thereafter acquired, shall be the separate property of the owner. Tex. Fam. Code 4.103; see Pearce v. Pearce, 824 S.W.2d 195, 197-198 (Tex. App.–El Paso 1991, writ denied) (by entering into trust indenture shortly after their marriage, the parties created a "postnuptial agreement," in which the parties agreed that the separate property of the husband would remain his separate property, and that all increases and income from the husband's separate property would constitute part of his separate estate); cf., Bradley v. Bradley, 725 S.W.2d 503, 504 (Tex. App. Corpus Christi 1987, no writ)(where the parties' premarital agreement provided that "...on or before the 15th day of April of each year during the existence of this marriage, [the parties] will fairly and reasonably partition (and/or exchange) in writing all of the community estate of the parties on hand that will have accumulated since January 1 of the preceding year...," the agreement did not itself effect a partition and exchange of the parties' respective community interests in each other's personal earnings, but rather merely evidenced an intent to do so in the future).

   `In 2003, the Legislature amended section 4.102 to provide that partitioned property automatically included future earnings and income from the partitioned property unless the spouses agreed in a record that the future earnings and income would be community property after the partition or exchange. Tex. Fam. Code 4.102 (repealed). This change applied to a partition and exchange agreement made on or after September 1, 2003. In 2005, the Legislature amended section 4.102 to delete the automatic partition of future earnings and income from partitioned property and made it discretionary. This change applied to a partition and exchange agreement made on or after September 1, 2005, and a partition and exchange agreement made before September 1, 2005, is governed by the law in effect on the date the agreement was made, and the former law is continued in effect for that purpose. As a result, partition and exchange agreements executed between September 1, 2003, and August 31, 2005 will automatically include future earnings and income from the partitioned property unless the spouses agree in a record that the future earnings and income would be community property after the partition or exchange.

c. Conversion Agreements

Spouses may agree that all or part of the separate property owned by either or both spouses is converted to community property provided that certain formalities are met. Tex. Fam. Code 4.201-4.206; Alonso v. Alvarez, 409 S.W.3d 754 (Tex. App.–San Antonio 2013, pet. denied)(converting separate property into community may be accomplished by a series of agreements); Monroe v. Monroe, 358 S.W.3d 711 (Tex. App.–San Antonio 2011, pet. denied)(premarital and postmarital agreements converted husband's separate property to community; divorce division restored much of husband's former separate property to him, a factor the court was authorized to consider).

A partition or exchange agreement can only affect community property. Robertson v. Robertson, 2015 WL 7820814 (Tex. App.—Corpus Christi 2015, no pet. h.)(mem. op.). In Robertson, the court of appeals held that the parts of the agreement that attempted to partition property that already belonged to the separate estate of the husband had no effect. The court further held that the terms of the agreement that attempted to allocate income from the husband's personal injury settlement in the future did not constitute a valid conversion of separate property, because it failed to include the warning language statutorily required under Texas Family Code Section 4.205(b).

d. Children Issues in Marital Property Agreements

1) ***Child Support May Not Be Adversely Affected :*** The right of a child to support may not be adversely affected by a premarital agreement. Tex. Fam. Code 4.003(b). Therefore, any provision in a premarital agreement that eliminates or reduces a party's child support obligation in the event of divorce would be unenforceable. Agreements for private education, college expenses, or cars for children might be enforceable as a contract between the parties as long as it was found not to be a "violation of public policy" if it infringes on a parent's rights or against a child's best interests.

   The phrase "adversely affect" does not mean parties cannot contract for child support in a premarital agreement; it just means that any provision affecting child support must be in the child's best interest or it can be disregarded. See *Radtke v. Radtke*, 521 S.W.2d 749 (Tex. App.–Houston [14th Dist.] 1975, no writ); *Preston v. Dyer,* 2012 WL 5960193 (Tex. App.–Beaumont 2012, pet. denied)(spousal support, child support and attorney's fees subject to arbitration under terms of premarital agreement); see also Tex. Fam. Code 154.124(b)(court must order child support in conformity with agreement if court finds agreement is in child's best interest).

2) ***Waivers of Child Support, Custody or Visitation Rights:*** The law of other Uniform Act states seems to make clear that public policy prevents the court from enforcing waivers of child support, custody, or visitation rights. See, e.g., *Edwardson v. Edwardson, 798* S.W.2d 941 (Ky. 1990); Huck v. Huck, 734 P.2d 417 (Utah 1986); *In re Marriage of Fox,* 795 P.2d 1170 (Wash. App. 1990). Other provisions restricting a parent's right to raise their children have been found to be unenforceable. See *Zummo v. Zummo,* 574 A. 2d 1130, 1148 (Pa. Super. Ct. 1990) (premarital promise to raise child in certain religion not enforceable); *In re Weiss,* 22 F.L.R. 1161 62 (Calif. Ct. App. 1996) (mother's premarital written agreement to raise her children in Jewish faith is not legally enforceable).

e. Not in Violation of Public Policy

The Family Code permits the parties to contract in a premarital agreement with respect to any matter listed and any other matter not in violation of public policy or any statute imposing a criminal penalty. Tex. Fam. Code 4.003(a)(8). All provisions of a premarital agreement are

subject to a public policy review standard.

f. Common Marital Property Agreement Provisions in Family Law

The following are common provisions used by family law practitioners when drafting premarital agreements:

1) ***Confirmation of Texas Law:*** It is common for premarital agreements to confirm Texas law, such as a confirmation that certain assets brought into the marriage by a spouse remain the owner's separate property. The agreement may also confirm that anything acquired during the marriage by gift or inheritance will be separate property.

2) ***Income from Separate Property:*** Parties may agree that income from separate property is the owner's separate property. Tex. Const. Art. XVI, 15; *Dokmanovic v. Schwarz,* 880 S.W.2d 272 (Tex. App.–Houston [14th Dist.] 1994, no writ).

3) ***Wages, Salaries, and Personal Earnings****:* Persons about to marry may partition or exchange between themselves salaries and earnings to be acquired by them during their future marriage. *Winger v. Pianka*, 831 S.W.2d 853 (Tex. App.–Austin 1992, writ denied). However, the agreement must specifically provide for such a division. See *Fanning v. Fanning*, 828 S.W.2d 135 (Tex. App.–Waco 1992) aff'd in part, and remanded in part on other grounds, 847 S.W.2d 225 (Tex. 1993); *Dewey v. Dewey*, 745 S.W.2d 514 (Tex. App.–Corpus Christi 1988, writ denied)(since appellant's income was not expressly listed in the premarital agreement and it was acquired during marriage, it was community property); *Bradley v. Bradley*, 725 S.W.2d 503 (Tex. App.–Corpus Christi 1987, no writ)(statement in premarital agreement that the parties would take all steps necessary to maintain separate property character of property and earnings merely expressed an intent and was not sufficient to act as a partition absent a more specific written agreement).

4) ***Salaries from Separate Property Business Require Specificity:*** Although a premarital agreement may state that income from separate property is separate property, salaries from a separate property business should be specifically addressed in order to be considered separate property. *Dewey v. Dewey,* 745 S.W.2d 514 (Tex. App. Corpus Christi 1988, writ denied). The premarital agreement in Dewey provided that income from separate property would be separate but did not expressly mention salaries received from husband's separate property medical practice. In finding the salary to be community property, the court held:

> "The premarital agreement, however, did not mention appellant's salary received from the corporation during marriage; nor did it state that there would be no accumulation of a community estate. It merely asserted that the

listed property and all profits, dividends, interest and proceeds resulting from that property should remain appellant's separate property. Since appellant's income was not expressly listed in the premarital agreement and it was apparently acquired during marriage, it was clearly community property."

5) ***Division of Property on Divorce:*** Parties to a premarital agreement often agree as to the division of their marital estate in the event of divorce. *Fanning v. Fanning*: 828 S.W.2d 15 (Tex. App.–Waco 1992), aff'd in part and rev'd in part, 847 S.W.2d 225 (Tex 1993); *Scott v. Scott*, 805 S.W.2d 835 (Tex. App.–Waco 1991, writ denied).

6) ***Disposition of Property on Death:*** Parties to a premarital agreement may agree as to the disposition of their property on the death of one of them. *In re Estate of Loftis*, 40 S.W.3d 160 (Tex. App.– Amarillo 2015, no pet.)(premarital agreement provision that wife was to receive house and car upon husband's death binding on his estate).

7) ***Choice of Law*:** The Family Code allows parties to a premarital agreement to contract with respect to the choice of law governing the construction of the agreement. Tex. Fam. Code 4.003(a)(7).

8) ***Waiver of Retirement Benefits:*** A waiver of a party's interest in the qualified retirement benefits of a spouse or future spouse is governed by both state and federal law. The federal ERISA statute expressly provides that it supersedes state laws regulating qualified employee benefit plans. 29 U.S.C. § 1144(a). Thus, state law is preempted generally in that area of regulation. A premarital agreement cannot waive a prospective spouse's survivor benefits in an ERISA retirement plan. See *National Auto. Dealers & Assocs. Ret. Trust v. Arbeitman*, 89 F.3d 496 (8th Cir. 1996). Under ERISA, survivor benefits can be waived only by a spouse. 29 U.S.C. 1055(c)(2)(A). Even though a premarital agreement cannot waive survivor benefits, a party can include a provision in a premarital agreement that requires a prospective spouse to execute a waiver of survivor benefits under 29 U.S.C. 1055(c)(2)(A) after the parties are married.

9) ***Arbitration Agreements:*** Parties may contractually agree to use an alternative dispute resolution method to resolve any subsequent issues of interpretation or enforcement. Section 172.051 of the Texas Civil Practice and Remedies Code provides the statutory authority for such agreements to arbitrate: "An arbitration agreement may be an arbitration clause in a contract or a separate agreement." TCPRC 172.051(a). The parties may contractually agree to binding or nonbinding arbitration, the use of a specific arbitrator, the allocation of the fees associated with an arbitration or mediation, and the mediator to use in the case of a future dispute. See *Koch v. Koch*, 27 S.W.3d 93 (Tex. App.–San Antonio 2000, no pet.)(provision to arbitrate any future disputes over premarital agreement binding on divorce court); *Preston v. Dyer*, 2012 WL 5960193 (Tex. App.–Beaumont 2012, pet. denied)(mem. op.)(spousal support,

child support and attorney's fees subject to arbitration under terms of premarital agreement).

10) ***Lifestyle Clauses***: On occasion spouses will agree to certain clauses in their marital property agreements related to their lifestyle. These clauses may include a contingency in the event a spouse has an affair, a requirement that a spouse spend a certain amount of time with the other spouse, a requirement for a spouse to maintain a certain weight, a provision for a spouse to maintain sobriety, a provision regarding the number of times the spouses will have sex, religious provisions, or a provision requiring a spouse to maintain a certain breast size.

11) ***Signing Bonus:*** A signing bonus is a provision that can be included in a marital property agreement to provide the non- monied or lower income spouse a sum of money to be immediately characterized as their separate property. The payment could be in a lump sum on the date of marriage, or an interest in the marital residence or other property.

12) ***Installment Payments:*** Payments by the monied spouse to the other spouse can be structured to occur on certain dates during the marriage, such as annually.

13) ***Payment on the Date of Divorce:*** A marital property agreement can include a requirement for the monied spouse to pay the other spouse a sum of money in the event of divorce, often referred to as an exit bonus. This includes payments that recognize years of marriage. The exist may consist of a lump sum payment on the date of divorce, or a series of payments that may be based on the years of marriage. As discussed above, these payments may be forfeited in the event the agreement is challenged and contains a no- contest clause.

14) ***Expiration Clause*** A property agreement may contain a clause providing that the agreement will expire after a period of time or an event, such as on an anniversary of the marriage or the birth of a child. Whether an expiration clause can retroactively recharacterize property is an open question, however, the expiration can apply on a prospective basis affecting property acquire after the term or condition.

g. Practice and Drafting Tips for Marital Property Agreements:

1) ***Separate Counsel:*** Several court decisions have held that lack of separate representation does not make an agreement unenforceable. *Marsh v. Marsh*, 949 S.W.2d 734 (Tex. App.–Houston 1997, no writ); *Pearce v. Pearce*, 824 S.W.2d 195 (Tex. App.–El Paso 1991, writ denied); *Sadler v. Sadler*, 765 S.W.2d 806 (Tex. App.–Houston [14th Dist.] 1988),rev'd on othe grounds, 769 S.W.2d 886 (Tex. 1989); *Chiles v. Chiles*, 779 S.W.2d 127 (Tex. App.--Houston [14th Dist.] 1989, writ denied)(the wife was represented by counsel at all times during extensive negotiations and drafts of the agreement). However,

the lack of assistance of counsel may be one factor in determining enforceability. Uniform Premarital Agreement Act. The best practice would be for both parties to be represented by independent counsel in the negotiation, drafting, reviewing, and execution of a premarital or partition agreement. If the other party chooses not to retain independent counsel, provisions should be included in the agreement that the party was encouraged to have independent representation but knowingly and willfully waived his or her right to do so. Also, the document should reflect that the lawyer of one party has provided no advice, legal or otherwise, to anyone other than his or her client. Finally, the agreement should be drafted as simple as possible. It is a conflict of interest for a lawyer to represent opposing parties to the same litigation, and a lawyer should not represent both parties when preparing a premarital or marital property agreement. Tex. Disc. Rules of Prof. Conduct 1.06. A lawyer also may not provide legal advice to the other party to a marital property agreement.

2) ***Timing of Agreement:*** Whenever possible, the negotiations, drafting, and execution of the premarital agreement should be completed as far in advance of the wedding date as possible. An agreement executed too close to the wedding date may be more likely to be challenged on the grounds of duress or undue influence. However, several cases have upheld premarital agreements that were executed close in time to the wedding. *Williams v. Williams*, 720 S.W.2d 246 (Tex. App.–Houston [14th Dist.] 1986, no writ)(signing premarital agreement one day before wedding did not invalidate agreement, especially in light of prior conversations for 6 months prior to the wedding and the sophistication of the parties); *Marsh v. Marsh,* 949 S.W.2d 734 (Tex. App. Houston [14th Dist.] 1997, no writ)(the fact that the premarital agreement was signed shortly before the wedding (one day) did not make the agreement unconscionable); *Osorno v. Osorno,* 76 S.W.3d 509, 510-11 (Tex. App. – Houston [14th Dist.] 2002, no pet.)(premarital agreement was signed voluntarily even though the agreement was signed the day before the parties married).

3) ***Full & Complete Financial Disclosure:*** Each party should provide a full and complete disclosure of all of his or her assets and liabilities. In order to comply with the requirements of the Texas Family Code, the party seeking to uphold a premarital or post marital provision must have given a "fair and reasonable disclosure of the property or financial obligations" of that party. Tex. Fam. Code 4.006(a), 4.105(a). While a party may "voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided," such waiver must be signed "before execution of the agreement." It is important to indicate the time and date that the waiver, if any, and agreement are signed to avoid any question later as to the timeliness of execution.

4) ***Videotape:*** Videotaping the signing ceremony could insure the enforceability

of a premarital or postmarital agreements. A videotape may provide evidence of a lack of duress and involuntariness should a disagreement later arise.

III. Marital Property Issues Relating to Trusts

The most common estate planning instrument in the divorce context is trusts, and as a result, examining issues surrounding trusts and marital property law will be the main focus of this section. While three types of trusts are recognized in Texas law – an express trust, a resulting trust, and a constructive trust

Our focus here is on express trusts. Express trusts are those defined and governed by the Texas Trust Code. *See* Tex. Prop. Code 101.001, *et seq*. On a fundamental level, a trust is a mechanism by which legal and beneficial title to property is separated, whereby one or more trustees holds title to property for the benefit of one or more beneficiaries, and with the relationship and responsibilities between trustee and beneficiary defined.

a. Marital Property Issues Relating to Trusts

1) ***Characterization of Trust Income from a Separate Property Beneficial Interest in a Trust:*** One of the most common areas of potential dispute regarding trusts in divorce cases involves the characterization of trust income. When one party has inherited, been gifted, or come into the marriage with a beneficial interest in a trust, the interest in the underlying trust corpus is the separate property of the beneficiary. However, whether the income from the trust is the beneficiary's separate property, or whether it is community, is not always so clear-cut.

2) ***When a Beneficiary is Not Entitled to Trust Corpus:*** With a trust where a beneficiary is entitled to only distributions of trust income and has no right to the corpus of the trust, Texas courts have consistently held that the income itself is the separate property of the beneficiary. Courts have said that, yes, income from separate property is community property, but since there is no underlying ownership interest in the corpus of the trust, the income that the beneficiary receives must be considered the gift, since it's the only thing the beneficiary receives.

3) ***When a Beneficiary is Entitled to Trust Corpus:*** In a clear-cut situation where a beneficiary has a clear and present right to receive some or all of a corpus of a trust, that corpus is generally treated as the beneficiary's separate property, with income generated by the corpus subject to the traditional rules governing the community nature of income generated by separate property. This oftentimes arises in a scenario where a beneficiary is also the trustee of a trust, with no meaningful restrictions on the trustee/beneficiary's ability to access or distribute to himself the income or corpus of the trust. There are also scenarios where a beneficiary may not also be the trustee, or be the sole trustee, of a trust, but under the terms of the trust, the beneficiary has the ability to compel, with no meaningful restrictions, the distribution of the assets of the trust. In such a scenario, there is said to be a merger in the ownership of the trust assets – the legal ownership and the beneficial ownership of the assets are effectively held by the same person, with unfettered rights to the trust assets. In such a case, the trust form itself can be disregarded for marital

asset characterization purposes, with the character of any income generated by the underlying assets being characterized in the same way it would be characterized if the assets were owned in the beneficiary's individual name.

4) ***When the Beneficiary May or May Not Be Entitled to Trust Corpus:*** The most contentious areas of disagreement in Texas divorce law relating to the characterization of trust income has to do when there is not clarity as to the beneficiaries ongoing right to trust corpus. The rule formalized in *Sharma v. Routh*—the seminal Texas case with regard to the characterization of distributions of trust income as separate or community property— governs characterization of distributions of income during marriage from a trust to a party who has a separate property beneficial interest in the trust.

   Sharma was decided on October 8, 2009 after a rehearing by the Fourteenth District of the Court of Appeals of Texas (the "14th Court of Appeals" or the "Sharma Court"). The Sharma Court adopted the following rule with respect to distributions of trust income during marriage from an *inter vivos* or testamentary trust settled by a third party for the benefit of a beneficiary- spouse (referred to therein as the 'recipient'): such distributions are community property "only if the recipient has a *present possessory right* to part of the corpus, even if the recipient has chosen not to exercise that right. Under these circumstances, the recipient's possessory right to access the corpus means that the recipient is effectively an owner of the trust corpus. *Sharma*, 302 S.W. 3d at 368 (emphasis added).

   The Sharma Court reasoned that this rule produced a result that was within the definition of separate property of the Constitution of the State of Texas and the Texas Family Code, which generally provide that property owned or claimed before the marriage, as well as property received during the marriage by gift, devise, or descent, is separate property, and all other property (including income on separate property) is community property. *See id.* at 360-61 (citing TEX. CONST. art. XVI, § 15, TEX. FAM. CODE §§ 3.001, 3.002).

   If the beneficiary-spouse had no present possessory right to part of the trust corpus, then the distribution of trust income to the beneficiary-spouse is in the nature of a gift or devise. *Id*. at 364. Contrastingly, if a beneficiary-spouse has a present possessory right to part of the trust corpus, then the distribution of trust income to the beneficiary-spouse is in the nature of an owner's receipt of income from property that he or she owns.

5) ***What constitutes a "present possessory interest"?*** *Sharma* makes clear that any distributions of income from a trust to a party are separate property if, at the time the distribution was made, the beneficiary did not have a present possessory interest in the underlying trust corpus. The question then becomes, what does it mean for a beneficiary to have a "present possessory interest" in the corpus of a trust? The initial determination must be whether the trust is a mandatory distribution trust or a discretionary distribution trust.

Under a mandatory distribution trust, the trustee is required to distribute income and principal from the trust pursuant to a set schedule or a defined set of provisions as set out in the trust instrument itself. For example, a mandatory trust may require that the trustee distribute income to the beneficiaries on a quarterly basis, or may require that the trustee distribute all accumulated income and principal to a beneficiary on a date certain. In analyzing a mandatory distribution trust, the analysis would seem to be relatively straightforward -- is there a requirement that corpus also be distributed at the time of the income distribution? If so, the beneficiary would, under the *Sharma* analysis, have a present possessory interest in the corpus (or at least a portion of the corpus), and thus the income would be community property. If not, the income would be separate.

With a discretionary trust, in contrast, the analysis is more complex. If distribution of trust property is at the discretion of the trustee, then whether or not the beneficiary has a present possessory interest in the trust corpus depends in large part on who the trustee is, the degree of discretion that the trustee has in distributing the trust property, and how that discretion has been exercised.

One of the most common discretionary standards often seen in divorce cases is the standard present in the Sharma trusts -- the ability to distribute trust income and/or principal to a beneficiary as is necessary for the beneficiary's health, education, support and maintenance One could argue that a trustee has a wide discretion in determining whether to make a distribution under the HEMS standard. One could argue that, as an example, the way the Sharma trusts were worded -- allowing Husband, as trustee and beneficiary, to make distributions to maintain the standard of living to which he was accustomed -- it essentially gave Husband a blank checkbook, and the ability to accustom himself to any lifestyle he chose, and then pulling money out of the trust to support that. Estate planners, however -- and the Internal Revenue Service -- would say otherwise, noting that the HEMS standard is viewed as an ascertainable standard that can be objectively evaluated and applied such that the beneficiary does not have full ownership of the underlying trust property, even if the beneficiary is also the trustee. Since the HEMS provision is viewed by the federal government as being sufficient to keep a beneficiary from having absolute ownership of the property in question, it stands to reason that the Texas courts would find that a beneficiary of a trust that includes a HEMS provision would not have automatically have sufficient control over the trust assets to give him a present possessory interest in the trust, even if he is also the trustee.

Ultimately, the question of whether a beneficiary has a "present possessory interest" in the corpus of a trust the beneficiary has an interest in, and thus whether the income distributed from the trust is community or separate, will involve an analysis of both the degree of control that the beneficiary has over the trust assets, particularly if the beneficiary is also a sole trustee, as well as the extent that the trustee complied with the distributive requirements.

6) ***Distributions from Business Entities Owned by Trusts*** It is common for grantors or settlors to use a trust to own an interest in a closely held business. Part of estate planning for entrepreneurs who have developed a successful family business is frequently to take steps to both ensure that the family business stays in the family going forward, and to ensure that the family business is properly managed in the future. That is oftentimes accomplished by putting entity interests in a trust, or in multiple trusts, which will be managed by trustees who must govern in accordance with the trust document – usually in the form of a limited partnership, whereby limited partnership interests are doled out to trusts (either *inter vivos*, testamentary, or both), while the managing general partnership interest is provided for separately.

   Whether monies received by a trust from an entity it has an ownership interest in is considered corpus or income is governed by the Texas Property Code. The general rule under Texas Property Code Section 116.151(b) is that receipts of a trust from a partnership or corporation are classified as trust income. An exception to the general rule would classify such receipts instead as trust corpus only in situations where (i) the trust receives property other than money, (ii) the trust receives money in exchange for its interest in the entity, or (iii) the trust receives money in partial liquidation of the entity. *See* TEX. PROP. CODE § 116.151(c). But note clause (iii) may not apply because, under Texas Property Code Section 116.151(d), money is received in partial liquidation of an entity when either (i) the entity indicates that the money is a distribution in partial liquidation of the entity or (ii) when the distribution or series of distributions from the entity is greater than 20% of the entity's gross assets immediately prior to the distribution. Barring one of those exceptions, a distribution from an entity that is owned by a trust is considered to be trust income, and thus, if and when those funds are distributed to the beneficiaries, it would be treated as a distribution of income, rather than of corpus.

   If a trust that owns interests in a closely-held business does not hold entity distributions, but immediately distributes any such funds it receives from the entity to the beneficiaries, it may be that whether you treat the distribution as a distribution of income or a distribution of corpus is moot. If it is a distribution of trust income, then it is likely separate property, because the beneficiary, under the terms of the trust instrument, almost certainly doesn't have a present possessory right to the underlying ownership interest in the entity itself -- the beneficiary isn't entitled to control of the entity, to sell it or compel its distribution. If it is a distribution of trust corpus, on the other hand, as defined by the section quoted above, then the entirety of the distribution is the separate property of the beneficiary, since it is a distribution of corpus, and there is no income at issue that would be subject to the present possessory interest rule.

7) ***Mismanagement of a Trust During Marriage:*** In the divorce context, the very existence of a trust has been (generally unsuccessfully) attacked on the basis of whether the trust forms are followed by the trustee of the trust, by engaging in such activities as doing regular accountings, maintaining separate books and accounts,

and otherwise adhering strictly to the requirements that trustees are supposed to follow. However, even if a trustee does not follow every form, or even does not properly segregate trust funds and personal funds, it doesn't negate the existence of the trust. As noted above, Texas law does not require that a trustee open a separate bank account for a trust. Further, Texas courts have found that even when a trustee co- mingles trust property in a personal account, the ownership of such property is not transferred by or otherwise divested from the trust; regardless of the co-mingling, the trust and its ownership rights continue. *Logan v. Logan*, 138 Tex. 40, 156 S.W.2d 507 (Tex. 1941); *Eaton v. Husted*, 141 Tex. 349, 172 S.W.2d 493 (Tex. 1943). Co-mingling or other mismanagement simply means that the trust property is in the possession of someone; it does not mean that the trust no longer owns the property, or that the property in question belongs to the individual possessing it, rather than the trust.

Even if one assumes that errors were made and that these errors constituted mismanagement of the trusts, there is no legal support for a result that changes the terms of the governing instruments or effectively terminates the trusts. Texas law is unambiguous that mismanagement by a trustee (at least with respect to a trust settled by a third party) does not terminate the trust or divest the trust's ownership of trust property. See *Kennedy v. Baker*, 59 Tex. 150, 163 (1883) (finding that wrongful possession or conversion of trust property does not divest trust of ownership of such property); *Langford v. Shamburge*r, 417 S.W.2d 438, 444 (Tex. App.—Fort Worth 1967, writ. ref'd n.r.e) (enforcing trust ownership of property despite self- dealing and other mismanagement by trustee).

If a party to a divorce case believes their spouse has misappropriated trust assets, seeking to have the misappropriated property treated as marital property is nonsensical. Moreover, such a party should be cognizant that even raising that issue could lead to a Pandora's Box of problems -- if trust assets were spent for the benefit of the community, as an example, and it is alleged that they should not have been removed from the trust, the community would potentially be obligated to repay the trust. To the extent that such a claim might be developed in a divorce case, it would likely need to be brought on behalf of one to whom the trustee owes, or owed, a duty, and a spouse of a beneficiary is owed no independent duty by a trustee. On the other hand, children of the marriage are often contingent beneficiaries of such a trust, and if the trustee has mismanaged the trust to the detriment of those contingent beneficiaries, there may be a cause of action to be brought against the misappropriating trustee spouse on behalf of the minor children.

IV. Guardianship Issues in Family Law Cases – Special Needs Trusts

Special Needs Trusts are another area where family law, probate and estate planning converge. Having a child with special needs can affect parents significantly and in remarkably different ways. The circumstances surrounding the cause of the special needs can also have an impact on the parents.

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Parents' relationships with typical children are only controlled by family court orders until the child turns 18 and graduates from high school. Parenting of a child with special needs may be subject to court involvement much longer. You should bear in mind the longevity of the orders that will be put in place regarding the child with special needs. When the child with special needs reaches the age of eighteen years, legal matters regarding parenting might shift from the divorce/family court to the probate court.

When a child attains the age of eighteen years, the authority of the family court changes. A child is "a person under eighteen years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes." Family Code Section 101.003(a). When the child turns eighteen, the authority of the family court to authorize parents to make decisions for their child ends and the rights and duties set out in an order or decree are no longer applicable. The family court will continue to have jurisdiction over the issue of support and possession of and access to an adult child with disabilities beyond his or her eighteenth birthday and completion of high school. The probate court will also have jurisdiction over the child support and possession issues.

When a child reaches his or her eighteenth birthday, he or she is considered an adult and, as mentioned above, the child with special needs will be an adult and no longer subject to the jurisdiction of the family courts except for child support and access and possession issues. Many children with special needs will remain dependent upon their parents for the same decision-making that parents make for minor children. Unfortunately, after a child turns eighteen, the court order that provided for how the parents would make decisions on behalf of the child no longer applies. In addition, when a child attains the age of eighteen years, parents are no longer entitled to private and confidential information regarding the healthcare and education of their child. In a typical scenario, this makes perfect sense because the child is now an adult and has the right to make his or her own decisions, and to have their personal information kept confidential.

a. Guardianship Issues with Adult Disabled Children

The parents will need to take steps to gain authority to act on behalf of their adult child with special needs through probate court through a guardianship of the person and/or estate of the child or otherwise. A guardian can only be appointed for someone who has been determined by the probate court to be partially or totally incapacitated so it is important to remember that a disability or special needs does not necessarily equate to "incapacitated." A person must have a mental or physical condition which is significant enough that medical, financial, or personal decisions cannot be made by that person, or that person is unable to provide for his or her own food, shelter, and clothing.

Texas law provides for the appointment of one guardian for an adult child with disabilities, although one person may be appointed as guardian of the person and another may be appointed as guardian of the estate. Estates Code 1104.001(a). In some instances, the joint appointment of two persons as co-guardians may occur if it is found to be in the best interest of the adult child with disabilities. Estates Code 1104.001(b). If the adult child with disabilities was the subject of a SAPCR suit as a minor, then generally both parents cannot be appointed as co-guardians unless

they were also appointed as joint managing conservators in the prior SAPCR proceeding. Estates Code Section 1104.001(b) states the following:[d]oes not prohibit the joint appointment, if the court finds it to be in the best interest of the incapacitated person or ward, of:

(1) a husband and wife;
(2) joint managing conservators; …
(4) both parents of an adult who is incapacitated if the incapacitated person:

    (A) has not been the subject of a suit affecting the parent-child relationship; or
    (B) has been the subject of a suit affecting the parent-child relationship and both of the incapacitated person's parents were named as joint managing conservators in the suit but are no longer serving in that capacity.

Estates Code Section 1104.001(b).

Under Family Code Section 153.131, the appointment of parents as Joint Managing Conservators of a minor child has been authorized by agreement since 1979 and has been presumed to be in the best interest of the child since 1995; however, the authority to appoint co-guardians is more recent in the Estates Code. There is no guidance in the Estates Code for what the terms of co-guardianship should be. A probate practitioner should be consulted to determine what the attitude of the local jurisdiction's probate judge(s) is regarding the appointment of co-guardians, since the probate court may not wish to appoint co-guardians of the ward. The joint appointment is permitted, but is certainly not required, and may only be ordered if both parents are seeking co-guardianship and agree on co-guardianship. If the probate court were to appoint both parents as co- guardians, they may not issue any order regarding how such a joint appointment is to be applied. Of course, the same considerations set out above regarding shared decision making by joint managing conservators of minors should be taken into consideration in the event parents are seeking co-guardianship. The adult child with disabilities might need someone to work with the government, medical and mental health providers, and educational facilities, and having one person who has clear authority might be a compelling reason to either not appoint co-guardians or to limit one of the co- guardian's authority.

b. Child Support for an Adult Disabled Child

The Family Code contains provisions that the family court will have continuing jurisdiction to make orders for decision-making rights and possession orders for an adult child with disabilities. The family court also has authority to order either or both parents to provide for the support of a child for an indefinite period if the court finds that:

(1) the child, whether institutionalized or not, requires substantial care and personal supervision because of a mental or physical disability and will not be capable of self-support; and
(2) the disability exists, or the cause of the disability is known to exist, on or before the 18th birthday of the child.

Family Code Section 154.302(a).

The suit may be filed regardless of the age of the child. Family Code Section 154.305 (a)(1). A suit for support of an adult child with disabilities may be filed after the child's eighteenth birthday, and there appears to be no statute of limitation for seeking support for an adult child with disabilities.Justice Eva Guzman, in a concurring opinion denying writ, indicated concern that the legislature has provided too little guidance regarding what evidence is necessary to establish how one may qualify for support for an adult child with disabilities. *In the Interest of D.C.*, 549 S.W.3d 136 (Tex. 2018). In addition, the Attorney General has been sued in an attempt to declare Section 154.302 unconstitutional. Cause No. D-1-GN- 18-002678; Rodolfo Canales, Jr. v. Ken Paxton; in the 345th Judicial District Court of Travis County, Texas. In the last legislative session, a bill was introduced that would have significantly reduced the ability of the court to order support for an adult child with disabilities. The bill did not make it out of committee, but it may return again.

Caution should be taken when there is a finding that an adult child is disabled and entitled to support. If there is such a finding but there is no provision for support to be paid by the parents, the Social Security Administration may impute income to the adult child although none is being paid. This imputed income will likely disqualify the adult child from governmental benefits as discussed below.

c. Use of Special Needs Trust and Governmental Benefits

Support payments made directly to the adult child with disabilities, or to a parent or guardian of the adult child with disabilities, may jeopardize governmental benefits available to the adult child with disabilities, including Supplemental Security Income (SSI), Social Security Disability Income (SSDI), Medicaid, and Medicare.

SSI is a small monthly cash benefit that is available to individuals who are both disabled and poor and the maximum benefit is $771 per month as of 2019. Qualification and eligibility for SSI takes into consideration sources of "income" for the disabled person and provides a cash benefit amount necessary to get the person up to $771 per month, and to qualify the person must have less than $2,000 in resources and less than $771 in income per month. There are complex rules set out in the Program Operating Manual System. In Texas and some other states, if you are eligible for SSI, you automatically qualify for Medicaid and, quite often, the Medicaid eligibility is the most essential reason to qualify for SSI and to maintain that qualification. SSI eligibility can also serve as a "gateway" for eligibility to a number of other programs for persons with disabilities.

Medicaid provides medical and healthcare-related services to persons with disabilities of limited financial means, and, like SSI, eligibility is related to resources and income – limiting resources to $2,000 and monthly income to less than $2,313 per month as of 2019. There are Medicaid programs which pay for nursing home care, skilled nursing, routine and emergency doctor visits, medications, hospitalizations, surgical procedures, and most other basic medical needs. There are Medicaid waiver programs which provide in-home care, respite-care, and attendant care.

SSDI pays a monthly cash benefit to those that are disabled to the point they cannot engage in work and is paid based on someone's work history and historical payments into the Social Security system. The monthly payment varies, depending upon the work history of the person upon whose payment record the payment is based, which would be the applicant, the applicant's parent, or spouse. It is a significantly higher source of income compared to SSI but only if the applicant or the applicant's parent(s) had a significant work history. After being eligible for SSDI for 2 years, the adult child with disabilities automatically becomes eligible for Medicare.

Medicare is a medical insurance program that provides health insurance coverage to individuals after they reach the age of 65 and for younger persons with disabilities who have been eligible for SSDI for at least 2 years. It is also possible to be "dually covered" by both Medicare and Medicaid. Medicare provides coverage for 80% of the cost of most basic medical needs.

To minimize the impact on eligibility for governmental benefits, the common practice is to create a Special Needs Trust (SNT) to receive and disburse the support for an adult child with disabilities. The rules governing SSI treat child support payments as unearned income to the child or adult child with disabilities, even if those payments were made by one parent to the other. If the child is a minor, then 2/3 of the child support payment is considered income to the child an 100% of the child support payment is considered income to the adult child with disabilities. The use of a properlyestablished first party SNT will eliminate child support as income to the child or adult child with disabilities and assets held within the SNT are exempt from the $2,000 cap on resources. The order for child support should direct that the child support payments are to be made to the SNT. See Practice Tips below.

A self-settled, first party SNT may be established by a parent, grandparent, guardian, court, or by the disabled individual and may have only the disabled person as the one beneficiary and should continue for the life of the beneficiary. The Trustee is, in most cases, the parent receiving the child support. Distributions from the SNT are at the discretion of the Trustee and should provide for no mandatory payments. The SNT must include a provision requiring the SNT to reimburse Medicaid upon the death of the beneficiary or termination of the trust. Rules regarding distributions from SNT can be complicated and guidance from a SNT attorney should be sought for guidance on a plan for distributions to maximize the benefit from the SNT. Due to the many complexities in the law, an experienced SNT attorney should handle the creation and drafting of the SNT. In addition, when payments start being made to the SNT, there are reporting requirements.

Other payments made by one parent to the other parent that could be construed for the purpose of meeting the child or adult child's needs could be considered to be "child support" by the Social Security Administration rules, including the requirement to maintain life insurance so keep in mind that life insurance ordered in a court order should be payable to the SNT also. Life insurance not detailed in a court order may be payable to a third party SNT which does not require Medicaid payback and can also provide for alternate beneficiaries upon the death of the adult child with disabilities.

The Family Code was amended effective September 1, 2019 to provide that support for an

adult child can be paid to a SNT. These payments to a SNT can only be paid to the SNT for an adult child and only if the payments are not paid through the SDU. These restrictions were required by the OAG due to 45 CFR 302.38 that limits who may receive child support payments. 45 CFR 302.38 does not authorize payments to a SNT and, until 45 CFR 302.38 is revised, the OAG will object to payments of support to a SNT. This means SNTs cannot be used to receive child support for minors. Because the SSA considers the income and assets of the custodial parent of a minor in determining eligibility for SSI, in most cases this will not matter. In circumstances where the custodial parent has very little income and assets, the child support might disqualify an otherwise eligible minor child. In such instances, until 45 CFR 302.38 is revised, the OAG will object to the use of a SNT to receive child support payments.

d. Procedure for Seeking Support for the Adult Child with Disabilities

The suit for support for an adult child with disabilities may be brought as an independent cause of action or may be joined with other claims or remedies under the Family Code. If there is a court of continuing, exclusive jurisdiction, the suit may be filed as a modification as provided in Family Code Chapter 156. If there is no court of continuing, exclusive jurisdiction, the claim may be filed as an original suit affecting the parent-child relationship. Family Code Section 154.305. An order for support of an adult child with disabilities may be modified or enforced as any other order for child support. Family Code Section 154.307. The Family Code provisions for support of an adult child with disabilities are not exclusive. The provisions for support of an adult child with disabilities do not affect the rights and remedies of a person other than a parent, including a governmental or private entity or agency, with respect to the support of a child with disabilities under any other law, nor do they affect a parent's right to contract for the support of a child with disabilities. Family Code Section 154.308.

The timing of seeking support for an adult child with disabilities is an important consideration. Disabilities range significantly. In many instances, it will be impossible to determine whether a young child will need substantial care and personal supervision beyond his or her 18th birthday. In such a case, it might not be possible to seek indefinite support at the time child support is established in the original suit affecting the parent-child relationship of the minor child. In other instances, it is a virtual certainty that the child will need support for the balance of his or her life. If the child has a mental or physical disability that is known at the time of the original suit, the person who will be that child's primary caretaker should at least seek a finding that the disability exists, and that the child might require support as an adult. Remember, the care of a child with special needs may limit the caretaker's career and earning potential, which may impair their ability to seek legal services to obtain support when the child becomes an adult. At the time of the original suit, if it is a divorce, the resources of both parents are available for the costs of the suit. The finding of the existence of the disability will protect the child and the caretaking parent from an argument that the disability did not exist prior to the child's 18th birthday. If the court orders that the support obligation is indefinite, the obligor can always seek a modification to have the court determine that the support is no longer necessary because the child is capable of self-support.

e. Amount of Support for the Adult Child with Disabilities after Age Eighteen

One or both parents of an adult child with disabilities may be ordered to provide for the support of the adult child. Family Code Section 154.302 (a). In determining the amount of support to be paid after a child's eighteenth birthday, the court shall give special consideration to:

15) any existing or future needs of the adult child directly related to the adult child's mental or physical disability and the substantial care and personal supervision directly required by or related to that disability;
16) whether the parent pays for or will pay for the care or supervision of the adult child or provides or will provide substantial care or personal supervision of the adult child;
17) the financial resources available to both parents for the support, care, and supervision of the adult child; and
18) any other financial resources or other resources or programs available for the support, care and supervision of the adult child.

Family Code Section 154.306. The Fourteenth Court of Appeals concluded that "when determining child support for adult disabled children, courts must apply section 154.306, but they continue to remain bound under section 154.304 to consider and apply the substantive rights and remedies applicable to SAPCR suits." *In re JMW*, 470 S.W.3d 544, 555 (Tex.App.- Houston (14th Dist. 2014, No Pet.).

f. Annuities as Support for the Adult Child with Disabilities

Structured settlement or an annuity is another option for support of the adult child with disabilities. The structured settlement can be paid to a SNT for the benefit of the adult child and would require a large outlay by the obligor up-front to purchase an annuity to pay the future support. The Family Code provides for a lump sum payment, an annuity purchase, and the setting aside of property to be administered for the support of the child as a method for the payment of child support. Family Code Section 154.003. An annuity that is payable for the life of the adult child with disabilities would protect the child, the obligor, and the obligee. The child with disabilities would be ensured support for his or her lifetime, provided the life insurance company is able to pay the obligation. The odds are better that the insurance company will be able to honor the contractual obligation than the parent will be able to continue to support the adult child with disabilities for the remainder of the adult child's life. If an annuity is purchased to pay the child support, life insurance would not be necessary.

ENGAGEMENT AGREEMENTS, LETTERS AND TERMINATIONS

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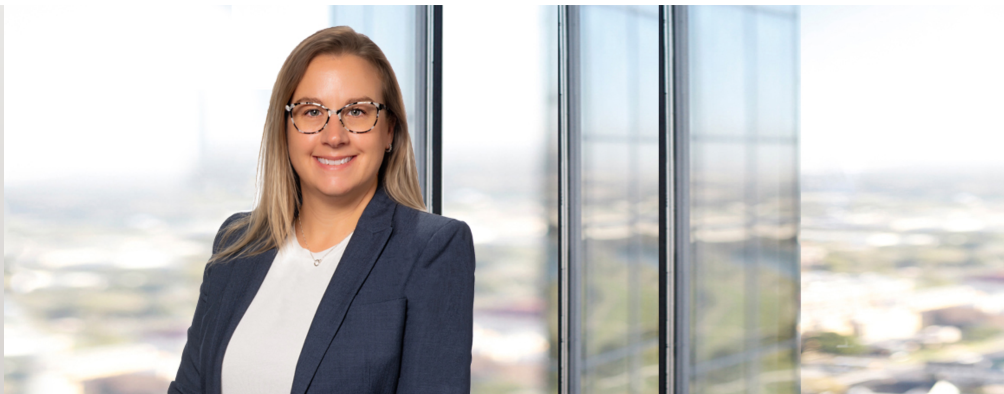

BIOGRAPHY

Ann Lopez is a partner in the Estate Planning and Probate Section of the firm and is Board Certified with the Texas Board of Legal Specialization. Her practice focuses on estate planning for a broad range of clients with varying levels of net worth, including utilization of various types of trusts to achieve desired estate and gift tax goals, asset protection, and wealth transfer techniques. Further, her practice includes estate administration, including probate proceedings, trust administration from funding to termination, and preparation of Estate Tax Returns (Form 709) for both taxable estates and portability purposes.

AFFILIATIONS AND HONORS

AFFILIATIONS

- The College of the State Bar of Texas, 2015–2021
- Tarrant County Probate Bar Association
    - Member 2011–2022
    - Board, 2016–2020
- North Texas Community Foundation, Board, 2022-2024
- WORTH - North Texas Community Foundation
    - Member 2015-2021
    - Steering Committee 2016–2021
- Friscovania
    - Founding Organizer
    - Member 2016–2019

HONORS

- Top Attorney, *Fort Worth Magazine,* 2018, 2022
    - Probate, Estates, Trust
- Super Lawyers Rising Star, Thomson Reuters, 2019-2021
    - Estate Planning

EDUCATION

- Board Certified, Estate Planning and Probate Law, Texas Board of Legal Specialization, 2017
- Texas Wesleyan University School of Law, J.D., 2010
    - Dean's List
- Texas Christian University, B.S., 2003

ADMISSIONS

- State Bar of Texas, 2011

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Experience:

Moorman Tate, LLP – Partner, November 1976 to present.

Estate Planning Practice

Planned estates ranging in size from modest estates to estates in excess of $100 million. Counseled numerous clients in estate planning and probate matters. Prepared hundreds of complex wills, containing provisions for testamentary trusts, marital deduction trusts, generation skipping trusts, life insurance, and powers of appointment (both general and special). Prepared and filed numerous federal estate (Form 706) and federal gift tax (Form 709) returns. Prepared family limited partnerships, grantor retained annuity trusts (GRAT), qualified personal residence trusts (QPRT), *Graegin* notes, intentionally defective grantor trusts (IDGT), corporations, private foundations, charitable trusts, limited liability companies, revocable and irrevocable trusts, pourover wills, insurance trusts, *Crummey* trusts, durable general and health care powers of attorney, buy-sell agreements, directives to physicians, and guardianship designations. Counseled clients in business succession planning. Handled both intestate and testate probate administrations from beginning to end. Represented taxpayers in audits of estate tax returns. Successfully obtained private letter rulings in the estate tax area. Judicial modification of trusts. Prepared qualified income trusts, special needs trusts, and advised clients on Medicaid qualification.

Civil Trial Practice

First chair bench and jury trial experience in will and probate contests, personal injury, contract, commercial, condemnation, deceptive trade practice, will contest, oil and gas, and other areas of law in district and county courts. Practiced in both state and federal courts. Represented clients in arbitrations and mediations. Served as an arbitrator. Participated in contested case hearings as a member of the Texas Air Control Board, the former Texas agency responsible for regulating air pollution in Texas.

Honors and Bar Activities

Listed in *Best Lawyers in America* each year since 2001. This distinction is awarded by consensus opinion of lawyers in the same geographical area and legal practice area. Named Lawyer of the Year – Trust & Estate Litigation for the Houston area for 2013 and Lawyer of the Year – Trust & Estates for the Houston area for the year 2021, an honor awarded to only one lawyer each year in the Houston region for these two areas of law. Appeared on the charter listing of *Texas Super Lawyers* in *Texas Monthly* magazine and named on the *Super Lawyers* list every single year this award has existed. This award is voted upon by members of the bar. The selection process includes independent research, peer nominations, and peer evaluations. Received the Texas Bar 2015 STANDING OVATION award for speaking and writing for Texas Bar sponsored seminars. Distinguished alumnus of the Brenham Independent School District.

Board Certifications:

Civil Trial Law, Texas Board of Legal Specialization; Estate Planning and Probate Law, Texas Board of Legal Specialization.

Education:

Massachusetts Institute of Technology, B.S. - Civil Engineering.
Southern Methodist University, J.D. cum laude (1976), Associate Editor of Air Law and Commerce; The Barristers; Order of the Coif; Corpus Juris Secundum Award for Significant Legal Scholarship; Five American Jurisprudence Awards for highest grade point average in the class.
Brenham High School, Valedictorian; President – Student Council

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ENGAGEMENT AGREEMENTS, LETTERS AND TERMINATIONS

"A LAWYER'S TIME AND ADVICE ARE HIS STOCK IN TRADE"
-Abraham Lincoln

I. INTRODUCTION AND WARNING.

This quote by Abraham Lincoln hung in my father's office from the time he started practicing law in Brenham in 1954 until he retired in 1984. His practice spanned manual typewriters to word processors, a few law books to computerized legal research, and general practitioners to board certified specialists. Two things that have never changed are the challenge all attorneys face in getting paid for the work they perform and in satisfying their clients. In 1954, malpractice insurance was cheap and claims were rare. Today, attorneys specialize in legal malpractice and in something less than malpractice: a claim for a breach of fiduciary duty that can result in a fee forfeiture for the attorney that has attained an excellent result for a client. The potential for liability is increasing. *See Belt v. Oppenheimer, Blend, Harrison & Tate,* 192 S.W.3d 780, (Tex. 2006) and *Smith v. O'Donnell*, 288 S.W.2d 417 (Tex. 2009).

While my father may have sued a client to collect a fee, our malpractice carriers advise us to never sue our clients for fear of the client bringing a counterclaim for malpractice.

The practice of law has changed dramatically, and, like most things, the pace of that change seems to be increasing. Therefore, it is important to draft fee agreements that are clear, understandable by the client, and in compliance with statutes and the Texas Disciplinary Rules of Professional Conduct ("Tex. D.R." or "D.R."). Even after we do all of that, there is still a risk the court will decide that something else needs to be done to resolve a conflict between an attorney and a client. Another important source to consider is the RESTATEMENT 3D OF LAW GOVERNING LAWYERS (American Law Institute, 2001) ("RESTATEMENT"). The Texas Supreme Court in *Burrow v. Arce*, 997 S.W.2d 229 (Tex. 1999) cites the RESTATEMENT. Like it or not, the RESTATEMENT, written by law professors, federal judges, state court appellate judges and lawyers from larger law firms, may have a great deal of influence on courts in judging attorney's conduct and behavior in the future. Tax practitioners are governed by the provisions of Circular 230 which was most recently revised in June of 2014 (31 C.F.R., Part 10). For estate planners and transactional lawyers, the ACTEC Commentaries on the Model Rules of Professional Conduct (5th ed. 2016) and the ACTEC Engagement Letters – a Guide for Practitioners (3rd ed. 2017) are useful resources. Another source for guidance is the American Bar Association's ethics search: americanbar.org/groups/professionalresponsibility/ publications/ethicsopinions.

The Texas Center for Legal Ethics has Texas Commission on Professional Ethics ethics opinions online at www.legalethicstexas.com/Ethics-Resources/opinions.aspx that are very helpful.

It is often believed that a violation of the Code of Professional Responsibility gives right to a private cause of action. The courts have consistently held, and the Texas Disciplinary Rules expressly provide, that a violation of the Code of Professional Responsibility does not give rise to a private cause of action. *Joyner v. Defriend,* 255 S.W. 3d 281 (Tex. App.-Waco 2008).

Some fine authors have produced great papers on this subject. The October 2012 edition of the Texas Bar Journal is entitled "Attorneys' Fees Some Issues to Consider". It contains articles about getting paid for what you do, preparing an effective engagement letter, problem areas in attorneys' fees, non-refundable retainers, security for fees, the Lodestar Method, Texas and Federal rules, and outside counsel as well as advice to solos about legal fee arrangements and billing practices. All of the articles are excellent and helpful. Also, Mark D. White, *Deadly Sins of Attorney Fee Agreements,* 15th Annual Estate Planning, Guardianship, and Elder Law Conference-2013, University of Texas; and *Attorney Fees in Business Litigation – Fee Agreements that Work: Examples & Samples*, Texas State Bar's 2013 Business Disputes Conference; Frank Ikard, *Negotiating Fee Contracts and Recovery Fees in Fiduciary Litigation*, presented to the State Bar's 2003 Advanced Estate Planning and Probate Seminar (at Tab 11),; D. Diane Dillard, *Engagement Agreements: The Top 20 Country Countdown with Tips for Ethical Compliance*, 2013 State Bar of Texas Advanced Reals Estate Drafting course; Justin M. Campbell, Kenneth J. Fair, and Suzanne E. Goss, *Who's Your Client?*, 2013 State Bar of Texas Advanced Estate Planning and Probate Course; and Patrick Pacheco, *The Engagement Agreement: One Knee and a Diamond Ring - Lawyer Style*, 2003 State Bar of Texas Drafting: Estate Planning & Probate Course; Claude E. DuCloux, *Attorney Fee Agreements and Miscellaneous Forms,* State Bar of Texas CLE; and Gregg S. Weinberg and Caitlin Booker, *Problems Caused By and Litigation Concerning an Attorney's Withdrawal from Representation*, State Bar of Texas 14th Annual Fiduciary Litigation Conference (2019). A great article on case management is "*Defensive Case Management*" by Pi Yi Mayo, 18th Annual Estate Planning, Guardianship, and Elder Law Conference,

University of Texas (2016). There are more listed in the Bibliography at the end of this paper.

II. FEE CONTRACTS.

A. The Attorney-Client Relationship.

When does an attorney-client relationship begin? How does an attorney know who is and isn't his client in an initial interview with someone the attorney has never seen before? Is it established sooner when the prospective client is not very sophisticated? The short answer is the attorney doesn't know. The better course is to negate the attorney-client relationship in a written document given to the prospective client until the client engages the lawyer's services with a written fee agreement.

The court in *Tanox v. Akin, Gump, Strauss, Hauer & Feld, LLP*, 105 S.W.3d 244 (Tex. App. - Houston [14th Dist.] 2003– pet. den.), discussed the factors to look at in determining when an attorney-client relationship is established. The case involved a sophisticated company that was dealing with the Akin Gump law firm. Tanox was conducting a "beauty contest" among a number of lawyers to see which firm it would hire in a high stakes litigation case. The court's opinion on Page 254 contains an excellent review of the factors that establish an attorney-client relationship.

The Akin Gump lawyers worked on the case prior to the time a fee agreement was signed, hoping to receive employment. Tanox argued that there was a fiduciary relationship between the attorney and client regarding preliminary consultations about the possibility of retaining the attorney, citing *Nolan v. Foreman*, 665 F.2d 738, 739 n.3 (5th Cir. 1982). In Nolan, Percy Foreman was retained to appeal a conviction for marijuana trafficking. The attorney argued that there was no attorney-client relationship prior to reaching a fee agreement. The court in *Nolan*, holding that the parties may manifest an intent to create an attorney-client relationship explicitly or by their conduct, found that the attorney's fiduciary duties attached when he entered into a discussion of the client's legal problems with a view towards undertaking representation. *Nolan* at 739.

The court in *Tanox* distinguished *Nolan*. In *Tanox*, the company was considering law firms other than Akin Gump for the representation. Akin Gump's fee agreement stated that "the attorneys have agreed to provide such representation...subject to the following terms, conditions, and understandings". The court, citing The Restatement Section 14 Comment, held that an attorney's agreement to represent a client may be conditioned on the negotiation of a fee agreement. The fee agreement further provided that it was the subject of negotiations with each party having the opportunity to consult with counsel and there was no presumption of construction of the fee agreement against either party. The client in *Tanox* would not allow the lawyers to review proprietary information of the company until they had entered into a fee agreement. Finally, there was a letter from Akin Gump to Tanox expressing Akin Gump's hope that they <u>would</u> enter into a satisfactory arrangement. *Id.* at 255, 256. The court in Tanox held that the evidence did not conclusively establish the existence of an attorney-client relationship and was a question of fact for the arbitrators. *Id.* at 256.

The lessons to be learned from *Nolan* and *Tanox* are many. In my opinion, the sophistication of the client is important. If you have an unsophisticated client, it is extremely important that you tell them in writing that you do not represent them until a fee agreement is signed. Even then, your conduct may contradict the fee agreement. It is better to follow that writing up with a letter each time you meet with someone even if your fee agreement contains similar language to *Tanox*. Appendix V is an example of such a letter. Even if the client is not represented by counsel, you can provide that the fee agreement was the subject of negotiation. The less sophisticated your client, the more likely the court will construe the fee agreement against you and find the existence of an attorney-client relationship <u>before</u> the agreement is signed.

Tanox is worth reading to see the type of problems that sophisticated clients can create for their attorneys. Tanox had its own counsel, and, from the case, it appears that Tanox never intended to pay the law firm the fee that Tanox owed.

In *Sotelo v. Stewart*, 281 S.W. 3d 76 (Tex. App. – El Paso 2008, pet. den.), the court held that an attorney-client relationship can be implied from the party's conduct and from the attorney's gratuitous rendition of professional services. In this case, Attorney Stewart defended a breach of contract suit filed against Daniel Sotelo. Mr. Stewart was Daniel Sotelo's attorney in the case from 1991 until March 9, 1994, when the trial court granted Stewart's motion to withdraw. Maria and Daniel Sotelo were married from 1971 until October 20, 2000. Maria Sotelo's name did not appear as a defendant in the breach of contract case until Stewart added it to the style of his Motion for a Continuance filed in February, 1994. In December 1994, the plaintiff obtained a judgment against defendants Daniel Sotelo and Maria Sotelo for the sum of $82,000.00 even though the plaintiff had not named Maria as a defendant.

No further action was taken on the 1994 judgment until August 2001 when the plaintiff obtained a writ of execution and a subsequent sale of Maria Sotelo's real property.

The Court of Appeals, in overturning a motion for summary judgment in favor of Stewart, found that Stewart's adding Ms. Sotelo's name to documents that he filed with the trial court created a fact issue on the existence of an implied attorney-client relationship. *Id.* at 81.

You and the person with whom you are speaking may have very different ideas about whether you are their lawyer. It is extremely important to inform a prospective client in writing that you do not represent them, or, if you are waiting for them to pay a retainer, that you do not represent them and that you will not do anything until you have received a signed engagement letter and a retainer fee. Keep these letters in a separate file labeled "Non Representation Letters". They can be invaluable in proving that you never represented someone. They can also motivate your client to fund your retainer and sign the engagement agreement. In addition to Frank Ikard's fine paper, 48-AM JUR Proof of Facts 2d, 525 §§ 7 et seq., 22 et seq., provide an excellent source for understanding the attorney-client relationship. Rather than worry about what the case law holds regarding when the relationship is established, make it clear to everyone you deal with.

B. All Things Being Equal, The Lawyer Loses - Sometimes.

When an attorney-client relationships exists, the attorney is a fiduciary and his contracts are subject to the same scrutiny by the courts as any fiduciary relationship. In *Archer v. Griffith*, 390 S.W.2d 735 (Tex. 1964), a married woman entered into a verbal contingent fee contract with a law firm for her divorce. She abandoned the divorce proceeding, but eighteen months later employed the same firm to reinstitute the divorce and signed a written contingent fee agreement giving the attorney a percentage of the separate and community property recovered in the divorce. She did not own any separate property, and, because of that, the employment of an attorney to institute and prosecute proceedings for divorce and partition of community property was not an incident of her power to manage, control and dispose of her property under the Texas law at the time.

After the divorce was granted, the client signed a deed conveying a portion of the property granted to her in the divorce to the attorney. This deed was attacked because it was held to be a contract between a client and an attorney who had a pre-existing attorney-client relationship.

Even though this principle applies only to those with whom an attorney has had a prior relationship, some attorneys will still make disclosures, as provided in Appendices B and I, that suggest having an independent attorney review the fee contract. Contracts that call for an independent lawyer to review the agreement can help if the proposed client has a lawyer who is referring the case to you. That lawyer can review the contract on the client's behalf. As Barney Jones of Houston points out, what about a proposed client who has no lawyer? Will the lawyer he sees to review your engagement agreement have an engagement agreement that also calls for independent attorney review of the second lawyer's contract? Where does it end? The "independent attorney" review language of your fee agreement may not save you if a court adopts this analysis in litigation over your fee agreement. On the other hand, it may save you with a sophisticated client.

Although courts make a distinction between contracts entered into before and after the beginning of an attorney client relationship, you are well served to review your engagement letters as if anyone signing them is your client. You owe existing clients a fiduciary duty. Draft your contracts and conduct your relationships with your clients as if the fiduciary duty exists.

C. Contract Construction.

It is dangerous to rely on case law that was decided a few years ago to determine how courts will construe attorney fee contracts. In the past, Texas has followed the general rule that attorney fee contracts are subject to the same rule of construction as other contracts. *Stern v. Wonzer*, 846 S.W.2d 939, 944 (Tex. App. - Houston [1st Dist.] 1993, no writ). In *Levine v. Bayne, Snell & Krause, Ltd.* (40 S.W.3d 92, Tex. 2001), the Supreme Court cited, with approval, Section 18(2) of the RESTATEMENT which provides:

"A tribunal should construe a contract between client and lawyer as a reasonable person in the circumstances of the client would have construed it."

In reviewing cases from other states, the court agreed with the premise that lawyers are more able than most clients to protect and clarify omissions in client/lawyer contracts because lawyers write the contracts, are more familiar with the intricacies of legal representations and with the law in drafting of fee agreements and other contracts.

In *Levine*, Ron and Sarina Levine hired the law firm to sue the grantors of their home (Smiths) for failure to disclose foundation defects in the home the Smiths sold to the Levines. The Smiths owner financed the purchase of the home. Although the court awarded $243,644.00 in damages for the foundation defect along with interest and attorney's fees, it also found that the Smiths were entitled to the balance due on the mortgage, accrued interest and attorney's fees, all of which totaled $161,851.38. The question for the court was whether the fee contract that the Bayne law firm had with the Levines provided for a contingent fee

on the net recovery after deducting the counterclaim or on the gross recovery. In construing the contract, the court held that the risk falls on the lawyer to draft a very clear contract because of the attorney's sophistication, the fiduciary relationship with the attorney's client, and the benefit to the legal system. In this case, the majority opinion does not hold that the contract is ambiguous only that it is contrary to public policy. Justices Hecht and Abbott, in their dissent, note that the majority fails to analyze how a reasonable person would construe the contract.

See *U.S. Denro Steels, Inc. v. Lieck*, 342 SW3d 677 (Tex. App. – Houston [14th Dist] 2011) for a case with similar facts and a similar outcome.

Oral Agreements Regarding Fees. In *David J. Sacks, P.C. v. Haden*, 263 S.W. 3d 919 (Tex. 2008) the Texas Supreme Court reversed the Court of Appeals (222 S.W.3d 580 (Tex. App.-Houston 1st Dist 2007), and held that a written fee agreement was unambiguous and that the parol evidence rule bars an oral agreement to cap the attorney's fees.

It is hard to reconcile the holding in *Levine* with the holding in *Lopez v. Munoz, Hockema & Reed, LLP,* 22 S.W.3d 857 (Tex. 2000). In that case, in construing a contingent fee agreement, the court held that the contract was unambiguous. It further held that when a contract was unambiguous, the court would enforce it as written.

The Latest Word in Contract Construction. In *Anglo-Dutch Petroleum International, Inc. v. Greenberg Peden, P.C.,* 352 S.W.3d 445 (Tex. 2011), the Texas Supreme Court has given us its latest word on the construction of attorney fee agreements. In *Anglo-Dutch*, the court was asked to determine whether a fee agreement was ambiguous, and, in turn, to construe the terms of the fee agreement. The pronouncements by the Courts are most helpful determining how to construe a fee agreement. The Court announced the standards as follows:

"Whether a contract is ambiguous is a question of law that must be decided by examining the contract as a whole in light of the circumstances presented when the contract was entered. One such circumstance is the existence of a lawyer-client relationship between the parties. Because a lawyer's fiduciary duty to a client covers contract negotiations between them, such contracts are closely scrutinized. Part of the lawyer's duty is to inform the client of all material facts. And so that this responsibility is not a mere and meaningless formality, the lawyer must be clear." *Id.* at 449-450.

"Clarity in fee agreements is certainly important to clients…." Clarity is also important to lawyers. *Id.* at 450.

"Only reasonable clarity is required and not perfection; not every dispute over the contract's meaning must be resolved against the lawyer. But the object is the client be informed, and thus whether the lawyer has been reasonably clear must be determined from the client's perspective. Accordingly, we agree with the Restatement (Third) of the Law Governing Lawyers that "(a) Tribunals should construe a contract between client and lawyer as a reasonable person in the circumstances of the client would have construed it." *Id.* at 451.

The court found that other circumstances surrounding the execution of a contract will inform its construction but there are limits to that. The court agreed that an unambiguous contract must be enforced as written and that parole evidence would not be received for the purpose of creating an ambiguity or giving the contact a meaning different from that which its language imports. *Anglo Dutch Pet v. Greenberg Peden P.C.*, 352 S.W.3d 445, 451 (Tex. 2011)

"Construing client-lawyer agreements from the perspective of a reasonable client in the circumstances imposes a responsibility of clarity on the lawyer that should preclude a determination that an agreement is ambiguous in most instances. Lawyers appreciate the importance of words and 'are more able than most clients to detect and repair omissions in client-lawyer contracts' (Restatement Third of the Law Governing Lawyers Section 18, Comment h). A client's best interests, which its lawyer is obligated to pursue, do not include having a jury construe their agreements." *Id.* at 453.

Where does that leave a lawyer? The agreement must be clear and as unambiguous as possible. What that means for many lawyers, as you can see by the examples in this paper, is that the contract will also be lengthy. Words are how we protect our clients and ourselves. Using more words rather than less to fully explain to a client the circumstances of the engagement can be helpful.

Be specific about what you are and are not going to do. Be specific about who your client is.

Attorneys should exercise special care in drafting fee agreements to take into account all of the circumstances and all of the probable events that can occur in litigation. That may mean that the modern agreement will be 10 pages or more with numerical examples. It will attempt to account for every possible contingency. If the case involves a seven or eight figure fee, no matter how well drafted the agreement is or how well the attorney performed, the agreement has a good probability of being the subject of litigation." *Id.* at 451.

D. Court Review of Attorney's Fees.

1. General Rule

When fees are the subject of an unambiguous contract that clearly states the parties' intent, the court will give effect to the intention of the parties as

expressed in the contract. Where the language is plain and unambiguous, the contract is enforced as written. *Stern v. Wonzer*, 846 S.W.2d 939 (Tex. App. - Houston [1st Dist.] 1993, no writ).

2. Statutory Regulation

Well recognized exceptions to this general principle can be found in Sections 351.152 and 1155.052 – 1155.054 of the Texas Estates Code. Contingent fee contracts on behalf of the estate or a ward under a guardianship must be approved by the court. Payment for any professional services for guardianships, including attorneys, other than a contingent fee contract, is covered under Sections 1155.053 and 1155.054 of the Texas Estates Code. Another exception is a bankruptcy proceeding.

The Texas Government Code § 82.065 has been amended. It retains the current requirement that a contingent fee be in writing and signed by the lawyer and the client. It also retains the voidability remedy but it modifies that remedy to also provide a limited quantum meruit recovery.

The section is modified in Paragraph (b) providing that a legal services agreement is "voidable by the client" if obtained by conduct that violates the laws of this state or disciplinary rules regarding barratry by attorneys or other persons. The provisions are another way that a court can void a contract.

There are also remedies for barratry provisions in the Government Code.

Section 82.0651 permits a client to sue to void a contract regarding barratry. Under Section (b) of 82.0651, the client who prevails may recover from any person who committed barratry their fees and expenses paid to that person under the contract, the balance of any fees and expense paid to anyone else under the contract, actual damages and reasonable attorney's fees.

Remedies are also available to a non-client if solicited by conduct violating Texas law or the disciplinary rules regarding barratry. The non-client who prevails can recover from each person who commits barratry a $10,000.00 penalty, actual damages and reasonable and necessary attorney's fees.

Barratry is defined as "the solicitation of employment to prosecute or defend a claim with intent to obtain personal benefit" *State Bar of Texas v. Kilpatrick*, 874 S.W.2d 656, 659 (Tex. 1994). Barratry has always been prohibited, but there are now substantial remedies to deal with this problem.

In *Neese v. Lyon*, 479 S.W.3d 368 (Tex. App. Dallas – 2015), the Court held that a contingent fee contract procured by barratry is voidable even if the attorney fully performed the contract and the client had approved and signed a settlement agreement with the defendant.

3. Fraud and Breach of Fiduciary Duty

Another exception that has received a great deal of notice occurs when the attorney is guilty of fraud or a breach of fiduciary duty. *Burrow v. Arce*, 997 S.W.2d 229 (Tex. 1999).

The Burrow case has been thoroughly discussed in numerous papers, seminars, and reported cases decided after it. The court held that the client need not prove actual damages in order to obtain forfeiture of an attorney's fee for the attorney's breach of fiduciary duty to the attorney's client. *Id.* at 240. The court, in determining whether or not to forfeit fees, will first determine whether a lawyer engaged in a clear and serious violation of duty to the client. *Id.* at 241. Depending on the violation, the forfeiture may be part or all of the fees. *Id.* at 241. Paragraph 13 of the fee agreement in Appendix S is the most interesting one in the agreement. It waives the client's right to obtain punitive damages and the remedy of disgorgement of attorneys fees and expenses. The general rule is that a lawyer cannot limit his liability in advance unless it is permitted by law and the client is independently represented (D.R. 1.08(g)). It is unclear in this instance whether this clause will be upheld by a court. The law firm believes it will because it represents sophisticated clients who have their own in house counsel.

Courts have been very specific about the fact that attorneys owe their clients a fiduciary duty. "Our legal system has long recognized the vital role of the fiduciary duty that the attorneys owe their clients." *Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d150, 154 (Tex. 2004).

"The fiduciary relationship between attorney and client requires absolute and perfect and/or openness and honesty and the absence of any concealment or deception." *Lopez v. Munoz Hockema & Reed, L.L.P.,* 22 S.W.3d 857, 867 (Tex. 2000)

4. An Unconscionable Fee or Breach of Fiduciary Duty

Two authors, Hughes and Castilla, *Ethics and Problems in Drafting Fee Agreements and Resolving Fee Disputes*, January 26, 2001 Telephone Seminar, State Bar of Texas, believe that a dissent written by Justice Gonzales joined by Chief Justice Phillips may be the precursor of another way that lawyers can forfeit their fees. In *Lopez v. Munoz, Hockema & Reed, LLP*, 22 S.W.3d 857 (Tex. 2000), the dissent held that a lawyer breaches his fiduciary duty to the client if he collects an unconscionable fee from his client. *Id.* at 867. The dissent cites the Texas Disciplinary Rules of Professional Conduct (DR) 1.04 as well as the RESTATEMENT. Rule 1.04(a) of DR provides:

> "the lawyer shall not enter into an arrangement for, charge, or collect an illegal fee or unconscionable fee. A fee is unconscionable if a competent lawyer could not form a reasonable belief that the fee is reasonable."

Section b of DR 1.04 tracks the language that we have all learned in determining the reasonableness of attorney's fees. These include, but are not in exclusion of other relevant factors, the following:

> "(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill of requisite that form the legal services properly;
> (2) the likelihood, if apparent to the client, that at the acceptance of the particular employment will preclude other employment by the lawyer;
> (3) the fee customarily charged in the locality for similar legal services;
> (4) the amount involved and the results obtained;
> (5) the time limitations imposed by the client or by the circumstances;
> (6) the nature and length of the professional relationship with the client;
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
> (8) whether the fee is fixed or contingent on results obtained or uncertainty of collection before legal services have been rendered."

In *Lopez*, the clients did not allege that the 45% appeal rate was excessive when the contract was made or that charge of the additional 5% was a breach of fiduciary duty irrespective of the contract. *Lopez* at 862. Because of that, the majority did not analyze the excessiveness of the fee. The dissent felt it necessary to discuss the issue of the unconscionability of the fees regarding excessiveness. *Lopez* at 867. The dissent cites DR 1.03 and 1.04 as well as Sections 28, 29A, 46, and 47 of the RESTATEMENT. It fails to cite or discuss Section 34 of the RESTATEMENT:

> "A lawyer may not charge a fee larger than is reasonable in the circumstances or that is prohibited by law."

It is hard to understand how the dissent could analyze the validity of a contingent fee without a review of Section 34 of the RESTATEMENT.

The RESTATEMENT comments to Section 34 indicate that three questions need to be asked about any fee:

> "First, when the contract was made did the lawyer afford the client a free and informed choice?
> Second, does the contract provide for a fee within the range commonly charged by other lawyers in similar representations?
> Third, was there a subsequent change in circumstances that made the fee contract unreasonable?"

RESTATEMENT § 34, Comment c. At the end of Comment c, there is some hope for the contingent fee lawyer:

> "A contingent fee contract, for example, allocates to the lawyer the risk that the case will require much time and produce no recovery and to the client that the case will require little time and produce a substantial fee. Events within that range or risks, such as a high recovery, do not make unreasonable a contract that was reasonable when made."

This quote seems to contradict the third question.

Immediately after this, an illustration indicates the point of having a contract is very explicit. In the illustration, a bank clerk is charged with embezzlement and retains a lawyer to defend him for a $15,000.00 flat fee. The next day another employee confesses to the crime and the prosecutor, not knowing of the lawyer's retention by the bank clerk, drops the charges. The RESTATEMENT's comments provide that. unless there were special circumstances, such as a prior discussion of this possibility, or the lawyer having rejected other representation, it would be unreasonable for the lawyer to retain the $15,000.00 fee. This is another example of why attorneys' contracts have to be much more explicit than they currently are.

For a recent example of a fee agreement that the El Paso Court of Appeals found to be unconscionable as a matter of law, see *Hoover Slovacek LLP v. Walton,* 206 S.W.3d 557 (Tex. 2006).

In *Wythe II Corporation v. Stone*, 342 S.W.3d 96 (Tex. Civ. App. – Beaumont 2011) *pet. den.; cert. den*. 132 S.Ct. 1150 (2012), the issues of forfeiture and contingent fee agreements both presented themselves. In this case the attorney entered into a fee agreement with a client that allowed the attorney at the attorney's sole option to switch from an hourly rate contract to a contingent fee contract. The facts that changed things somewhat is that Stone was the lawyer for Wythe Corporation in trying to recover on an insurance

settlement. Wythe had separate counsel in a bankruptcy proceeding. The bankruptcy court approved Stone's contract as a contingent fee contract only.

Stone negotiated an acceptable settlement for Wythe. A fee dispute arose between Stone and Wythe. Stone, while still representing Wythe, had intervened in the lawsuit to collect his fee and moved to withdraw his counsel for Wythe. Wythe counterclaimed for fraud and breach of fiduciary duty.

The court held that the sole option provision allowing Stone to convert the case to an hourly rate case was void but that did not void the entire agreement as being unconscionable. It also held as void the termination fee provision that provided that the attorney could get a contingent fee at any time as long as the matter had been settled in its entirety on the date of withdrawal.

In this case, unlike in *Hoover Slovacek LLP v. Walton*, 206 S.W.3d 557, 562 (Tex. 2006), the termination provision allowing a contingent fee even if the lawyer terminated the agreement did not void the Stone's right in this case to a contingent fee because, the court found, he had already earned it.

Secondly, the fee agreement was reviewed by a second lawyer, Wythe's bankruptcy lawyer, and the contingent fee provision was approved by the bankruptcy court.

The court further found that the attorney was not required to bear all the litigation costs and that a client could bear the expenses of the litigation so long as the contract clearly stated what expenses of litigation were the client's responsibility.

Finally, the court held that fee forfeiture is restricted to an attorney's clear and serious violations of duty, citing Section 49 of the Restatement Third of the Law Governing Lawyers. *Id.* at 104. Continuing to cite the RESTATEMENT, the court held that a clear violation of an attorney's duty to a client occurs if a reasonable lawyer knowing the relevant facts and law reasonably accessible the lawyer would have known that the conduct was wrongful. The Court found that there was no fraudulent concealment and that the attorney adequately explained things to the client. *Id.* at 106. Finally, Wythe complained that a condition precedent to recovery was approval by the bankruptcy court of the settlement. The bankruptcy had been dismissed before there was a settlement. Wythe claimed this voided the contract. The court held that when a condition to performance of a contract would impose an impossible result, it is not generally treated as a condition precedent. *Id.* at 106. Because the bankruptcy court no longer had any jurisdiction over the matter, that condition precedent disappeared.

A recent case, *Izen v. Laine*, 614 S.W.3d 775, Tex. App. – Houston [14th Dist.] 2020 – pet. filed, discusses the attorney-client relationship and the review of a contingent fee agreement. The Court held that contingent fee agreements are subject to the prohibition against an attorney charging or collecting an unconscionable fee. In this matter, Brian Laine was a seaman who had some serious injuries. He and his employer negotiated a settlement of his Jones Act claims. The lump sums that they agreed on were payable once Mr. Laine signed the formal settlement agreement and also included an annuity of $1,100 per month for a minimum of 30 years.

The employer drafted a settlement agreement and sent it to the employee recommending he consult an attorney.

Mr. Laine contacted attorney Izen to review the agreement to make certain it said what he thought it said and to pursue claims he might have against third party entities regarding those responsible for his injuries.

Izen reviewed the agreement and nothing changed about the settlement. Izen and Laine signed an employment agreement which provided that Izen was retained to "sue for and recover all damages and compensation to which Mr. and Mrs. Laine may be entitled as well as to compromise and settle all claims arising out of the causes of action against the fabricators that employed his employer and his employer." Izen did not offer a flat fee option or an hourly rate, only a 30% contingent fee. Included in this contingent fee were fees for all the prior payments that Mr. Laine had already negotiated.

The employer made the two lump sum payments and set up the annuity with an insurance company. The insurance company made monthly payments to Mr. Laine. Mr. Laine made an initial 35% payment on the lump sum amounts and timely made 35% payments on all the annuity payments to attorney Izen.

Izen drafted a pro se petition for Mr. Laine because Izen had not yet contacted a Louisiana attorney to represent Mr. Laine. The third-party litigation was dismissed, and Mr. Laine terminated Mr. Izen's services and quit paying him.

Mr. Izen sued the Laines for his fees. The Laines answered that the fees were unconscionable and they filed a counter-claim against Izen asking for disgorgement. The trial court signed an order directing Izen to disgorge all fees collected from the Laines and instructed the Laines to file a proposed final judgment. The trial court affirmed everything except for the order ordering Izen to disgorge the $70,000 in fees that Mr. Laine had paid him.

The court found this was an unconscionable fee. It was especially unconscionable when one of the defendant entities had already reached a settlement before the attorney ever began his representation. The claim for fee forfeiture was a counter-claim, and the

court held it was barred by the statute of limitations. There was a vigorous defense stating that these types of matters should not be viewed as simple contract claims. Because a petition for review is pending before the Texas Supreme Court, we may get a different answer once the Texas Supreme Court has spoken.

5. No Attorneys Fees Allowed for Time Spent on Motion to Withdraw

In *Lee v. Daniels & Daniels*, 264 S.W.3d (Tex. App.-San Antonio 2008 reh. overruled), the court held that an attorney cannot charge the attorney's client for the time the attorney spends on withdrawing from representation, no matter how justified the attorney is in withdrawing. The court reasoned that the services are not rendered for the benefit of the client, but rather for the benefit of the lawyer.

6. Modern Court's Review of Attorney's Fees

A good example of modern court's review of the reasonableness of attorney's fees is found in *Miller v. Kennedy & Minshew Prof. Corp.,* 142 S.W.3d 325 (Tex. App. - Fort Worth 2003, pet. denied). This case involved a complicated set of facts in which the lawyer took a contingent fee contract in a business transaction. The court began its analysis by stating that the reasonableness of attorney's fees in a contract is reviewed at the inception of the contract. In *Miller*, there was an argument about the burden of proof of establishing the fairness and reasonableness of the agreement. The attorneys waived that by failing to object to the trial court's instruction. The appellate court, in a footnote (fn8 at 336) found that the attorney-client relationship began much earlier than the day the contract was signed. The attorneys had an expert, Frank Douthitt, former general counsel for the State Bar of Texas and a former state district judge to testify. It reviewed what the various provisions of D.R. 1.04(b) provided in this instance, and probably something that helped the law firm, was the fact that the firm offered to represent the client on an hourly basis.

El Apple I, Ltd. v. Olivas, 370 S.W.3d 757 (Tex. 2012) set a new standard for the proof required in obtaining attorneys' fees at trial. The Court held that the attorney had the burden to show the hours that were devoted to each task and these hours had to be based on the attorney's time records and other documentary evidence. The Dallas Court of Appeals in *Metroplex Maling Services, LLC v. RR Donnelly & Sons Co.*, 410 S.W.3d 389 (Ct. App.-Dallas 2013, no pet. hist) held that, for the month prior to trial, the attorney did not have to submit documentary evidence but could testify regarding his experience, the total amount of attorneys' fees and the reasonableness of such fees.

7. Depositing Disputed Fee in an Escrow Account.

If an attorney has a fee dispute with a client over a fee that constitutes part of a recovery on the client's behalf, the attorney should never deposit it in his escrow account. By doing so, the attorney has "charged" his client for his services, within the meaning of DR 1.04(a) prohibiting the charge of an illegal or unconscionable fee. *Comm'n For Lawyer Discipline v. Eisenman*, 981 S.W.2d 737 (Tex. App - Houston [1st Dist.] 1998, pet. den.). Although the court held this to be true, part of the reason for its holding was the attorney did not have a written agreement with the client authorizing him to charge the client for the fee that was held in his escrow account. *Id.* at 740. The court held that the attorney's remedy was to sue the client, not retain the fee. *Id.* at 741.

8. Multi Plaintiff Litigation

The issue of court approval of fees has arisen in *Spera v. Fleming, Hoverkamp & Grayson, P.C.,* 25 S.W.3d 863 (Tex. App. - Houston [14th Dist.] 2000, no writ). In Spera, the attorneys were sued by their former clients over their fees in a settlement in a mass tort case. *Id.* at 867. It was not a class action, but the court, *sua sponte*, decided to hold a fairness hearing regarding the contingent fee arrangement. *Id.* at 867. The client sued for breach of fiduciary duty alleging that the attorneys had a duty to advise these clients that there was now a conflict of interest between the clients and the lawyers regarding the fee. The lawyers argued that the trial court's ruling on fees was collateral estoppel. The Houston court held that once that conflict arose, the attorneys had a duty to advise their client of that conflict.

9. Contingent Fee Contract as Evidence of Reasonable Fee

A contingent agreement, standing alone, is not evidence of a reasonable fee. The Supreme Court has held: "a contingent fee may indeed be a reasonable fee from the standpoint of the parties to the contract. But, we cannot agree that the mere fact that a party and a lawyer have agreed to a contingent fee means that the fee arrangement is in and of itself reasonable for the purposes of shifting that fee to the defendant." *Arthur Andersen v. Perry Equipment Corp*., 945 S.W.2d 812 (Tex. 1997).

10. Non-Refundable Retainer or Prepayment of a Fee

What is the difference between a non-refundable retainer and a prepayment of a fee? How about professional misconduct? In a recent Austin Court of Appeals case, *Cluck v. Commission for Lawyer Discipline*, 214 S.W.3d 736, (Tex. App.-Austin 2007 no pet. hist.), a lawyer learned the difference between the prepayment of a fee and a true retainer. Cluck

agreed to represent Smith in a divorce case and had her sign a fee agreement which stated: "In consideration of the legal services rendered on my behalf, in the above matter, I agree to pay Tracy D. Cluck a non-refundable retainer in the amount of $15,000 …." After that sentence, a handwritten provision explains, "Lawyer fees are to be billed at $150 per hour, first against non-refundable fee and then monthly thereafter. Additional non-refundable retainers requested". The contract also provided that no part of the legal fee was to be refunded.

Smith paid Cluck $15,000 on June 28, 2001. Cluck did some work and stopped at Smith's request. One year later, Smith contacted Cluck about resuming work on the case. Cluck asked Smith to sign an amendment to the contract in which Smith agreed to pay an additional $5,000 non-refundable fee and increased the hourly rate to $200 per hour.

Smith fired Cluck and requested a return of the file and an itemization of the fee. There was a dispute about the hours Smith worked, but even the highest figure at $200 per hour only produced a fee of $5,700.

The appellate court held that the Cluck's fee was a prepayment for services which should have been placed in Cluck's trust account . It held that a retainer is not a payment for services but an advance fee to secure a lawyer's services and to pay the lawyer for loss of the opportunity to accept other employment.

Cluck's contract should have provided that the money was paid to secure the lawyer's availability and to pay him for the loss of other employment opportunities. If the money paid was not excessive, the court held, it would have been deemed to have been earned when it was received and need not have been placed in the lawyer's trust account.

The court found that the money paid under Cluck's contract, however, was an advance fee payment which belonged partly to the client. It should have been deposited in Cluck's trust account and withdrawn as Cluck had earned the money.

This case shows that non-refundable retainers are dangerous. They have to be reasonable and properly documented. The "securing the lawyer's availability and paying him for the loss of other employment opportunities" part is more difficult. A good example would be a case that would require all of the lawyer's time for several weeks. If the lawyer had a good practice, he might lose clients if he was unavailable. In that instance, a non-refundable retainer (if not excessive) would be appropriate.

The State Bar has cleared up some of the confusion regarding a non-refundable retainer in Ethics Opinion No. 611 issued in September 2011. The opinion basically restates what some other opinions have held in that a true non-refundable retainer is not a payment for services. It is more of an advance fee to make sure that the lawyer will be available and will not take other employment. It compensates the lawyer for the loss of opportunity to accept other employment. If the lawyer can prove that other employment would be lost by obligating himself to represent the client, the retainer fee would be deemed earned at the moment it is received. A problem arises if the client discharges the attorney for cause before the attorney has lost any opportunity to represent others or if the attorney withdraws voluntarily. The attorney must then refund an equitable portion of the retainer.

It is very difficult to determine a fair non-refundable retainer. For that reason, you should always proceed with caution in obtaining a non-refundable retainer from a client. The opinion goes on to provide that if you are going to enter into one of these agreements, and you have future work to do, if the future work is covered by the employment agreement and by what the attorney has called a non-refundable retainer, that part must be kept in the lawyer's trust account until the future work is performed. It is only that part that is a true retainer, in other words a payment to secure the lawyer's availability and to keep the lawyer from obtaining other work, which can be deposited in the lawyer's operating account. As mentioned above, even all or part of that fee might be required to be returned to the client. In all of these matters, however, the fee must be reasonable.

Cynthia Canfield Hamilton thoroughly examines the issue of nonrefundable retainers in *When is a Retainer Truly Non-Refundable?* 75 Tex. Bar J. 694 (2012). Proceed with great caution in this area.

11. <u>Contingent Fee Contracts – Too Complicated?</u>

Jim M. Perdue, Jr. was kind enough to let me use this contract in Appendix MM. He believes that the more complex agreements that all of us use are too complex for many people to even understand and, as a result, he uses a simplified form of agreement that you can see attached in Appendix MM. He is a very successful plaintiff's lawyer with a very successful law firm.

E. Alternatives to Billable Hour

Lawyers have tried to determine ways to set their fees in ways other than by hourly rates. The contingent fee was one of the first alternate fee arrangements. Until it was declared it was declared to be in violation of the anti-trust laws by the U.S. Supreme Court, the State Bar of Texas published a minimum fee schedule that suggested alternate fee arrangements such as billing for handling a real estate transaction by a percentage of the sales price. I have represented individuals in estate matters who would not afford to pay me immediately but who would be receiving

money at a later date by charging them 1.5 times my hourly rate until they were able to pay my fee. Once they were able to pay me and were able to pay a retainer fee, the rate dropped down to my normal hourly rate.

Attached as Appendix S is the engagement letter of a very fine law firm that does work in major litigation matters. The agreement is worthwhile to review for a number of reasons. First of all, note that it provides at the bottom of each page for arbitration and a waiver of certain remedies. Secondly, in Paragraph 6, it provides for bonuses upon the attainment of certain client goals. These are arrangements that would normally be negotiated in advance by the client and must meet the reasonableness requirements that are discussed elsewhere in this paper. Even though the firm deals with sophisticated clients, it still disclaims any warranty of success in the litigated matter in Paragraph 7 of the agreement. Even sophisticated clients can have unreal expectations. This is a matter involving the representation of more than one person. Paragraph 10 goes into great detail about the possible conflicts that might arise. It names a client representative to deal with the law firm.

Two great articles on this subject are Your Money or Your Life: Mutual Fairness in Billing and Engagement Agreements by Deborah D. Welch (16th Annual Advanced Drafting: Estate Planning and Probate Course, Chapter 3.1, (2005)) and Fee Agreements: Structuring Alternative Fee Agreements to Enhance Recovery of Fees and Align Interests of Attorneys and Clients by Alistair Dawson (2005 Page Keeton Civil Litigation Conference - University of Texas).

F. Matters to Think About Before Accepting Representation.

These topics are taken directly from Frank Ikard's excellent article. I have put my thoughts in the topics.

1. Evaluate the Client Personally.

a. Compatibility.

Lawsuits and long term engagements are difficult even with the best of people. You can often tell whether or not you are going to get along with someone in the first five minutes of your meeting. The feelings that you have that you don't like this person will only intensify as the litigation or other matter continues. If you don't think you can work with a client, decline the representation by simply telling them: "I think that I will not be able to satisfy your needs and desires in this matter. I believe you would be better served by another lawyer." I represent individuals who are unusual, odd, or societal outcasts. They all need representation. It is a great mistake, however, to represent someone you cannot stand to be with.

b. Truthfulness.

If it is possible, check out whether or not your client is telling the truth. You are often unable to be able to do that, but if the story just doesn't make sense, you need to challenge the client in a polite manner in the interview. There are exceptions to this rule. I have had cases where the client's story did not seem to be believable but turned out to be the truth. You have to follow your intuition in a situation like this. It is important to tell the client that they must tell you the absolute truth or you will withdraw at a later point and that it will be expensive for them if you have to do that. Explain that they should not hold anything back from you because it will be confidential. Tell them that even if they don't hire you, once you have their confidential information, you cannot disclose it to others and you cannot be involved in the case against them.

2. Reasonableness.

a. Unreasonable Expectations Regarding the Case.

It is easy to tell the client who has unreasonable expectations regarding the case. They usually tell you what they want before you ask. You should ask the client what they want to achieve from the litigation. If what they want is unreasonable, you need to tell them that it is. It is not always necessary to reject the client simply because their expectations are unreasonable if you can lower their expectations.

b. Unreasonable Demands on the Lawyer.

Some clients will demand to be put through to you on the telephone, demand your cell phone number, call you at night and on weekends, and demand that their work take priority over everyone else's work. A certain amount of this is normal, especially if this individual has not had legal work done for them in the past. If, however, you believe that this client will be extremely demanding, you can, ethically, charge a much higher fee if you do put their work first and disclose that or you can decline the representation.

3. Motive.

If a client tells you that they are entering into litigation for the principle of the thing rather than for the economics or if they say they are doing this because of anger or for revenge, you should decline the representation. It is often better to explain this to a client. It is not ethical to litigate simply for harassment.

4. Willingness to Go to Trial.

Most people that you represent will not want to go to trial. You have to determine, however, if they will go to trial if it is necessary. Your reputation as an attorney will be substantially compromised if your opponents discover you are unwilling to try your cases. You can successfully represent someone who does not want to go to trial. You must, however, tell them in writing that their case will not be as valuable if they are unwilling to try it.

5. Ability to Accept the Rigors of Litigation.

Litigation is time consuming and emotionally and physically draining. It costs a great deal of money. The client needs to understand this at the outset. If you feel that your client cannot undergo the rigors of litigation, however, you still may be able to work out a settlement to their satisfaction.

6. Mental Capacity.

You also have to determine if your client has sufficient mental capacity to enter into a contract for legal services. You also need to know if they are being unduly influenced by others. These issues arise in any context and none of us are psychiatrists or psychologists. If you have a question about a client's mental capacity, you should not enter into a contract with them to prepare a document that requires contractual capacity or testamentary capacity. If, however, this person has been injured, there are remedies such as having a next friend file the litigation or asking the court to appoint a guardian to approve your fee contract in advance for the litigation.

7. Financial Ability

a. Ability to Pay.

If your client can't pay you, there is no reason to do the work unless you intend to work for free. A refundable retainer fee is the best way to determine whether or not a client will pay you. Some of the fee agreements in this paper call for a deposit that secures the payment of the last bill. A great lawyer once said that a deposit tells the client he has a lawyer and tells the lawyer he has a client.

b. Willingness to Pay.

If the client, at first conference, questions your hourly rate, your charges for expenses, and wants to know if you charge for phone calls and the like, it is fine to answer their questions. If you get the feeling that your bills will be the source of a constant battle between you and that client, you may want to consider declining the representation. I have a conference with the client that goes something like this: "I don't enjoy working for free. I make my living representing people on an hourly rate basis. I have a retainer to secure the payment of my last fee. If you are worried about my honesty or my reputation, I can supply references. You also need to know that I will withdraw from the representation if you don't pay me as agreed. That has nothing to do about how I feel about you, it is simply a business proposition." If the client balks at this conversation, you should consider declining the representation.

G. Understanding the Fee Agreement.

I usually go over the fee agreement briefly with the client, explaining each paragraph. I give them plenty of time to ask questions and make comments about the documents. Except for clients that you represent on a regular basis, it is important to have a written fee agreement. It is essential for any substantial undertaking, especially litigation. As provided elsewhere in the outline, you must have one signed by both you and the client for contingent fee litigation.

Attached as Appendix S is the engagement letter of a very fine law firm that does work in major litigation matters. The agreement is worthwhile to review for a number of reasons. First of all, note that it provides at the bottom of each page for arbitration and a waiver of certain remedies. Secondly, in Paragraph 6, it provides for bonuses upon the attainment of certain client goals. These are arrangements that would normally be negotiated in advance by the client and must meet the reasonableness requirements that are discussed elsewhere in this paper. Even though the firm deals with sophisticated clients, it still disclaims any warranty of success in the litigated matter in Paragraph 7 of the agreement. Even sophisticated clients can have unreal expectations. This is a matter involving the representation of more than one person. Paragraph 10 goes into great detail about the possible conflicts that might arise. It names a client representative to deal with the law firm.

H. Withdrawal-The Remedy for Failure to Pay or Cooperate.

Evaluating the client, the client's ability to pay you, to be truthful, and to be able to withstand the rigors of litigation is an art rather than a science. It comes with experience and, even with experience, you can make mistakes. I certainly have. If you find yourself at an impasse with a client, review the reasons that will allow you to withdraw and see if it makes sense for both you and the client to do so. You may have to spend some time for which you will not charge helping another lawyer get up to speed on the case. Sometimes you make mistakes with personalities or you are in a situation with a client with unrealistic expectations and you didn't realize it at the outset. If you know that you can't meet the client's expectations

or if you have any other reason, such as untruthfulness of the client, or an overly demanding client, the best thing you can do is try to withdraw from the case, giving the client plenty of time to hire another lawyer. Whatever money that you lose on the fee, you will gain in peace of mind. If you agree to not charge a part of your fee, that could be your consideration for a release from the client. *See* III.D.5 for additional considerations on withdrawal.

III. STATUTES, DISCIPLINARY RULES AND OTHER SOURCES OF REGULATION OF FEE CONTRACTS.

A. Contingent Fee Contracts.

Section 82.065 of the Texas Government Code provides:

> "(a) A contingent fee contract for legal services must be in writing and signed by the attorney and the client.
>
> "(b) A contingent fee for legal services is voidable by the client if it is procured as a result of conduct violating Section 38.12(a) or (b), Penal Code, or (c) Rule 7.03 of the Texas Disciplinary Rules of Professional Conduct of the State Bar of Texas, regarding barratry by attorneys or other persons.
>
> "(c) An attorney who was paid or owed fees or expenses under a contract that is voided under this section may recover fees and expenses based on a quantum meruit theory if the client does not prove that the attorney committed barratry or had actual knowledge, before undertaking the representation, that the contract was procured as a result of barratry by another person. To recover fees or expenses under this subsection, the attorney must have reported the misconduct as required by the Texas Disciplinary Rules of Professional Conduct of the State Bar of Texas, unless:
>
> "(1) another person has already reported the misconduct; or
>
> "(2) the attorney reasonably believed that reporting the misconduct would substantially prejudice the client's interests."

As absolute as this statute appears to be, the Austin Court of Appeals in *Enoch v. Bratton*, 872 S.W.2d 312 (Tex. App. - Austin 1994, no writ) held that a written contingent fee contract signed by the client, but not by the attorney that had been fully performed was not void or voidable. The court construed Section 82.065(a) in a manner similar to the statute of frauds. It held that the agreement was enforceable if it was in writing and signed by the parties it charged. *Id.* at 318. This holding can be limited to its facts because the contract was challenged after the plaintiff's attorney had reached a $2.2 Million settlement on behalf of the client. The court held that to allow the contract to be voidable would lead to an inequitable result and would unjustly enrich the client. *Id.* at 318.

In spite of the holding in *Enoch*, the attorney should sign a contingent fee contract along with the client.

In the attempt to enforce an arbitration clause in a contingent fee contract, the court upheld the requirement that the attorney must sign the contract. In *In re Godt*, 28 S.W.3d 732, the court cites Section 82.065(a) of the Government Code and holds that since the fee agreement was not signed by anyone from the attorney's office, the attorney may not enforce the arbitration clause because it failed to comply with the requirements set forth in the Government Code. *Id.* at 738. In *Godt*, the client signed a contingent fee contract for representation in a medical malpractice case with a provision in the agreement calling for arbitration. The attorney did nothing and the statute of limitations expired. In Godt's suit against the attorney, the attorney answered and filed a motion to compel arbitration. Arbitration was denied because of Section 82.065(a) and because of Tex. Civ. Prac. & Rem. Code Ann. § 171.0023(a)(3)(c) (Vernon Supp. 2000) which provides that the Texas Arbitration Act will not apply to a claim for personal injury unless: (1) each party to the claim, on advice of counsel, agrees in writing to arbitrate; and (2) the agreement is signed by each party and each party's attorney. *Id.* at 739. The court in *Godt* held that a suit for legal malpractice for a medical malpractice claim was a suit for personal injuries. In *Sans v. Clark*, 25 S.W.3d 800 (Tex. App. - Waco 2000, pet. denied), the attorney had no written contract for a contingent fee case. That attorney's contract was held to be voidable. *Id.* at 805. A written fee agreement with another attorney was also held to be voidable because it violated Tex. Disciplinary R. Prof'l Conduct DR 1.02(a)(2) in that it provided that the attorney was authorized to settle the suit in any manner that he deemed necessary without any further consultation with the client. *Sans* at 805. Because this contract violated the disciplinary rule, it violated Section b of Section 82.065 of the Government Code and was voidable. In *Celmer v. McGarry*, 412 S.W.3d 691 (Tex. App. Austin – 2013, no writ), the Court held that an email exchange between attorney and his client regarding a contingent fee agreement was not sufficient evidence of the meeting of the minds to constitute an

agreement. It also held that the attorney could not recover in quantum meruit for his services at a second trial and appeal because that was not covered in the written agreement between the client and the lawyer.

DR 1.04 has further requirements for such an agreement. *See* III.D.2.

Circular 230 is now final (Rev. 6-2014). The IRS does not have to furnish a written notice of examination to a taxpayer before a practitioner may charge a contingent fee and provides a new exception allowing contingent fees for whistleblower claims under Internal Revenue Code § 7623(b). In general, a practitioner cannot charge a contingency fee for services rendered in connection with any matter before the IRS. There are exceptions. The IRS has now provided that a practitioner can charge a contingent fee for services rendered in connection with an IRS examination of, or challenge to, an amended return or claim for refund or credit filed before the taxpayer received a written notice of examination of, or a written challenge to the original tax return; or filed no later than 120 days after the receipt of such written notice or written challenge. The 120 days is computed from the earlier of a written notice of the examination, if any, or a written challenge to the original return. This is in addition to the exception that allows a contingent fee to be charged for services rendered in connection with an IRS examination of or challenge to an original tax return.

B. General Attorney's Fees Provisions.

There are numerous provisions in the Civil Practice and Remedies Code that provide attorney's fees to a litigant. *See, e.g.,* TEX. CIV. PRAC. & REM. C. § 38.001 *et. seq*. In drafting a fee agreement, consider including the following: "The court may award attorney's fees in your favor, however, that court award is not dispositive of what you owe the attorney." This will not be the case in litigation involving class actions in which a court has to approve the attorney's contract. Explain this to the client at the initial meeting. Tell them that some courts feel it is their duty to trim whatever attorney's fees are proven. Tell them juries do not always award all attorney's fees proven.

C. Arbitration, Waiver of Jury Trial Mediation, Limitation of Liability, and Indemnity.

Section 171.001, *et. seq*. TEX. CIV. PRAC. & REM. C. provides the rules for arbitration under Texas law. Section 171.001 requires a written agreement. Section 171.002 provides that the chapter does not apply to a claim for personal injury. An agreement to arbitrate a personal injury claim must be in writing, signed by each party and their respective attorneys. *Id.* at 171.002(c).

In an article entitled *Arbitration Primer: An Alternative Dispute Resolution Tool for Your Professional Responsibility Repertoire or an Ethical Response to Disagreements in a Trust Context*, John K. Boyce (State Bar of Texas, 2004 Advanced Estate Planning & Probate Course, Ch. 26) discusses arbitration in fee agreements, concluding that arbitration is permissible in fee contracts.

A number of lawyers are incorporating arbitration agreements in their fee agreements. Many of us would like to stay out of court since we know that attorneys are esteemed by juries as much as used car salesmen. We would like to arbitrate fee disputes and malpractice claims. The recent case law appears to give a green light to having arbitration clauses in our contracts. It is advisable, however, to proceed with caution. One reason is that an arbitration clause may void your malpractice coverage. Check with your carrier to see if it does before inserting it in your fee agreement.

The San Antonio Court of Appeals in *In re Emily Albrink Fowler Hartigan*, 107 SW3d 684 (Tex. App. - San Antonio 2003), had a chance to review a claim by an attorney's client that an arbitration provision in an engagement letter for a divorce case violated Rule 1.08(g) of the Texas Disciplinary Rules of Professional Conduct and failed to meet requirements of Section 171.002 of the Texas Civil Practice and Remedies Code because a claim for legal malpractice is a personal injury claim.

The court held that an agreement for arbitration would not violate DR 1.08(g) which provides that "A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement."

Since that all the agreement did was to provide that the parties had to arbitrate any claims, the court held that the agreement did not insulate the lawyer from liability or limit the lawyer's liability, citing Formal Opinion 02-425 of the American Bar Association Committee on Ethics and Professional Responsibility Id. at 689.

Secondly, the court held that a malpractice claim is not claim for personal injury and is excluded from the scope of Section 171.002(a)(3) of the Texas Civil Practice and Remedies Code. Id. at 690. The court reviewed several cases that led to the conclusion. In *In re Godt,* 28 SW3d 732 (Tex. App. - Corpus Christi, 2000, orig. proceeding) the Corpus Christi Court held that the malpractice claim would be a claim for personal injury. In *Godt*, the court relied on Willis v Maverick, 760 SW 2nd 642, 644 (Tex) (1988) which held that a claim for legal malpractice was a tort and was governed by the two year statute of limitations. The *Godt* Court relied on *Sample v Freeman*, 873 SW 2nd 470, 476 (Tex. App. - Beaumont 1994, writ

denied) holding that because a legal malpractice injury is a suit for personal injury, pre-judgment interest was appropriate and the *Estate of Degley v Vega*, 797 SW 2nd 299, 302-03(Tex. App. - Corpus Christi 1990, no writ) holding that a legal malpractice claim was a claim for personal injury so that the two year statute of limitations applied. The *Hartigan* Court distinguished the *Willis* case holding that all that Willis held was that a claim for legal malpractice was a tort and thus would be subject to a two year statute of limitations. The court disagreed with the Beaumont and Corpus Christi rulings in *Sample, Degley, and Godt* Id. at 690. Finally, the court held that the legal malpractice claim was within the scope of the parties' arbitration agreement because the factual allegations forming the basis of the client's claim necessarily arose from the law firm's representation of the client. Id. at 691.

The language of the contract in *Hartigan* read:

> "Should any dispute arise regarding the terms or conditions of this Employment Agreement, including, but not limited to, the services rendered or the fees, costs, or expenses payable thereunder, all parties hereby agree the dispute shall be referred to binding arbitration by an arbitrator appointed by the then Presiding District Judge of Bexar County, Texas. The provisions of Chapter 171 of the Texas Civil Practice and Remedies Code shall govern any proceedings under this clause to the extent the parties cannot otherwise agree." Id. at 687.

This contract was for services rendered in a divorce case, not a personal injury case. The court in *Hartigan* did not discuss whether the underlying representation of the client would ever cause an arbitration agreement to be ineffective.

In *Miller v. Brewer*, 118 S.W.3d 896 (Tex. App. - Amarillo 2003, no pet. hist.), the court held that a claim for legal malpractice was not a claim for personal injuries, upholding the arbitration clause in an attorney's fee contract.

The San Antonio Court in *Henry v Gonzalez,* 18 SW 3rd 684, 690 (Tex. App. - San Antonio 2000, pet dism'd by agr.), held that the case law favored mandatory arbitration and arbitration did not deny their parties to the right by trial of jury as a matter of law. *Gonzales,* 18 SW 3rd at 691. In *Taylor v. Wilson*, 180 S.W.3d 627 (Tex. App. - Houston [14th Dist.] 2005 pet. den.), the 14th Court of Appeals in Houston found an arbitration clause in an attorney's fee contract to be binding. It also held that a legal malpractice claim was not a claim for personal injuries. The arbitration provision was upheld in spite of the fact that it lacked many of the warnings contained in the sample clause in this paper.

Arbitration Issues in *Tanox*. In *Tanox v. Akin, Gump, Strauss, Hauer, & Fell*, 105 S.W.3d 244 (Tex. App. - Houston [14th Dist.]), cited elsewhere in this paper regarding the attorney-client relationship, the court also reviewed the arbitration clause in the fee agreement. The arbitration clause states:

> "Any actual or potential breach of this agreement by a party is to be brought to that party's attention promptly. Upon request of a party, a meeting shall be convened among the parties to attempt to resolve any issues relating to such actual or potential breach. If the parties are unable to resolve such issues or if the parties cannot resolve any other issues which may require further negotiations and agreement, any party may, by written request, require that any such unresolved issues be submitted to binding arbitration..." *Id.* at 267.

The court, in reviewing that contract, held that the language: "any other issues that may require further negotiations and agreement" in the fee agreement arbitration clause was broad enough to include tort related claims. *Id.* at 267.

Tanox asked the court to declare that, as a matter of public policy, a client's breach of fiduciary duty in legal malpractice claims should never be the subject of arbitration, absent special protection. The court took this as Tanox's request to declare the arbitration agreement void as a matter of public policy. The Court, citing *Henry v. Gonzales*, supra held that the law favors arbitration and that the arbitration does not deny parties a right to a jury trial as a matter of law. The court bolstered its holding by finding that Tanox had the benefit of representation by independent and experienced legal counsel. *Id.* at 268.

The *Tanox* court, in a footnote, cites a dissent in the *Henry* case by Justice Hardberger expressing his concerns about applying general contractual principles to an arbitration agreement in the context of the attorney-client relationship. Justice Hardberger argued that ignores the reality that the attorney and client are not, in most instances, engaged in arms length transactions during initial negotiations. *Henry* at 693.

Sample Arbitration Provision for Board Certified Attorneys. A sample arbitration clause calling for board certified attorneys to serve as arbitrators is as follows:

Any dispute that may arise with respect to any aspect of this fee agreement shall, on the written request of either of us, be submitted to arbitration in accordance with the Federal Arbitration Act (applying

Texas law) and the Commercial Arbitration Rules of the American Arbitration Association; and, judgment upon the award rendered by the arbitrators may be entered in any court having appropriate jurisdiction. Each party shall appoint one person as arbitrator, and a third arbitrator shall be chosen by the two arbitrators previously selected by the parties; provided however, if there is no agreement as to the third arbitrator within 60 days after the notice of arbitration is served, then the third arbitrator shall be selected by a district or probate judge in Harris County, Texas, having subject matter jurisdiction over the dispute. We further agree that the expenses of arbitration shall be paid in such proportions as the arbitrators decide, except that the successful party in any such proceeding seeking enforcement of the provisions of this agreement shall be entitled to receive from the party not prevailing reasonable and necessary attorney's fees and expenses, in addition to any other sums to which such successful party may be entitled. The arbitrators shall decide the identity of the successful party for purposes of the preceding sentence. We also agree that each of the arbitrators shall be either (i) Board Certified as an Estate Planning and Probate Law specialist by the State Bar of Texas, or (ii) a Fellow of the American College of Trust and Estate Counsel. **ARBITRATION IS FINAL AND BINDING ON THE PARTIES. THE PARTIES ARE WAIVING THEIR RIGHT TO SEEK REMEDIES IN COURT, INCLUDING THE RIGHT TO JURY TRIAL. PRE-ARBITRATION DISCOVERY IS GENERALLY MORE LIMITED THAN AND DIFFERENT FROM COURT PROCEEDINGS. THE ARBITRATORS' AWARD IS NOT REQUIRED TO INCLUDE FACTUAL FINDINGS OR LEGAL REASONING AND ANY PARTY'S RIGHT TO APPEAL OR TO SEEK MODIFICATION OF RULINGS BY THE ARBITRATORS IS STRICTLY LIMITED. YOU MAY BE REQUIRED TO PAY THE COSTS AND EXPENSES AND BOTH SIDES' ATTORNEYS' FEES IN SUCH A PROCEEDING WHICH CAN BE SUBSTANTIAL.**

ABA Opinion. The ABA held in American Bar Association Formal Opinion 02-425, Feb. 20, 2002, that it is ethically permissible to include binding arbitration of fee disputes and malpractice claims provided that (1) the client has been fully apprised of the advantages and disadvantages of arbitration and has been given sufficient information to allow the client to make an informed decision about whether to agree to the inclusion of the arbitration provision in the retainer agreement, and (2) the arbitration provision does not insulate the lawyer from liability or limit the liability to which the lawyer would otherwise be exposed under common and/or statutory law. That opinion discusses the fact that arbitration is merely a procedure for determining the lawyer's liability. It only becomes a limitation on the lawyer's liability if some type of damages, such as punitive damages, or other relief that could be awarded in a court could not be awarded in an arbitration proceeding.

State Bar Opinion. In Opinion No. 586, the Professional Ethics Committee for the State Bar of Texas discussed whether binding arbitration clauses in fee agreements were permissible under the D.R. In the opinion, the Court discusses D.R. 1.08(g) and 1.03(b). The latter rule provides that a lawyer must explain a matter to the extent necessary to permit the client to make informed decisions. The Committee believes that the scope of that explanation will depend upon the circumstances of a client and that in some situations, namely a highly sophisticated client, no explanation will be necessary. In other circumstances, the lawyers should normally advise the client of the possible advantages and disadvantages of arbitration as compared to a judicial resolution of dispute such as:

> "(1) The cost and time savings frequently found in arbitration, (2) the waiver of significant rights, such as the right to trial by jury, (3) the possible reduced level of discovery, (4) the relaxed application of the rules of evidence, and (5) the loss of the right to a judicial appeal because arbitration decisions can only be challenged on limited grounds."

The rule goes on to state that lawyers should advise the client that arbitration is private, regarding the method of selecting arbitrators and the obligation, if any, of the client to pay some or all of the fees and costs of arbitration and that those fees could be substantial. The rule does not, unfortunately, give specific guidelines to the lawyer which would be very helpful in this circumstance.

Texas Supreme Court Decisions. The case of *Royston, Rayzor, Vickery & Williams, LLP v. Francisco Lopez* 467 S.W.3d 494 (Tex. 2015) discussed the enforceability of an arbitration provision in an attorney-client employment contract. That provision provided that the client and the firm would arbitrate all disputes that arise between them except for claims made by the firm for the recovery of its fees and expenses.

The Texas Supreme Court held that the client failed to prove that either the arbitration provision was substantially unconscionable or any other defense to the arbitration provision.

This case is not a great comfort for lawyers who want to arbitrate because some things were not covered in the case such as the fact that Lopez did not brief

CIV. PRAC. AND REM. CODE which discusses what agreements Chapter 171 regarding arbitration covers.

The Court struggled with this contract because it was trying to balance the favorability of arbitration clauses with the principle of protecting the client. It held that arbitration clauses in attorney-client employment contracts are not presumptively unconscionable. It also held that a client is not excused from reading the terms of a fee agreement absent fraud. The Court held that arbitration did not unduly burden Lopez's substantive rights and that exempting certain claims from arbitration was not unconscionable even in the attorney-client context. It held that prospective clients who sign attorney-client employment contracts containing arbitration provisions were deemed to know and understand the contents of the contract and are bound by their terms.

The caution for lawyers from this case is that the arbitration provision should be clear, should be pointed out to the client, and should fully discuss how arbitration differs from a court proceeding.

The Texas Supreme Court in *In re Morgan Stanley & Co,. Inc. Successor To Morgan Stanley DW, Inc.,* 293 S.W.3d 182 (Tex. 2009) held that the issue of the mental capacity of a party to an agreement providing for arbitration was an issue for the court and not the arbitrator under the Federal Arbitration Act (FAA). Federal law controls issues regarding the FAA. The Court analyzed the holdings of the United States Supreme Court, the Fifth Circuit and other courts and found that there was a conflict between the circuits and that the Supreme Court had not decided this issue. It analyzed two Fifth Circuit decisions, an earlier one holding that the issue was for the arbitrator and a later one stating it was for the court and held that contract formation issues such as whether the obligor ever signed the contract, whether the signor lacked authority to commit the principal, and whether the signor lacked the mental capacity to assent were issues for the court and not the arbitrator. *Id.* at 189.

These three issues are a concern for any fee agreement, not just for one that calls for arbitration.

In *In Re Wood*, 140 S.W. 3d 367 (Tex. 2004), John O'Quinn represented and settled the claims of over 3,000 women in breast implant litigation. Each of his fee agreements provided for arbitration according to the Federal Arbitration Act of all claims and causes of action regarding the attorney client relationship. O'Quinn added a 1.5 percent deduction to each of the client's settlement costs. The clients were unhappy about this and sued O'Quinn as a class. The Texas Supreme Court, citing the U.S. Supreme Court's decision in *Green Tree Fin. Co. v. Bazzle*, 539 U.S. 444, 123 S. Ct. 2402, 156 L.Ed.2d 414 (2003), held that the issue of class certification would be determined by the arbitrator under the arbitration clause of the contract.

The Texas Arbitration Act (Tex. Civ. Practice & Remedies Code Section 171.001 et. seq.) ("TAA") requires the signature of a party's counsel to any agreement to arbitrate in personal injury cases. The Texas Supreme Court has held that the Federal Arbitration Act ("FAA") can preempt the Texas Arbitration Act removing the requirement for the signature of a party's counsel. In *re Nexion Health at Humble.,Inc .d/b/a/ Humble Healthcare Center*, 173 S.W.3d 67 (Tex.2005). In that case, a patient's spouse signed an arbitration agreement with the hospital. The patient died and the spouse filed personal injury claims against the hospital. The Texas Supreme Court held that because Medicare was making payments to the hospital, the transaction involved interstate commerce. The factors the court cited to determine whether the FAA preempted the TAA were whether (1) the agreement is in writing, (2) it involves interstate commerce, (3) it can withstand scrutiny under traditional contract defenses, and (4) state law affects the enforceablity of the agreement. The court found that all of the factors were present and that the FAA preempted the TAA. In another case, Jim Walter Homes, Inc. v. Cryer, 207 S.W.3d 888 (Tex. App. – Houston [14th Dist] – 2006 no pet. hist.) the court held that an agreement to arbitrate under the FAA, and disavowing any state statute that conflicted with the FAA, could include arbitrating personal injury claims.

Should Arbitration clauses be used? Even though arbitrating a malpractice claim or a fee dispute with a client sounds like a great idea, not everyone in the legal community is of the same mind. The claims lawyers at ALAS, a captive insurance company for 250 large law firms which include Vinson & Elkins, and Norton, Rose, among others, does not encourage arbitration clauses. They like having the option of discovery, a jury trial, a right to appeal and all the other advantages that arbitration does not always provide. Other malpractice carriers caution against a wholesale use of the clauses in fee agreements because other state courts have not upheld arbitration clauses in fee agreements. Some jurisdictions allow them but require full disclosure of the rights the client is waiving, such as a trial by jury. If the agreement to arbitrate is held invalid by the court, this could be one more bad fact against the attorney attempting to invoke it. They also believe the arbitrator has a tendency to compromise the matter and give something to everyone. On the other hand, they have realized substantial savings in defense costs having arbitration rather than a court proceeding. Perhaps the best policy is to fully disclose what the client is waiving and use this clause only with more sophisticated clients.

Mediation. An alternative may be providing that your contract is subject to mediation before resorting to arbitration or litigation. I owe this idea to Rhonda Brink of Austin. The contracts in Appendices I, J, O, and Z provide a clause for mediation.

Indemnification. Lawyers have been sued by those other than their clients. This is normally a strategic move to get a good lawyer off of the case or to distract them from doing their primary job in representing the client. Whatever the reason, this is not an expense normally anticipated by the client at the beginning of the litigation. One law firm has anticipated this problem by inserting the following clause in their fee agreements:

You have also agreed that you will indemnify and hold harmless the Firm and its shareholders and personnel against all losses, claims, damages, liabilities and expenses (including counsel fees and expenses), incurred by or asserted against any of such indemnified persons in connection with, arising out of or in any way based upon or related to the performance by the Firm of the professional services contemplated by this letter, including expenses incurred in connection with investigating, responding to, defending or preparing to defend against any such loss, damage or liability, or any pending or threatened claim or action arising therefrom, or otherwise participating in discovery or providing evidence in connection therewith; provided, however, that your indemnification obligation shall not extend to any loss, damage, liability, action or claim to the extent the same is determined, in a final judgment by a court having jurisdiction, to have resulted from the professional malpractice of the Firm or any of its shareholders or personnel.

The Professional Ethics Committee of the State Bar of Texas recently issued an ethics opinion (Opinion No. 581, April 2008, 71 Texas Bar Journal 587 (2008)) regarding the issue of indemnification. The opinion holds that an indemnity provision, by itself, would not create a conflict of interest. It held that it was ethical as long as the indemnity provision did not prospectively limit the lawyer's liability. The focus was then on Rule 1.04(a) and whether an indemnity provision would make the lawyer's fee unconscionable even though the lawyer's fee with the indemnity provision would not be unconscionable and even though the attorney's defense lawyer's fee was not unconscionable. I don't think this opinion helps anyone. It doesn't take much imagination to see how a vexatious litigant on the other side could make an indemnity arrangement unconscionable under Rule 1.04(a).

Venue and Jurisdiction. I could not find a case one way or another on this. It is not clear if you would rather be sued in your home county or in another place where people do not know you. A sample clause is as follows:

> **Venue and Jurisdiction.** You agree that if you bring a lawsuit against us that the lawsuit will be brought in the state courts (court jurisdiction) in Washington County, Texas (the venue of the lawsuit).

Waiver of Jury Trial. An alternative to arbitration is a waiver of jury trial provision in your fee agreement. The advantage to this alternative is that you have a trier of fact that has experience in judging the credibility of witnesses and the court's decision can be appealed like any other trial court judgment. The waiver should be conspicuous and clear.

For a while it appeared that an attorney seeking a jury trial waiver would have the burden of proving the waiver was made knowingly, voluntarily, intelligently, "with sufficient awareness of the relevant circumstances and likely consequences." *In re Prudential*, 148 S.W. 3d 124, 132 (Tex. 2004).

The *Prudential* decision was clarified in *In re Bank of America, N.A.*, 278 S.W. 3d 342 (Tex. 2009). The Texas Supreme Court held that a contractual jury trial waiver in a real estate contract did not create a presumption that placed a burden on a vendor to prove that the purchasers knowingly and voluntarily agreed to waive the right to trial by jury. In this case, the Supreme Court corrected a misunderstanding that contractual jury waivers were different from arbitration provisions. The Court held that arbitration clauses and jury waiver provisions will be enforced equally. It held that a jury waiver that is conspicuous is prima facie evidence of a knowing and voluntary waiver and shifts the burden to the opposing party to rebut the presumption. The Court held that the parties are presumed to know what they have signed and, where a jury trial waiver was conspicuous, it would be enforced. In attorney fee agreements, this puts a jury trial waiver's enforceability on equal footing with an arbitration clause.

In *Parallel Networks, LLC v. Jenner & Block, LLP*, 2015 WL5904685 (Tex. App. – Dallas 2015) (not reported), the Jenner law firm had done extensive work for Parallel. The fee agreement between the parties provided that, at termination, the client (*Parallel*) would either pay the lawyer for the time spent on the matter or pay an appropriate and fair portion of any contingent fee award based on what the client received.

The arbitrator held, and the Court of Appeals affirmed, that Jenner could receive damages for quantum meruit or a contingent fee that would be reasonable. In this case, the Court held that they would not substitute the Court's judgment for that of the arbitrator. It held that the arbitrator's decision

allowing a fair and reasonable portion of the contingent fee was reasonable.

In *Schrader & Associates, LLP v. Crissy Carrasco and David Carrasco, Jr.*, 2019 WL4615823 (Tex. App. – Dallas 2019), the Court reviewed another arbitration agreement. In this one, the attorney did not sign the agreement although the client did. The Carrascos argued that the arbitration clause was unenforceable. The Court cited *Chambers v. O'Quin*, 305 S.W.3d 141 (Tex. App. – Houston [1st Dist.] 2009, pet. denied) in which the Court reasoned that the arbitration clause could be upheld if the party against whom the arbitration clause was being enforced signed the agreement.

In *Chambers*, the facts showed ample evidence that the attorney accepted the fee agreement and intended to be bound by it. In *Shrader*, the firm failed to present any proof that it had done any work on the matter before it turned it back over to the client.

Given the prejudice against arbitration clauses by some malpractice carriers, a jury trial waiver may be the way to go now that the Texas Supreme Court has placed it on equal footing with arbitration agreements. The jury trial waiver should be very conspicuous. Explain, in your fee agreement, what the party is giving up in the same manner that you would in an arbitration agreement.

D. Texas Disciplinary Rules of Professional Conduct (DR) and the RESTATEMENT

1. Limiting the Scope of Representation.

Texas Rule. D.R. 1.02(b) provides that a lawyer may limit the scope, objectives and general methods of the representation if the client consents after consultation. The Comments 4-6 to DR 1.02 provide examples of how representation may be limited. The Comments 4 and 5 provide that an agreement must be in accord with the DR and other law. It further provides: "thus, the client may not be asked to agree to representations so limited in scope as to violate Rule 1.1 (Competent and Diligent Representation), or to surrender the right to terminate the lawyer's services or the right to settle or continue litigation that the lawyer might wish to handle differently." Comment 6 provides that the representation must be carried through unless terminated by the provisions of DR 1.15 and that even though the representation is limited, for example to a trial, the lawyer should advise the client of the possibility of an appeal. Section 19 of the RESTATEMENT contains similar provisions.

Model Rules and ACTEC Commentaries on the Model Rules of Professional Conduct. The ABA Model Rules have a similar provision: 1.2(c): "A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent." The ACTEC Commentaries provide the following:

> **General Principles**. The client and the lawyer, working together, are relatively free to define the scope and objectives of the representation, including the extent to which information will be shared among multiple clients and the nature and extent of the obligations that the lawyer will have to the client. If multiple clients are involved, the lawyer should discuss with them the scope of the representation and any actual or potential conflicts and determine the basis upon which the lawyer will undertake the representation. As stated in the Comment to MRPC 1.7 (Conflict of Interest: Current Clients) with respect to estate administration, "the lawyer should make clear the lawyer's relationship to the parties involved." Also, as indicated in the ACTEC Commentaries on MRPCs 1.6 (Confidentiality of Information), and 1.7 (Conflict of Interest: Current Clients), it is often permissible for a lawyer to represent more than one client in a single matter or in related matters. A lawyer may wish to consider meeting with prospective clients separately, which would give each of them an opportunity to be more candid and, perhaps, reveal potentially serious conflicts of interest or objectives that would not otherwise be disclosed.
>
> In the estate planning context, the lawyer should discuss with the client the functions that a personal representative, trustee, or other fiduciary will perform in the client's estate plan. In addition, the lawyer should describe to the client the role that the lawyer for the personal representative, trustee, or other fiduciary usually plays in the administration of the fiduciary estate, including the possibility that the lawyer for the fiduciary may owe duties to the beneficiaries of the fiduciary estate. The lawyer should be alert to the multiplicity of relationships and challenging ethical issues that may arise, particularly when the client has a personal interest in the subject matter of the representation in addition to a fiduciary role. This is discussed below. The lawyer should also be alert to such issues when the representation involves employee benefit plans, charitable trusts or foundations.
>
> **Facilitating Informed Judgment by Clients**. In the course of the estate planning process, the lawyer should assist the client in making informed judgments regarding the method by which the client's objectives will be fulfilled. The lawyer may properly exercise reasonable judgment in deciding upon the alternatives to describe to the client.

For example, the lawyer may counsel a client that the client's charitable objectives could be achieved either by including an outright bequest in the client's will or by establishing a charitable remainder trust. The lawyer need not describe alternatives, such as the charitable lead trust, if the use of such a device does not appear suitable for the client. As indicated below, the lawyer should describe the tax and nontax advantages and disadvantages of the plans and assist the client in making a decision among them.

Defining and Refining the Scope of Representation. As the lawyer obtains information from a client, the lawyer and the client are typically working together toward defining further the scope and objectives of the representation, which are often revised as the representation progresses. One of the lawyer's goals should be to educate the client sufficiently about the process and the options available to allow the client to make informed decisions regarding the representation. See ACTEC Commentary on MRPC 1.4 (Communication). In furtherance of that goal, many lawyers review with an estate planning client the appropriate alternative methods by which the client's general estate planning objectives could be implemented. In the course of doing so, the lawyer should express to the client the relative cost advantages of the alternatives, including the present and future tax, legal and other costs, such as trustee's fees. See ACTEC Commentary on MRPC 2.1 (Advisor).

Formal and Informal Agreements. Variations in the circumstances and needs of trusts and estates clients and in the approach and practice of individual lawyers naturally result in lawyers and clients adopting different methods of working together. The agreement between a lawyer and client regarding the scope and objectives of the representation is often best expressed in an engagement letter or other written communication. However, often their agreement is implicit—reflected in the manner in which lawyer and client choose to work together. Their approach will reflect the client's needs (as perceived by the client and the lawyer) and the lawyer's judgment regarding the client's needs and objectives and the ways in which they may reasonably be fulfilled.

Limitation on the Representation Must Be Reasonable. This Rule recognizes that a lawyer and client may limit the scope of the representation in a manner that is reasonable under the circumstances. For example, a lawyer and client may agree that the lawyer will represent the client with respect to a single matter, such as the preparation of a durable power of attorney. See discussion of Adequate Information in the ACTEC Commentary on MRPC 1.0 (Terminology). Unless the scope of the representation is expanded by a subsequent agreement, the lawyer is not obligated to provide advice or services regarding other matters.

Avoiding Misunderstandings as to Scope of Representation. The risk that a client will misunderstand the scope or duration of a representation can be substantially reduced or eliminated if the lawyer sends the client an appropriate engagement letter at the outset of the representation. If a lawyer is retained by a new client with respect to a single matter, the representation may terminate when the work on the matter is completed; on the other hand, the representation may become dormant. See the discussion of a dormant representation in the ACTEC Commentary on MRPC 1.4 (Communication). Where the lawyer has served a client in a variety of matters, the client may reasonably assume that the representation is active or that the client may reactivate the representation at any time. A lawyer in these circumstances should clarify with the client the scope of the representation and the expectations of the client. A client may terminate a representation at any time and, subject to the requirements of MRPC 1.16 (Declining or Terminating Representation), a lawyer may also terminate a representation at any time.

Some commentators have written that unbundling the services that a lawyer provides is an excellent way to lower the cost of legal services so that they are more readily available to the middle class. The lawyer who decides to do this must thoroughly document what is and is not being done for the client in writing and obtain the client's advance approval. If we can adequately inform the client and manage client expectations, it can be beneficial to a client who does not need or want all of an attorney's services. If inadequately explained and documented, however, the limited representation can result in an angry client with all of the consequences that arise from that.

How Do We Handle Limiting the Scope of our Representation and Adequately Informing the Client? Communicating in writing with the client or prospective client is the best way. Having written documentation of what you are doing and not doing on a client's behalf is great protection from later claims that the lawyer failed to inform a client of choices the client had.

In *Smith v. O'Donnell*, 288 S.W.3d 417 (Tex 2009), a husband acted as executor of his wife's estate. It was not the first marriage for either party. The children of the wife sued and settled with the deceased husband's estate on allegations that the husband breached his fiduciary duty as executor of his wife's estate by mischaracterizing property as his separate property rather than community property of the marriage.

The executor of the husband's estate then filed a malpractice action against the law firm representing the husband in his capacity as the wife's executor claiming that the law firm failed to properly advise the husband regarding the characterization of the wife's and husband's properties at the wife's death.

The matters were all brought up on an appeal from a successful summary judgment in favor of the law firm. In reading the Texas Supreme Court case cited above and the ones leading up to it, it appears that the law firm did not produce any written documentation advising the husband that the property could be community and that the husband should either call it community property or seek a declaratory judgment to determine its proper characterization. If the law firm could have produced a letter given to the husband advising him to take either course of action and the consequences that might occur if he didn't, the plaintiff's law firm probably would not have taken the case. Because the entire matter was taken up on a summary judgment, the case has not been developed well factually. For example, the executor of the husband's estate did not raise the statute of limitations as a defense against the claims of the wife's children. It may well be there are documents that will protect the law firm once the case is tried on the merits.

Nonprobate Assets. Assets that are not subject to probate are becoming a much larger part of our clients' estates. Banks and other financial institutions such as brokerage firms are becoming our clients' estate planning advisors and drafters of documents. Many of our clients' assets, such as any type of a retirement plan account, require beneficiary designations to be effective. Others such as bank and brokerage accounts do not need beneficiary designations but often have them. Many times our clients are unaware of the designations because they signed an agreement with the institution ages ago that provided that all of the accounts are joint tenancies with rights of survivorship.

Understanding that account agreements are important and that beneficiary designations can drastically alter an estate plan, how do we help our clients plan for these assets and get paid for it? We know that getting information from a bank or a brokerage firm, changing a beneficiary designation, or changing an account from a survivorship account to something else can often require hours of time. Most of our clients do not want to pay for this service. How do we protect ourselves?

We know that we can limit the scope of our representation if clients are given sufficient information to make an informed decision. The solution is to provide the information and to limit the scope of representation in our fee agreements unless the client agrees to pay us for what it takes to deal with these accounts.

Proposed Fee Agreements. Attached to this outline is a proposed fee agreement (Appendix J) and information regarding survivorship accounts (Appendix CC). I welcome your comments about this agreement since I cannot guarantee it will protect you. The documents provide one way to start a conversation and to, hopefully, protect yourself from claims by clients. It also can start a conversation with your client about how to take care of a very important part of their estate.

Many clients do not want to pay for your time to do what is really necessary to handle these accounts. The problem is that, like advising a client about the cost of a lawsuit, there is no way you can tell the client what it will cost to handle these matters prior to working on them. These agreements make it clear that it is important and it can be costly to deal with. It informs the client and leaves the choice up to the client to employ you. If you had to include the cost of dealing with a difficult bank or brokerage company with a beneficiary designation in a lump sum fee for estate planning, you would probably never be hired.

Dealing With Assets in the Probate of an Estate not Subject to the Estate Tax. If we continue to enjoy exemptions in excess of $11,000,000, getting an exact value on every asset the client owns becomes less important to the client in the probate of a will that leaves everything outright to a devisee. We know that establishing these values is still important because the value at the date of death determines basis. There are federal estate and gift tax implications to nonprobate asset dispositions. The disposition of nonprobate assets can constitute a gift when, for example, a community property life insurance policy names the children as beneficiaries rather than a spouse. If the spouse doesn't assert the spouse's community property rights, the spouse has made a gift of half of the proceeds to the children. A federal gift tax return should be filed. The same is true when a survivorship account of community property names the spouse and children.

Portability. The only way that a surviving spouse can take advantage of portability is by filing a federal estate tax return.

I have tried to come up with a great way to deal with this in an engagement agreement. I have revised my probate agreement (Appendix O) to mention both

nonprobate assets and portability. Please let me know your comments. I have attached a letter I send to surviving spouses regarding portability and filing a federal estate tax return (Appendix DD). I thank Melissa Willms for her feedback on this document. This letter should be followed up with the preparation of a Form 706 or a letter to the spouse stating that they have elected not to file a return.

Date of Death Values to Determine Basis. The same applies to basis. When we are engaged to handle a probate matter, we are often are unclear on what the assets are and where they are. Many lawyers are happy to have the clients obtain the information because it lowers the fee to the client. Depending upon the client, we often spend more time asking the client to get the information for us than we would spend getting it ourselves. Similarly, it is important to inform the client about the consequences of an improper valuation of an asset in the income tax area. I have included a reference to Schedule A of IRS Form 8971 in my estate planning fee agreements (Appendix J). We need this information to properly prepare a gift tax return.

Conclusion. It is extremely important to document, in writing, the choices that a client has and, also, what choices the client makes after you write them. The documentation takes the matter out of a swearing match in later litigation, or can even eliminate the litigation.

2. Fees.

Rule 1.04 provides for how a lawyer may charge. It provides that a fee shall not be illegal or unconscionable. Unconscionability is discussed in II.D.

It further discusses the factors in determining the basis of the fee. *See* Discussion in II.D. When the lawyer has not represented a client on a regular basis, Section c of DR 1.04 provides that the fee shall be communicated to the client, preferably, in writing, before or within a reasonable time after commencing representation. Obviously, to remove any doubt, it makes sense that the fee be communicated at the outset of the representation in writing and signed by the client and the lawyer.

When the fee is a contingent fee, Rule 1.04(b) mandates that the fee agreement be in writing and state the method by which the fee is to be determined. Any difference in percentages that accrue to the lawyer in the event of settlement, trial or appeal must be stated. It is very important to be very explicit in how that is stated. It must state the litigation and other expenses to be deducted from the recovery and whether those expenses are to be deducted before or after the contingent fee is calculated. It further requires the lawyer to provide the client with a written statement describing the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of determination.

It prohibits contingent fees for representing a defendant in a criminal case and DR 1.04(e) and provides for how a division is to be made between lawyers who are not in the same firm. DR 1.04(f).

DRAFTING TIP: Consider including this in the contingent fee agreement:

Example: Note: the figures used in the example are to illustrate how the fee is calculated and how expenses will be deducted from the matter. It is not intended to be an estimate of the recovery in this particular case or of the amount of the expenses in this case. It is only an example to show how expenses and fees will be calculated. Expenses and fees can vary dramatically from what is shown in this example. To understand how fees and expenses will be calculated, if the recovery in a case is $100,000 and the expenses are $10,000, and if the case is settled prior to trial, the attorney's fee will be 33-1/3 percent of the total recovery or $33,333.33. Expenses of $10,000 will also be subtracted before determining the amount due to the client in this example. The net recovery in this example for this client will be $100,000 less the attorney's fee of $33,333.33, less the expenses of $10,000, netting the client in this example $56,666.67.

When you have a contingent fee contract, be specific about the basis of how the fee will be calculated. The Texas Supreme Court examined a fee agreement in *In Re: Dean Davenport*, 529 S.W.3d 452 – Texas (2017). In this contract, the law firm was hired to sue partnerships and partners in a declaratory judgment regarding whether another partner still had an interest in the partnership. After being dissatisfied with the progress obtained by the first law firm, the clients hired a second law firm. The fee agreement states "it is the purpose of this Agreement to successfully pursue client's claim arising out of business dealings with WECO." It further provides, "in consideration for the present agreement of [the Attorneys] to represent [the Client] and a promise to render legal services in the future in pursuit of this claim, [the Client] agrees to sell, transfer, assign and convey to [the Attorneys] an undivided interest in the above claim to be calculated as follows: Forty percent (40%) of the gross amount recovered except that Attorneys will take a fee out of the ownership of 5D Water Resources and Dillon Water Services by 'gross amount' is meant the total sums recovered. *Id.* at 453. In examining the fee agreement, the Texas Supreme Court held that the term "sums" was the issue. The Court held that the term "sums" refers to money and that the lawyers have a duty to draft clear fee agreements. The Court limited the lawyers to recovering only their percentage from the monetary awards recovered. *Id.* at 459.

The contingent fee agreement in Appendix JJ attempts to make it clear how the fee will be calculated on assets other than money and that assets other than money and that assets other than money will be included in calculating the recovery.

3. Limitation of Liability and Releases.

DR 1.08(g) prohibits a lawyer from limiting his liability to a client from malpractice unless it is permitted by law and the client is independently represented in making the agreement. The lawyer cannot settle a claim for malpractice liability with an unrepresented client or former client without first advising the person in writing that independent representation is appropriate. See Appendix A for an example of such a release.

Even this may not be enough. In *Keck, Mahin & Cate v. Nat'l Union Fire Ins.,* 20 S.W.3d 692 (Tex. 2000), the court had the opportunity to construe the validity of a release between a law firm and its client. Wolf Point Shrimp Farm sued Granada Food Corporation for damages for improper processing and marketing of shrimp. Granada hired the law firm of Keck, Mahin & Cate (KMC) as its attorneys. KMC tendered the defense of the suit to Granada's primary insurance carrier (Primary) and its excess carrier (Excess). Primary agreed to defend Granada under a reservation of rights and KMC was formally engaged by Primary to defend Granada since Granada had the right under its policy to select its own defense counsel. The Excess policy did not require Excess to investigator or defend claims against Granada as long as another carrier was providing a defense. Excess did have the right to associate in the defense and trial but it did not exercise those rights. Settlement demands were made prior to trial and KMC advised both carriers that the case could be settled for less than half the sum demanded. The trial court gave the plaintiffs a preferential trial setting. KMC's efforts to continue the setting were unsuccessful and, on the first day of trial, Primary tendered its policy limits to Excess and two days later Excess settled the suit for twice the initial settlement demand the plaintiffs had made.

Excess filed suit against Primary and KMC to recover the money it had paid to settle the Wolf Point litigation. Excess alleged that Primary and KMC mishandled Granada's defense and sued for malpractice and sued Primary for negligence, gross negligence, and violations of the Texas Insurance Code. Because all of these claims belonged to the insured, Excess asserted them under the doctrine of equitable subrogation.

Two weeks prior to the trial between Wolf Point and Granada, KMC and Granada signed a release. Granada owed KMC a substantial sum for past legal services unrelated to the current litigation and wanted to clear that debt from its balance sheet. In exchange for KMC's promise to forgive the unpaid fees, Granada released KMC from "all demands, claims, or causes of action of any kind whatsoever, statutory, at common law or otherwise, now existing or that might arise hereafter, directly or indirectly attributable to the rendition of professional legal services by KMC to Granada between June 1, 1988 and April 1, 1992". *Id.* at 696. The settlement date for the litigation was April 30, 1992.

The Supreme Court held that the release language was sufficient to release all malpractice claims included in the release. *Id.* at 698. The court held, however, that it did not release claims after April 1, 1992. *Id.* at 698.

The more important ruling concerns the validity of the release itself. Although the court construed the release language as granting a general release, KMC had the burden to prove that the agreement it negotiated with Granada was fair and reasonable and that Granada was informed of all material facts relating to the release. *Id.* at 699. The only proof offered by KMC was the language in the release itself which provides "whereas, KMC has advised Granada in writing that independent representation is appropriate in connection with the execution of this Agreement". *Id.* at 697, 699. The court held that this recitation was insufficient to rebut the presumption of unfairness or invalidity attaching to the contract. In a footnote, the court held that the presumption of invalidity applied because KMC was still representing Granada. There would be no presumption had Granada severed its relationship with KMC and hired new attorneys before agreeing to the release. *Id.* at 699 n.3. The lesson to be learned from *Keck* is that the court will strictly construe any release agreement negotiated with a current client and that the attorney will always have the burden of proving the fairness of that agreement as well as the fact that the client understood the agreement and all of the facts related to the agreement. A release like the one shown in Appendix A should be accompanied by a lengthy letter explaining what the client is giving up, advising the client that the attorney cannot advise the client in that situation, and that the client needs to obtain independent legal advice before signing the release.

4. Conflict of Interest.

DR Rules 1.06 through 1.15 govern various elements of the conflict of interest issues that could arise in a litigation context. The contract in Appendix A provides an explanation of what the attorney will do if the conflict of interest arises. The attorney should make every effort to discover a conflict of interest prior to entering into litigation, but some conflicts do not become apparent until well into the litigation. That is why those disciplinary rules are worth reviewing. The

contract in Appendix D contains an unusual provision. It provides that, after the litigation has ended, the firm is allowed to represent others in matters that may be adverse to the client. Even if an attorney has this in a fee agreement, she should use great caution in proceeding against a former client. The ACTEC documents are very comprehensive in their coverage of the conflicts of interest. Appendix BB is an example of a law firm's agreement to represent a client's employee.

5. Withdrawal.

Rule 1.15 of the DR addresses declining representation and withdrawing. It provides:

"(a) A lawyer shall decline to represent a client or, where representation has commenced, shall withdraw except as stated in paragraph (c), from the representation of a client if:

(1) the representation will result in violation of Rule 3.08, other applicable rules of professional conduct or other law;
(2) the lawyer's physical, mental or psychological condition materially impairs the lawyer's fitness to represent the client; or
(3) the lawyer is discharged, with or without good cause.

(b) Except as required by paragraph (a), a lawyer shall not withdraw from representing a client unless:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;
(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes may be criminal or fraud;
(3) the client has used the lawyer's services to perpetrate a crime or fraud;
(4) a client insists upon pursing an objective that the lawyer considers repugnant or imprudent or with which the lawyer has fundamental disagreement;
(5) 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 obligation is fulfilled;
(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
(7) other good cause for withdrawal exists.

(c) When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall takes steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payments of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law only if such retention will not prejudice the client in the subject matter of the representation."

Section (a)(1) refers to a lawyer acting as a witness in the case.

The fee contracts in Appendices A through D, I, and O provide a means for allowing the attorney to withdraw in a matter. The disciplinary rule is clear that under (b)(5) a lawyer may withdraw if the client fails "to fulfill an obligation 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 obligation is fulfilled." Section (b)(6) provides that the lawyer may withdraw if "representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client." In spite of these clear provisions of the disciplinary rules, every lawyer can recount times when a court will refuse to allow an attorney to withdraw. As provided in 1.15(c), the attorney cannot withdraw when a court will not permit it. The attorney should make the fee agreement very clear that she will withdraw if she is not pa*Id* When the client has not paid, the attorney should warn the client in writing and verbally about what will happen if payment is not made. The same rule applies for lack of client cooperation. When payment does not come, the attorney should withdraw.

Section 32 of the RESTATEMENT is not so generous. Although it provides similar provisions to DR 1.15, it provides, in Part 4 of Section 32, that, in the case of permissive withdrawal, a lawyer may not withdrawal if the harm that the withdrawal would cause significantly exceeds the harm to the lawyer or others in not withdrawing. RESTATEMENT 32 § 4. This may violate the 13th Amendment of the U.S. Constitution. This is an example of a rule promulgated by individuals who have, in all likelihood, never faced the prospect of having to represent a client who never intends to pay his lawyer. The rule is unrealistic, impractical and wrong. Section 33 of the RESTATEMENT provides that a lawyer must take reasonable steps to protect the client's interest after withdrawal. These would include giving notice to the client of the termination, allowing time for employment of other counsel, surrendering papers and property that the client is entitled and refunding any advanced fee which the lawyer has not earned.

6. Security for Payment of Fees and Attorney's Lien.

Appendix C is contains a fee agreement in which the attorney is granted a security interest in the estate to secure the payment of an hourly rate fee.

In Opinion No. 610 of the Professional Ethics Committee for the State Bar of Texas, the committee discussed whether a lawyer may acquire, by agreement with his client, a security interest in the subject matter of the litigation that the lawyer is conducting for the client in order to secure the payment of the lawyer's fee with respect to the litigation. The statement of facts is the lawyer and client enter into a contingent fee agreement with respect to a litigation matter being handled by the lawyer which provides for the client to grant the lawyer, as a means of securing payment of the fee due to the lawyer, a security interest in the cause of action that is the subject of the litigation. The cause of action relates to a claim for damages from a personal injury of the client.

The Committee examines D.R. 1.08(h) and an old case *Thomson v. Findlater Hardware Co*., 205 S.W. 831, 109 Tex. 235 (Tex. 1918) which provides for the attorney's common law lien which is discussed in a number of cases and is limited by D.R. 1.15(d) discussed elsewhere in this paper. The Committee believes that, in this case, the rule prohibits an attorney from acquiring a lien upon the subject matter of litigation. Thankfully, this Committee's opinion is not binding on the courts. In *Dow Chemical v. Benton*, 357 S.W. 2d 565 (Tex. 1962), an opinion not discussed in Opinion No. 610, the court finds that there is nothing wrong and everything right with the attorney obtaining a security interest in the contingent fee contract and cites old case law that says that the lawyer's rights in the contract are derivative from the client and do not create a conflict of interest for the lawyer to continue to represent the client. Two unreported federal district court cases, *USA v. Betancourt*, 2005 W.L. 3348908 (S.D. Tex.) and *Norem v. Norem*, 2008 W.L. 2245821 (N.D. Tex.) both examine whether it is proper for a lawyer to have a security interest in the litigation. The court examines the common law lien which is discussed elsewhere. The two cases hold that an attorney may have a lien for reasonable compensation for obtaining a judgment or for procuring a settlement if the attorney holds a lien or a contract enforceable against the judgment or settlement amount. *Betancourt* examines Texas law and finds that Texas law, while not providing for statutory liens, does recognize that a lien may be arrived at under a contractual agreement (2005 W.L. 334890 at 2). "Under Texas Law, a contract may establish an attorney's lien for money received in judgment or in settlement of a matter." *Id.* at 3.

Opinion No. 610 is unfortunate in a number of aspects. The client is not harmed by the security interest or the assignment of a cause of action. If the client ends up in bankruptcy, the lawyer has a secured interest in the recovery for services rendered and it is justifiable because of the risks the lawyer takes in working on a contingent fee basis. Without the services of the lawyer, the claim would not even exist. The interpretation of the case law is flawed and this opinion is poorly reasoned. It is hoped that this Committee will reconsider its finding.

Frederick C. Moss has written an excellent criticism of Ethics Opinion 610: *One Lawyer's Perspective: A Second Look at Ethics Opinion 610*, 75 Tex. Bar J. 696 (2012). His excellent criticism of opinion 610 is worth reading.

The Texas Commission on Professional Ethics, in Opinion 449 (51 Tex. B.J. 165 (1988)) has allowed an attorney to acquire an undivided fee simple interest in property as security for the payment of the attorney's fees as long as the interest was acquired in good faith and with the client's consent. The opinion held that this does not violate the prohibition under DR 1.08(h) that a lawyer may not acquire a proprietary interest in the cause of action or such matter of litigation that the lawyer is conducting for a client. That provision, DR 1.08, makes it clear that an attorney may acquire a lien granted by law to secure the lawyer's fees or expenses. Section 43 of the RESTATEMENT allows such a lien as follows:

"Lawyer Liens

(1) Except as provided in Subsection (2) or by statute or rule, a lawyer does not acquire a lien entitling the lawyer to retain the client's property in the

lawyer's possession in order to secure payment of the lawyer's fees and disbursements. A lawyer may decline to deliver to a client or former client an original or copy of any document prepared by the lawyer or at the lawyer's expense if the client or former client has not paid all fees and disbursements due for the lawyer's work in preparing the document and nondelivery would not unreasonably harm the client or former client.

(2) Unless otherwise provided by statute or rule, client and lawyer may agree that the lawyer shall have a security interest in property of the client recovered for the client through the lawyer's efforts, as follows:

(a) the lawyer may contract in writing with the client for a lien on the proceeds of the representation to secure payment for the lawyer's services and disbursement in that matter;
(b) the lien becomes binding on a third party when the party has notice of the lien;
(c) the lien applies only to the amount of fees and disbursements claimed reasonably and in good faith for the lawyer's services performed in the representation; and
(d) the lawyer may not unreasonably impede the speedy and inexpensive resolution of any dispute concerning those fees and disbursements or the lien.

(3) A tribunal where an action is pending may in its discretion adjudicate any fee or other dispute concerning a lien asserted by a lawyer on property of a party to the action, provide for custody of the property, release all or part of the property to the client or lawyer, and grant such other relief as justice may require.

(4) With respect to property neither in the lawyer's possession nor recovered by the client through the lawyer's efforts, the lawyer may obtain a security interest on property of a client only as provided by other law and consistent with §§ 18 and 126. Acquisition of such a security interest is a business or financial transaction with a client within the meaning of § 126."

Section 126 governs business relationships with a client and Section 18 governs a client's duty to pay his lawyer.

7. The Attorney's Common Law Lien.

The Texas Commission on Professional Ethics in Opinion 411 (47 Tex.B.J. 47 (1984)) reviewed whether an attorney can ethically assert a lien and withhold the client's papers, money, or property relating to a specific legal matter, if the client has refused to pay the attorney's fees and expenses in regard to that matter. Although the opinion holds that an attorney may ethically assert a retaining lien on the client's file if the attorney has first made demand and the client has refused to pay the fees and expenses in connection with that file, it also provides that the client's legal rights must not be prejudiced by this retention. The better practice would be to give up the file. The opinion cites cases in which the attorney's failure to give up the file prejudiced the client resulting in sanctions and monetary liability for the attorney.

A recent opinion from the Professional Ethics Committee sheds some more light on this issue. In Opinion No. 570, May 2006 (69 Tex. Bar Journal 788), it was held that a lawyer must, upon request, provide a former client his notes from his file for that former client subject to certain exceptions. The lawyer can withhold the notes under the following circumstances: (1) when the lawyer has a right to withhold the notes pursuant to a legal right such as a lawyer's lien, (2) when the lawyer is required to withhold the lawyer's notes (or a portions thereof) by Court order, or (3) when not withholding the notes (or portions thereof) would violate a duty owed to a third person or risk causing serious harm to the client. In this Opinion, the Committee recognized that the lawyer has a fiduciary duty to the client and if the lawyer's desire to withhold those notes is the result of a selfish desire to put the lawyer's interests ahead of those of the client, the lawyer should not withhold the notes.

Section 43 of the RESTATEMENT recognizes a lien but also provides that the client's interest must be preferred over the lawyer's interest.

8. Payment for Fees Due After the Lawyer Withdraws.

The contingent fee attorney whose client discharges him continues to have a right to enforce his contingent fee agreement and receive the percentage fee agreed upon in the contract. *Mandell v. Wright*, 431 S.W.2d 841 (Tex. 1969). This is true when a client, without good cause, discharges the attorney before he completes his work. *Id.* at 847. Texas is in a

minority of states that apply this rule. The RESTATEMENT Section 40 provides that the attorney may recover the lesser of the fair value of his services or the ratable proportion of the compensation provided by the enforcement of the contract.

The limitation the RESTATEMENT places on this is that the lawyer must have been discharged for reasons not attributal to his misconduct, that he has provided severable services, and allowing the compensation under the contract would not burden the client's choice of counsel or the client's ability to replace counsel. The RESTATEMENT rule is the opposite of the current Texas rule.

In the *Law Offices of Windle Turley v. French*, 140 S.W.3d 407 (Tex. App. - Fort Worth 2004, no pet. hist.), the court reviewed a contingent fee agreement between a client and a personal injury firm. In this instance, one of Turley's associates filed a medical malpractice case on behalf of the Frenches. The associate, Sawicki, left the Turley law firm and another Turley lawyer took over. In this case, after the client moved their case to solo practitioner, Sawicki's firm, Turley filed a motion in intervention in the case seeking his full contingent fee. After that, the Frenches asked Turley to take the case back. Turley refused to do so citing a grievance filed against him by one of the former clients.

On rehearing, the Court of Appeals recognized the continuing validity of *Mandell* and it reversed a summary judgment in favor of the Frenches.

In the personal injury arena, aggressive solicitation of good personal injury cases occurs frequently. Individuals are encouraged to avoid fee agreements entered into in good faith. *Mandell* serves to discourage clients from shopping for attorneys and attorneys from shopping for clients after a fee agreement has been signed. Few trial courts will, as practical matter, enforce two contingent fee agreements. The court will encourage the attorneys to resolve their differences. Given the Supreme Court's recent reliance on the RESTATEMENT in *Arce* and in *Lopez*, it is questionable whether the Texas Supreme Court will follow *Mandell* if faced with this situation, again.

9. Withdrawal Without Good Cause.

The general rule in Texas is that if an attorney without just case abandons his client before the proceeding for which he was retained has been finished or if the attorney commits a material breach of his contract of employment, he forfeits all rights to compensation. *Royden v. Ardoin*, 331 S.W.2d 206 (Tex. 1916). This case also holds that if an attorney is disbarred or suspended prior to completion of his contract, he is not entitled to collect either on the contract or *quantum meruit* for the services he may have rendered. *Id.* at 209.

What constitutes "just cause" is not easily determined. In *Staples v. McKnight*, 763 S.W.2d 914 (Tex. App. - Dallas 1988, writ denied), an attorney withdrew from a case in which she had a contingent fee agreement because of a dispute over testimony that the client might have been called upon to give in an oral deposition. The contract was an oral contingent fee agreement. *Id.* at 910. The Court of Appeals held that, in the absence of a manifest contrary intent, an attorney who is retained to conduct a legal proceeding presumably enters into a contract to conduct a proceeding to its conclusion. *Id.* at 916. Although the court held that a client's intention to give perjury testimony provides just cause for the attorney to withdraw, it also held that the burden is upon the attorney to establish the falsity of the testimony threatened to be given. *Id.* at 917.

Rocha v. Ahmad, 676 S.W.2d 149 (Tex. App. - San Antonio 1984, writ dism'd w.o.j.), concerned a contingent fee agreement in a Texas Deceptive Trade Practices case. In this case, the court held that when a client breaches the contract, the attorney can treat the contract as rescinded and recover under quantum meruit or sue for what he would have received under the contract. *Id.* at 156. Once the attorney has proven the contract and the fact of discharge, the attorney makes a prima facie case and is entitled to recover. The court held that the issue of good cause is defensive in nature and the former client must plead and prove good cause for discharge. *Id.* at 156. The court then departs from what appears to be well established law and cites an old case: *Thompson v. Smith*, 248 S.W.1070, 1072 (Tex. Comm'n App. 1923, judgm't adopted) and holds that when an attorney is discharged for good cause, the attorney may attempt to recover a fee for services rendered up to the time of discharge under quantum meruit even though the attorney may not recover under his contract with the client. *Id.* at 1056. *Thompson* is a case in which an attorney is discharged without just cause. In *Rocha*, the jury found that the attorney was discharged with good cause. *Id.* at 153. The court of appeals allowed the attorney to recover $500 of his fee. *Id.* at 156. *Rocha* is difficult to reconcile with the rest of these cases cited here. It does not cite any of these cases. *Rocha* is an anomaly.

When the attorney withdraws from a case, even for good cause, the courts will not necessarily award fees to the law firm either under the contract or in quantum meruit. In *Auguston v. Linea Area National, et .al.,* 76 F.3d 658 (5th Cir. 1996), the law firm representing personal injury claimants sought and received the permission of the trial court to withdraw from its representation of the plaintiffs over the

objections of its clients, the plaintiffs. The law firm had negotiated a settlement of $650,000 for the plaintiffs which they refused to take. The firm was worried that pursuing discovery would prove that the defendants had not intentionally caused the accident. Intentional acts were the basis of the settlement. The plaintiffs hired new counsel who settled their case for $850,000. At the settlement hearing, the trial court awarded the old counsel fees and expenses of approximately $110,000. The plaintiffs appealed. The appellate court held that good cause by the law firm for withdrawal did not necessarily justify a quantum meruit award of fees. It held that it could find no Texas case requiring a quantum meruit or other recovery for a just cause withdrawal by counsel. It appears that the appellate court did not believe it was fair to penalize the plaintiffs for their unwillingness to accept a settlement offer recommended to them by the old law firm in spite of the fact that it appeared that if the old law firm pursued the litigation, the plaintiffs could end up with nothing by uncovering facts showing simple negligence by the defendants rather than an intentional tort.

10. Adding *Quantum Meruit* to Your Fee Contract in Contingent Fee Case.

The law in Texas is clear that you can proceed on a *quantum meruit* claim when discharged without cause. A recent Colorado decision may help you in drafting your agreement. In *Dudding v. Norton Frickey & Assoc.*, 11 P.3d 441 (Colo. 2000), the Colorado Supreme Court held that an attorney cannot recover in *quantum meruit* when the contingent fee agreement failed to give the client notice that the equitable relief was possible if the contract failed. This case was a wrongful termination claim. The parties entered into a written contingent fee agreement that did not address what would happen if Dudding accepted re-employment with his previous employer, which he did. Dudding settled with his employer and went back to work.

The court noted that because the attorney understands the law much better than the client, that the agreement between the client and the lawyer must be very specific as to *quantum meruit*. The language in the agreement provided that the attorney could seek recovery for the value of his services based on an hourly rate but the court held that language was not sufficient to support a *quantum meruit* recovery because it did not mention *quantum meruit*, unjust enrichment, or equitable relief. It included no reference to the possibility the attorney could ask a court to determine the worth of his services in relationship to the outcome of the case.

11. Costs and Attorney's Fees as Damages.

The RESTATEMENT Section 35(2) provides that "unless the contract construed in the circumstances indicates otherwise, when a lawyer has contracted for a contingent fee, the lawyer is entitled to receive the specified fee only when and to the extent the client receive payment." Comment (d) provides that in the absence of an agreement to the contrary, costs and attorney's fees awarded in a case are not considered damages. Texas courts have construed this differently in reviewing the language of a fairly standard contingent fee agreement. In *Martin v. Lovorn*, 959 S.W.2d 358 (Tex. App. - Houston [14th Dist.] no writ), attorney Lovorn represented Martin in a sexual harassment suit in which damages and attorney's fees were awarded. The attorney and client sued each other over the statutory award of attorney's fees. The attorney contended that she was entitled to the contingent fee award on the damages and all of the statutory attorney's fees. The 14th Court of Appeals held that the client was entitled to the damages and the attorney's fees award. The contingent fee agreement that provided for a percentage out of "any and all recovery obtained on behalf of the Client" provided that the attorney could recover her contingent fee on the combined amount of the statutory damages and the attorney's fee award. The RESTATEMENT Section 38(3)(b) provides that unless the contract is construed otherwise, statutory attorney's fees awarded from one party to the other belong to the client and not the lawyer absent a contrary statute or court order. Comment f to Section 38 of the RESTATEMENT provides: "a contract providing that a lawyer is to receive both a standard contractual fee and a fee award, without crediting the award against the contractual fee is presumptively unreasonable under Section 34 of the RESTATEMENT (Reasonable and Lawful Fees)." One of the contracts - Appendix B, provides that the attorney is entitled to receive the greater of a contingent fee award or a statutory attorney's fee award. This would not seem to violate any of these provisions since the attorney is not receiving both the contingent fee award and the statutory award.

12. Charging Interest and Using Credit Cards.

The Texas Commission on Professional Ethics, Opinion 409 (47 Tex.B.J. 44 (1984)) allows for the charging of interest when it is reasonable, complies with customary law and where the original stands is reasonable. In *Griffith v. Geffen & Jacobsen, P.C.,* 693 S.W.2d 724 (Tex. App. - Dallas 1985, no writ), the court upheld the law firm's right for an attorney to charge interest at the legal rate applicable to contracts where no rate of interest is specified. *Id.* at 726. The better practice, however, would be to provide for interest charges in the written agreement.

Note h to RESTATEMENT Section 38 allows for a reasonable interest charge if agreed to in advance. In Opinion 465 of the Texas Commission on Professional Ethics (54 Tex.B.J. 76 (1981)), the commission held that the attorney could properly own an interest in a lending institution which lends money to personal injury clients of the attorney and the attorney may properly borrow money from the lending institution for case expenses for a personal injury clients and charge, or pass on to a client the actual out of pocket interest and finance charges of the lending institution. This Opinion assumes that the attorney did not own or control the lending institution to the extent that the institution only loans to the clients of the attorney and that there was not a conflict of interest prohibited by DR 1.06 and, that the interest charges were fair, reasonable and customary, and that the attorney client relationship and the contract was proper in all other circumstances. It is also clear that an attorney can honor a credit card. Texas Commission on Professional Ethics, Opinion 349 (1969).

New Development Regarding Credit Cards. In a new development, lawyers and any other merchant or service provider may be free to apply a surcharge for credit card use.

In Texas, there was a statute in place banning surcharges by the merchant on customers using a credit card. Many states had these laws, and the "anti-surcharge laws" in Texas, California, New York, Florida, and other states were challenged on first amendment constitutional grounds. The New York statute went to the US Supreme Court, and the court held that these statutes are in fact a regulation of speech, meaning they must withstand strict scrutiny by the courts (i.e. a very high burden must be met for the courts to uphold these statutes).

The Texas lawsuit made it to the US Supreme Court and was sent back to federal court in Austin for proceedings consistent with the USSC holding that these laws are regulations of speech. In August, 2018, that court found the Texas statute to be unconstitutional and issued a permanent injunction against the Texas Attorney General from enforcing that law. *Rowell v. Paxton*, 336 F. Supp. 3d 724 (W.D. Austin 2018). The State of Texas had thirty days to appeal that decision, and they did not appeal. The case cites all the prior litigation including the United States Supreme Court decision.

The Texas Attorney General came out with an opinion (Opinion No. KP-0257) in June, 2019 that limits the application of the case to its facts.

It is hard to say if the Texas legislature will try to rewrite this law; if they do, I suspect they will rewrite it to say that surcharges can be applied, but the surcharges must be limited to the amount of the swipe fees charged by the credit card companies to the merchant.

The bottom line, at least for our firm, is that we are not applying the surcharge.

13. Charging the greater of the fee that would be charged for the same circumstance on an hourly basis or a percentage of the amount recovered for the client.

The Texas Commission on Professional Ethics, Opinion 518 (September 1996) held that an attorney may not, absent very unusual circumstances that would make such an agreement reasonable under DR 1.04, enter into a contingent fee agreement where the same attorney is to be paid the greater of (a) the fee that normally would be charged for the same services on an hourly basis, or (b) the usual percent of the amount recovered for the client on a contingent fee basis. The commission based its holding on the fact that this fee arrangement would violate DR 1.04 because the uncertainty of collection normally would not be considered in arriving at a fee for services on an hourly rate and a higher fee payable only out of recovery on a contingent fee basis is normally justified due to the uncertainty of collection. The opinion did indicate that it would be possible to have such an arrangement if the hourly rate could be charged was less than the normal hourly rate and if the percentage of the contingent fee were less than the percentage that would be reasonable absent the hourly fee provision. The contract in Appendix B would not violate this opinion because it allows the greater of an hourly rate or contingent fee contract only if the court awards a higher fee than the contingent fee.

14. Notice of Complaints.

Section 81.079(b) of the Texas Government Code provides:

> "(b) Each attorney practicing law in this state shall provide notice to each of the attorney's clients of the existence of a grievance process by:
>
> (1) making complaint brochures prepared by the state bar available at the attorney's place of business;
> (2) posting a sign prominently displayed in the attorney's place of business describing the process;
> (3) including the information on a written contract for services with the client; or
> (4) providing the information in a bill for services to the client."

Some of the sample contracts include this provision in the contract, itself.

15. <u>The Texas Lawyers Creed.</u>

The Supreme Court of Texas and the Court of Criminal Appeals adopted "The Texas Lawyers Creed - A Mandate for Professionalism" in 1989 (Texas Rules of Court - State at 569 West 2001). Attaching this to the fee agreement and referring to it can help a client understand why you may grant extension of time to your opponent and why you, at times, are courteous to your opponent.

16. <u>Third Party Guarantee of Fees.</u>

When someone other than the client guarantees payment of the attorney's fee, there is an immediate conflict of interest. What happens if the guarantor refuses to pay or doesn't like the decisions the attorney has made in the litigation? This conflict has existed for a long time in the area of insurance defense in tort cases. In those cases, the law is very clear that the lawyer representing both the insured and insurer owes the duty of loyalty and allegiance to the insured and not the insurance company. *State Farm Mut. Auto Ins. Co. v. Traver*, 980 S.W.2d 625 (Tex. 1998); *Employer's Cas. Co. v. Tilley*, 496 S.W. 2d 552 (Tex. 1973). For an excellent discussion of these issues *see Brown, Hebdon, Schmidt*, 1 Texas Practice Guide-Personal Injury 2d, § 2.97 (West 2000). Comment 12 to DR 1.06 provides that an attorney may be paid from a source other than the client, if the client is informed of the fact and consents to it and the arrangement does not compromise the attorney's duty of loyalty to his client. *See also* Tex. Comm'n on Prof'l Ethics, 166 (1958) (www.txethics.org/index/166.htm). A sample guaranty provision below attempts to meet the requirements of the cases and the DR.

"Guarantee of Payment of Fees.

> I have read the agreement to which this paragraph is attached. I understand that in negotiating this agreement and reviewing it that the attorney does not represent me and I should have an independent attorney review this agreement for me. I understand that the attorney is not representing me and that I have no right to control the course of this matter in any manner. I have no right to information regarding the case. Conferences between the attorney and the client are confidential and privileged from disclosure to the other side of the lawsuit. If these conferences are disclosed to me, it may cause the privilege to be lost. I further understand and agree that I absolutely and unconditionally guarantee payment of the fees and expenses as outlined in this agreement. I have the right to withdraw this guaranty upon written notice to the attorney, however, I am responsible for all fees and expenses incurred prior to the attorney's written receipt of my withdrawal of this guarantee which will include expenses paid for by the attorney after receipt of the withdrawal but incurred prior to that time. I further understand that if I withdraw this guaranty, that the attorney will request the court's permission to withdraw from the case and will withdraw if permission is granted. I agree to pay all fees and expenses of the attorney incurred in the attorney's withdrawal from the case after my withdrawal of my guarantee.
>
> (Signature line for guarantor)
>
> Review of Guarantee Clause by Client.
>
> I have reviewed the paragraph titled: "Guarantee of Payment of Fees". I understand that I am not paying the fee in this matter. I also understand that the nonpayment of the fee by the guarantor or the withdrawal of the guarantee of the agreement by the guarantor will cause the attorney to request the court's permission to withdraw from the case and will withdraw if permission is granted.
>
> (Signature line for client)"

The other part of this issue is whether you have a sufficient agreement in writing to support your claim of attorney's fees. In *Dynegy v. Yates,* 422 S.W.3d 638 (Tex.2014), Dynegy, by board resolution, agreed to advance attorney's fees for the defense of a former officer. The resolution provided that it could be modified by the board at any time. The former officer hired attorney Yates to represent him and was told by the former officer and Dynegy's counsel that they would pay the bills. The former officer signed a written fee agreement but Dynegy never signed anything. Dynegy paid one of Yates' bills but then refused to pay the rest. The Texas Supreme Court held that the agreement did not satisfy the statute of frauds and attorney Yates could not get his fees paid by Dynegy.

17. <u>Referral Fees.</u>

a. Changes to D.R. 1.04.

Disciplinary Rule 1.04 (f) and (g) have been amended. This will require a change, mainly, in your

contingent fee agreement, unless you are paying or obtaining referral fees for fee arrangements other than contingent fees.

b. Specific Client Consent Referral for Referral Fees.

The client must consent, in writing, prior to the time of the proposed referral to the terms of the arrangement. The terms have to include the following:

(1) the identity of all lawyers or law firms who will participate in the fee sharing arrangement,
(2) whether fees will be divided based on the proportion of services performed, or by lawyers agreeing to assume joint responsibility for representation, and
(3) the share of the fee that each lawyer or law firm will receive, or, if the division is based on the proportion of services performed, the basis on which the division will be made.

Some of the contingent fee agreements provide that a case may be referred to another lawyer and that the fee to the client will not increase. Under this new rule change, this fee agreement is probably adequate. Prior to making any such referral, however, it is extremely important that you provide another document to the client that complies with new D.R. 1.04 (f)-(h) and that agreement be signed by you and your client.

c. Basis of the Referral

The referral fees have to be divided based on one of two criteria. The first is on the proportion of services performed. The second is by lawyers agreeing to assume joint responsibility for the representation.

i. Proportion of Services Performed

Comment 12 to D.R. 1.04 provides that if a division of a fee is based on the proportion of services performed, each lawyer is to perform substantial legal services on behalf of the client with respect to the matter. These services must go beyond initially seeking to acquire and being engaged by the client. It requires that there be a reasonable correlation between services rendered and responsibility assumed, and the share of the fee to be received. This allocation can be made at the beginning of the agreement and, according to Comment 12, "should" control even if the division ends up not being directly proportional to the actual work performed. It can be also be made at the end of the work, so long as the agreement so provides. If the allocation is deferred until the end of the work, however, the arrangement itself must include the basis by which the division must be made.

ii. Joint Responsibility

Comment 13 details the requirements for joint responsibility. This entails ethical and, according to the Comment, "perhaps" financial responsibility for the representation. It is interesting that comment 13, which only refers to joint responsibility for the work, requires that the referring or associating lawyer conduct a reasonable investigation of the client's legal matter and refer it to a lawyer whom the referring lawyer believes is competent to handle it, referencing D.R. 1.01. This is a requirement whether you are receiving a fee based on a proportion of the services rendered or on joint responsibility. The referring lawyer has to monitor the matter throughout the representation and make sure the client is informed of the matters that come to the lawyer's attention and that a reasonable lawyer believes that the client should be aware of. It does not, however, require the referring or associating lawyer to attend all of the depositions or receive copies of all of the pleadings because this may increase the cost. It does, however, require that the referring lawyer be kept reasonably informed. Who know what that really means. Neither the comment nor the rule give specific guidance.

d. Consequences of the Violation of the Rule are Unknown.

D.R. 1.04 (g) requires that the client get all of the information required in D.R. 1.04 (f)(2). It does have a quantum meruit provision so that a lawyer who renders services that can receive a fee if D.R. 1.04 (f) and (g) are not complied with. The comments, however, leaving you hanging because comment 17 provides that "what should be done with any otherwise agreed-to fee that is forfeited in whole or in part due to a lawyer's failure to comply with paragraph (g) is not resolved by these rules". In this author's opinion, pursuing a quantum meruit recovering would be perilous.

Comment 18 provides that the overall fee should not be unconscionable.

e. Contract Lawyer.

For a number of years, when law firms were overwhelmed with work, the firm would hire a lawyer on a contract basis. The lawyer would not be an employee of the law firm but would be paid for the lawyer's time. The law firm would charge the client an additional amount on top of what the contract lawyer charged the firm for its profit. In Professional Ethics Opinion for the State Bar of Texas No. 577 issued in March 2007, the Committee determined that this was a violation of D.R. 1.04 and that a law firm could not charge a different hourly rate for a contract lawyer than it paid to the contract lawyer. Only if the lawyer was an employee or a member of the firm could the law firm add on an additional amount to the hourly rate of the lawyer. This is an unfortunate aspect of D.R. 1.04

if it, indeed, really applies. This seems to be an overly technical reading of the rule by the Committee. It will discourage lawyers from hiring other lawyers on a contract basis and from efficiently taking on extra work. An issue totally ignored in this ethics opinion is malpractice liability and the cost of malpractice insurance. If a malpractice problem arises with the matter, the client will be seeking a recovery from the attorney with whom they have a relationship and not some other lawyer. These rulings are not binding on the Courts, but they are out there and we all need to be aware of them.

If you regularly use a contract attorney, consider an of counsel arrangement. *Review* D.R. 7.01 and the following opinion to make sure you have properly documented that the lawyer is truly in the firm: *Professional Ethics Opinion for the State of Texas*, Opinion 402. This opinion presents a discussion of what an "of counsel" relationship should look like.

f. Conclusion.

This amendment to the D.R. 1.04 creates significant problems for a lawyer who wants to refer their client to another lawyer and divide the fee and for law firms who hire contract lawyers to take on additional work. Given the danger of the Arce case for fee forfeiture, and these new rules, lawyers need to tread carefully in this area.

Richard Hile has written an excellent article for a State Bar Webcast in 2006 entitled: *An Analysis of 2005 Changes to Rule 1.04 and Part VII of the Texas Disciplinary Rules of Professional Conduct*.

18. <u>Circular 230 Concerns.</u>

Circular 230 governs the rules that attorneys and others have to follow when a representing taxpayer before the Internal Revenue Service. The latest Circular 230 was published in 2017 but was first issued in 2005 and changed how lawyers write tax opinions. A complete analysis of Circular 230 is beyond the scope of this paper. Circular 230, however, has a quite bit to say about the attorney's relationship with the client and what matters must be in writing. All references are to Circular 230.

a. Conflicts of Interests.

Section 10.29 of Circular 230 covers conflicts of interest. This section prohibits a practitioner from representing a client before the Internal Revenue Service if the representation involves a conflict of interest. Circular 230 defines conflicts of interest in two circumstances: "(1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the practitioner's responsibility to another client, a former client or a third person or by a personal interest of the practitioner."

Paragraph (b) of §10.29 provides exceptions to the prohibition of representation where conflicts of interest are present. They are: "(1) the practitioner reasonably believes that the practitioner will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) each affected client gives informed consent, confirmed in writing, by each affected client, at the time the existence of the conflict is known by the practitioner. The confirmation may be made within a reasonable period after the informed consent, but in no event later than 30 days."

The provisions of Circular 230 go beyond the Disciplinary Rules in requiring that the consent to representation under a conflict of interest be confirmed in writing. Not only must these consents be confirmed in writing but they must also be retained by the practitioner for at least 36 months from the date of the conclusion of the representation of the clients. These written consents must also be provided to any officer or employee of the IRS on request.

b. Fees.

Circular 230 also governs the collection of fees. Section10.27(a) prohibits a practitioner from charging an unconscionable fee for representing a client in a matter before the IRS. "Unconscionable" is not defined in Circular 230. Although Circular 230 does not say so, an attorney can presume that the IRS would look to the bar rules having jurisdiction over the lawyer to determine what an unconscionable fee is.

Section 10.27(b) prohibits a practitioner from charging a contingent fee for any matter before the IRS and then provides certain exceptions. The exceptions are: (1) a practitioner may charge a contingent fee for services rendered in connection with the Service's examination of, or challenge to – (i) an original tax return; or (ii) an amended return or claim for refund or credit where the amended return or claim for refund or credit was filed within 120 days of the taxpayer receiving a written notice of the examination of, or a written challenge to the original tax return; (2) a practitioner may charge a contingent fee for services rendered in connection with a claim for credit or refund filed solely in connection with the determination of statutory interest or penalties assessed by the Internal Revenue Service; (3) a practitioner may charge a contingent fee for services rendered in connection with any judicial proceeding arising under the Internal Revenue Code."

Section 10.27(b)(2)(ii), to provide that a practitioner may charge a contingent fee for services rendered in connection with an IRS examination of, or challenge to, an amended return or claim for refund or

credit filed within 120 days of the taxpayer receiving written notice or written challenge. The 120 days is computed from the earlier of a written notice of the examination, if any, or a written challenge to the original return.

A matter before the IRS is defined as "tax planning and advice, preparing or filing or assisting in preparing or filing returns or claims for refund or credit, and all matters connected with a presentation to the Internal Revenue Service or any of its officers or employees relating to a taxpayer's rights, privileges, or liabilities under laws or regulations administered by the Internal Revenue Service. Such presentations include, but are not limited to, preparing and filing documents, corresponding and communicating with the Internal Revenue Service, rendering written advice with respect to any entity, transaction, plan or arrangement, and representing a client at conferences, hearing, and meetings." §10.27(c)(2)

For purposes of Circular 230, a contingent fee agreement is defined as "any fee that is based, in whole or in part, on whether or not a position taken on a tax return or other filing avoids challenge by the Internal Revenue Service or is sustained either by the Internal Revenue service or in litigation. A contingent fee includes a fee that is based on a percentage of the refund reported on a return, that is based on a percentage of the taxes saved, or that otherwise depends on the specific result attained. A contingent fee also includes any fee arrangement in which the practitioner will reimburse the client for all or a portion of the client's fee in the event that a position taken on a tax return or other filing is challenged by the Internal Revenue Service or is not sustained, whether pursuant to an indemnity agreement, a guarantee, rescission rights, or any other arrangement with a similar effect." §10.27(c)(1)

c. The Client's File

Section10.28(a) requires a practitioner to return any and all records of a client necessary for a client to comply with the client's Federal tax obligations. It allows a practitioner to retain copies of the records and, if there is a fee dispute, it recognizes an attorney's lien on the client's file, but it requires the practitioner give the client the documents necessary to prepare the client's tax return and reasonable access to review and copy any other records. The practical effect of this is that lawyers should give the client the client's file regardless of the situation.

d. Fee Information

Section 10.30(b) and (c) govern information about fees that may be disseminated. The provisions are as follows: "(b)(i) a practitioner may publish the availability of a written schedule of fees and disseminate the following fee information – (a) fixed fees for specific routine service; (b) hourly rates; (c) range of fees for particular services; (d) fee charged for an initial consultation; (ii) any statement of fee information concerning matters in which costs may be incurred must include a statement disclosing whether clients will be responsible for such costs; (2) a practitioner may charge no more than the rate(s) published under paragraph (b)(1) of this section for at least 30 calendar days after the last date on which the schedule of fees was published." "(c) *Communication of fee information*. Fee information may be communicated in professional lists, telephone directories, print media, mailings, and electronic mail, facsimile, hand delivered flyers, radio, television, and any other method. The method chosen, however, must not cause the communication to become untruthful, deceptive, or otherwise in violation of this part. A practitioner may not persist in attempting to contact a prospective client if the prospective client has made it known to the practitioner that he or she does not desire to be solicited. In the case of radio and television broadcasting, the broadcast must be recorded and the practitioner must retain a recording of the actual transmission. In the case of direct mail and e-commerce communications, the practitioner must retain a copy of the actual communication, along with a list or other description of persons to whom the communication was mailed or otherwise distributed. The copy must be retained by the practitioner for a period of at least 36 moths from the date of the last transmission or use."

These appear to be a regulation of how an attorney can publish his or her rates. The lawyer needs to communicate the basis for fees to the client, in writing, for matters covered by Circular 230 in compliance with this language.

e. Communication Regarding Engagement Under Circular 230

Section 10.33 covering best practices for tax advisors requires, among other things, that the practitioner communicate clearly with the client regarding the terms of the engagement. This includes having a clear understanding and communicating with the client about the client's intended purpose and use for the advice and the form and scope of the advice or assistance to be rendered to the client. This is unusual because it requires not only specific written communication about the work the lawyer is going to perform, but also about what the client is going to do with the lawyer's work.

f. Engagement Agreements.

I asked a number of lawyers to send me copies of their engagement agreements for tax opinions under

Circular 230. Most of them said they don't do that anymore and the few who did say that they were giving tax opinions told me that they used their standard fee agreement. In my opinion, your standard fee agreement may be insufficient if you are engaging in any type of work for the client before the Internal Revenue Service. You should read Circular 230 very carefully and make sure that you have complied with all of its requirements. If the IRS wants to stop a lawyer from practicing before it, part of its discovery will certainly be the communications with the client regarding the attorney's engagement.

g. Advertising and Solicitation Restrictions.

Circular 230, Section 10.30(a)(1) provides that: "A practitioner may not, with respect to any Internal Revenue Service matter, in any way use or participate in the use of any form or public communication or private soliciting containing a false, fraudulent, or coercive statement or claim; or a misleading or deceptive statement or claim. Enrolled agents or enrolled retirement plan agents, in describing their professional designation, may not utilize the term of art "certified" or imply an employer/employee relationship with the Internal Revenue Service. Examples of acceptable descriptions for enrolled agents are "enrolled to represent taxpayers before the Internal revenue service," "enrolled practice before the Internal Revenue Service," and "admitted to practice before the Internal Revenue Service." Similarly, examples of acceptable descriptions for enrolled retirement plan agents are "enrolled to represent taxpayers before the Internal Revenue Service as a retirement plan agent" and "enrolled to practice before the Internal Revenue Service as a retirement plan agent."

h. Other Circular 230 issues.

The other issues regarding Circular 230 are beyond the scope of this outline.

19. <u>HIPAA</u>

The reach of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") and House Bill 300 enacted in 2013 ("HB 300") as they apply to lawyers is scary. An excellent article entitled *The Risky Business of HIPAA – Why it Should Matter to You* written by Charles Hardy, Ann Jamison, and Sarah Darnell and presented at the 2017 Advanced Estate Planning and Probate Course instructs lawyers on how to comply with these two acts. The provisions contain forms for attorneys that should be reviewed by all of us. These laws require training and proof of training for lawyers and staff. They have a number of requirements for keeping information safe as well as a notice requirement that we have to provide to our clients.

I have copied and attached as Appendix KK excerpts from that article regarding a notice to clients that you can post in your office and a HIPAA release that is customized. I am no expert in this area, but these laws have very stiff penalties for noncompliance.

IV. DRAFTING TIPS.

A. Examples.

Many of the appendices were donated by lawyers in large metropolitan areas who have practiced with large law firms either currently or in the past. I am very grateful to those firms for their help. Since one lawyer indicated he thought some of his provisions might be illegal, I decided to eliminate the names of the firms from all of these. Given the current state of the law, every one of these contracts could stand a review and revision. After reading the case law, I do have some drafting tips that would be helpful to you.

Mark D. White has written a short and helpful article on fee agreements: *Preparing an Effective Engagement Letter*, 79 Tex. Bar J. 684 (2012) that is worth reading.

B. General Comments.

1. <u>Make the Contract Clear.</u>

Let several individuals who are not lawyers read your agreement to see if they understand it. Pay close attention to their questions. Making an agreement understandable usually means making it longer. Don't let that stop you.

2. <u>Cover Every Contingency.</u>

Make your agreement specific to the case in which you are involved, especially if you are drafting a contingent fee agreement. Think about what would happen in the case that would affect your fee and try to cover it in the agreement with the clients. Tailor your contract to the type of proceeding. For example, if you are representing an applicant for a guardianship, consider putting in the matters that will disqualify an applicant from acting as guardian.

3. <u>Make it Fair.</u>

Read the RESTATEMENT, the Texas Commission on Professional Ethics Opinions, and the Texas Disciplinary Rules of Professional Conduct as well as this paper.

4. <u>Add the Texas Lawyer's Creed.</u>
<u>Complaint Notice.</u>

Make sure that the complaint notice mandated by Section 81.079(b) of the Government Code is contained in the agreement or somewhere else as mandated by that section.

5. Fee is Negotiable.

Provide in the agreement itself that this fee is not set by law, but it is negotiable.

6. Independent Attorney Review.

The contract in Appendix B provides that the client was advised to retain independent legal counsel. We have seen that that may not be enough, but it certainly cannot hurt.

7. Withdrawal.

State specifically in your contract the reasons allowing your withdrawal and what will happen upon withdrawal. Appendix B, in paragraph 3.5, states specific reasons that will allow the attorney to withdraw.

8. Conflicts of Interest.

State what happens if you discover a conflict of interest. See Appendix A for an example.

9. Sign the Agreement.

Since contingent fee agreements and agreements to arbitrate must be signed by the lawyer, sign all agreements and avoid this problem.

10. Arbitration.

Consider whether you want to require arbitration or mediation in your agreement.

11. Venue.

Provide that venue for any litigation over the fee agreement will be held in the county in which your office is located.

12. Client Responsibilities.

In Appendix Z, the lawyer incorporates some client responsibilities in his engagement agreement. This is a great idea in almost any engagement.

C. Hourly Rate Contracts.

1. Be Specific.

State how you are going to determine your hourly rates and what the different rates will be and whether they will ever vary. If you charge a quarter of an hour for everything you do, state that in the contract.

2. Interest.

Consider charging interest and specifically stating it to encourage your clients to pay you promptly.

3. Credit Cards.

Appendix A provides for payment by the credit card or guaranteed by the credit card. In my experience, if they can't write a check, their credit cards aren't any good, either.

4. Third Party Guarantee.

Ask a third party to guarantee payment. There are problems with this, but that can mean the difference between representation and no representation for a client.

5. Attorney's Fee Recovery by the Court.

If the court can provide for an attorney's fee recovery on your hourly rate case, consider stating in your agreement that your fee is not limited by what a court or a jury may award. Many lawyers can recount the experience that a client, sometime after the jury verdict, gets the idea that you will refund any excess you have charged if the jury does not award attorney's fees in the amount that you have charged.

D. Contingent Fee Contracts.

1. Put in Writing.

Make sure that the contingent fee agreement is in writing and complies with the provisions of the Government Code and DR. 1.04(d).

2. Expenses and How to Calculate.

Consider using an example to show the client how her net recovery will be calculated.

3. Shifting to Higher Percentages Upon Specified Events.

Given the problems in *Lopez*, you need to be very specific about when those percentages change. Even if you are specific, consider backing off of that additional percentage if problems arise.

4. Calculation of the Recovery.

If counterclaims or offsets to your client's recovery are possible, cover that in your fee agreement and use an example. If attorney's fees can be awarded by the court, as well as costs and expenses, make sure that you provide that will be considered part of the recovery upon which the contingent fee will be calculated, or, consider paragraph 3.2.2 of the contract in Appendix B which allows that fee to offset any contingent fee or that fee to be the exclusive fee.

5. Mixed Contingent and Hourly Fee.

If the fee is to be a mixed fee of contingent and hourly, it cannot be the same contingent fee if it was your normal contingent fee nor can your hourly rate be as high as normal.

6. Don't Be Greedy.

Even when you aren't greedy, realize that the client can be. When the numbers are high, you always run the risk of someone else second guessing your fee contract. Document what you are doing with letters and other information that clearly communicates the

status of the case to the client so that a jury will believe that anyone could have understood what you were doing, what you were telling your client, and that you were conducting yourself in an ethical manner.

7. Provide for Referral Fees.

If you are planning on referring the case, you need to comply with the Revisions to D.R. 1.04.

8. Client Approval to Settle.

You cannot stop a client from settling the client's case. Nothing in your fee agreement should provide for that. This rule has been repeated several times in the cases. See Lopez v. Maldonado, Jr., 2016 WL 8924108 (Civ App – Corpus Christi 2016) for an example.

E. Estate Planning Contracts.

1. State What You Will Do and How You Will Do It.

Informing clients of the cost of your services is paramount in estate planning contracts. The best way to handle this issue is to offer to give a fifteen minute consultation at no charge to the client to determine some of the issues involved. When your client calls for an appointment, have your staff indicate that you will offer a no charge and no obligation fifteen minute consultation to determine the client's needs as well as the cost for estate planning services. Have your staff briefed on what to say when someone calls for an appointment. The materials contained in Appendix L provide an example. The debate has just begun about how lawyers can protect themselves against *Belt, supra*. Do you list every potential tax planning technique at your client's disposal and discuss which ones they chose not to do? No one has the answers at this point.

2. Questions About The Family.

The interview process seems to go easier if your first questions are about the client's family such as:

> "a. Tell me about your family. (Listen to whom they name first and what they say about that person.)
> b. Do you like your children?
> c. Do your children get along?
> d. How do they handle money?
> e. If you died tomorrow and your children receive your assets, would you be comfortable letting them have all of the assets they would receive outright with no restrictions?"

These simple questions often open up a world of information that you need to determine what the client needs. Make sure you not only ask the questions but also listen to the client's responses.

3. Marriages.

It is important to discuss the issue of trusts when the first spouse dies. One way to approach this question is to ask the following:

> "a. When one of you dies, do you want the survivor to be in complete control of all of the assets?
> b. Do you want the survivor to have the right to control where all of your assets pass at the death of that survivor?
> c. If not, who do you want to have in charge of the assets?"

4. Financial Information.

To get a good picture of the financial information, I suggest you say the following:

> "For me to do a good job for you as an estate planner, I need to know what you have and what it is worth. I will keep the information confidential."

If the client will not disclose financial information to you, it is a judgment call as to whether or not to proceed with the estate planning work. If you decide to proceed, you should document that the client would not give you all of the information, that you cannot do an adequate job without all of the information, and that there may be severe estate and income taxes consequences from your planning if the client does not give you the information. The client should sign that letter and you need to keep a copy of the client's original signature in the file if you choose to do the work. The lack of the client's trust in you can be a sign that you will have client problems and should not represent the individual.

Given The *Belt* decision, it is important to document what the client tells you about their net worth. The best way is in your letter sending them their planning documents, explaining these were prepared on the basis of an estate of "$X" in value.

5. Other Questions

Ask them about their hopes for, fears of and goals for the process. Ask them if they are concerned about paying for long term care and qualifying for Medicaid.

6. Questionnaires.

Having a client completely fill out questionnaires is an excellent way to avoid malpractice and to know everything about the client. Unfortunately, I have never been able to have a client who will fill out a questionnaire. The clients who have requested a

questionnaire before coming in to see me have never come in to see me. I have no idea what they have done, but they have not ask for planning work from me.

7. Estate Planning Engagement Letter.

Attached as Appendices J and J-1 are the engagement letters I use for estate planning services. It is also a malpractice prevention and marketing tool. I have also attached other attorneys' versions as Appendices Q, R, and V.

a. Services.

The first paragraph lists the common and uncommon estate planning services to perform for a client. If you retained this document after you have completed the work, it helps show others that you have, indeed, offered the client options such as directives to physicians, designation of agent for burial, and other tools. It does not spell out in great detail what type of will you are going to prepare, but the advantage of having this on one page probably outweighs the disadvantage of not having a very detailed engagement letter detailing exactly the type of will you are planning to prepare. When doing work by the hour, I have modified the agreement by hand, initialed it, and have had the client initial it. Some commentators do think such a list is a good idea, however, it can speed up the process of completing your contract for services. I also provide blanks for other work and that the list is not exclusive.

b. Married Clients.

I also provide a warning for married clients about what can change the nature (community vs. separate) of their property.

c. Fees.

This indicates the total fee that will be charged and what that fee covers. Some attorneys suggest allocating a certain amount of time for explanation and conferences, and providing that an hourly rate would be charged if the conferences exceed that amount of time. I have found that provision makes the client uncomfortable and that a client is much happier when the client knows exactly what he or she will spend for estate planning services. I do explain that I charge additional work if the client changes his mind after leaving my office. I started this practice when I prepared seven different wills for a couple. The first four were under the original fixed price agreement. When they called for the fifth, I told them it was going to be by the hour after that. I never should have gone past the third draft.

Sometimes a client is not ready to have you prepare documents. In that circumstance, provide you will charge them by the hour for planning until they decide what they want. At that point you can set a fixed fee. Some of those clients, however, will want to see multiple versions of documents before they make up their mind about what they want. You are better off with an hourly rate basis with a fixed fee from the draft document with everything else billed at your hourly rate.

Note in the fee agreement in Appendix J-1, there is a fixed fee and an hourly rate. I started using this when the initial interview told me what the client needed in the way of documents but the client was uncertain of all of the terms. I would quote a fixed fee to prepare the document but would charge hourly for the discussions surrounding the document.

d. Fee Earned

There is no good guidance on when a flat fee or a portion of it is earned. Your division must be reasonable. Practically speaking, if a client wants to terminate the relationship and wants a return of the fee after the initial interview and before I have produced any documents, I return the fee to the client. Life is too short.

e. Citizenship and Document Review.

This tells the client that you expect them to read the documents and notify you of any errors as well as whether they are U.S. citizens. There are estate tax implications for planning for someone who is not a citizen of this country.

f. Payment Terms.

Receiving all of the fee immediately lets you know whether the client is serious about doing the work. It also helps your cash flow if your fee agreement provides how your fees are earned. For example, if your fee agreement provides that one-third of the fee is earned after the initial interview, you can take one-third of the total fee into income after the interview and the remaining two-thirds into income when you send out the documents with your bill. Encouraging the client to come in within 60 days after they receive the documents helps you complete the estate planning matter. For some strange reason, clients do not understand that the agreements are not effective unless they sign them. Requiring a client to pay extra at your hourly rate if they request changes after the 60 day period encourages them to complete the matter quickly which is usually in their best interest.

g. Witness or Assistance.

This allows you to charge if you have to appear as a witness in a will contest. Most of the wills that you

prepare will not be contested and you can explain that to your client. If this is in your fee contract, however, it can protect you in the event of a later proceeding that you may not anticipate.

This will also cover the circumstance when you are not chosen to handle the probate but are asked to give information or other assistance to the law firm handling the probate. This can involve several hours of your time. This paragraph allows you to bill for that. I recommend including this clause in all of your engagement agreements.

h. Mediation.

I am not totally convinced that I want to arbitrate fee or malpractice disputes. Since most disputes can be resolved through a mediation, this paragraph provides an alternative to having nothing in the agreement.

i. Confidentiality.

This sets out the individuals with whom you can discuss the client's information. You can modify this by crossing through the various items.

Mark D. White suggested these two paragraphs:

"Please make every effort to maintain the confidentiality of our communications because those are privileged from disclosure. We understand that your daughter, Martha Smith, and your son-in-law, David Smith, are authorized by you to receive confidential information from us, but it is not intended by you to have that information disclosed to third persons.

"We also understand that Marsha and David have authority to obtain legal services or act on advice rendered by us, on your behalf. According to the Texas Rules of Evidence, the communications between all of us are also privileged, but please caution Marsha and David to not discuss these matters with others, for that could waive this privilege."

Rule 503, Texas Rules of Evidence (TRE) covers the lawyer/client privilege. Section (a)(2) defines a representative of a client as a "person having authority to obtain professional legal services, or to act on advice thereby rendered, on behalf of a client, or (b) any other person who, for the purpose of effectuating legal representation for the client, makes or receives a confidential communication while acting within the scope of employment for the client."

The rules of privilege covered in TRE 503(b) provide that a client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of legal services to the client between the client or a representative of the client and the client's lawyer.

A client can authorize someone else to act as their agent in obtaining legal services on their behalf and the matters remain privileged through Rule 503.

The Houston First Court of Appeals in *In re Larken*, 2016 WL1054729 (Tex. App. – Houston [1st Dist.] 2016) held that a father's power of attorney naming his daughter as his agent made the daughter the father's agent for obtaining legal advice. The Court held that the attorney's communications with the daughter regarding the litigation on behalf of the father were privileged.

There are exceptions to this privilege such as claimants who claim through the same deceased client. TRE 503(d)(2).

j. Other clients.

This paragraph explains potential conflicts of interest among family members. Appendix FF is a waiver of that conflict. It has not been tested in the courts. If you have any comments on it, please send them to me.

k. Future legal services.

I explain that the client cannot afford to have me pull their file on a periodic basis to determine if legal changes have affected their estate plan. I encourage them to set up a review time on a frequent basis. This also provides that the fixed fee doesn't cover continued client conferences after the documents are signed.

l. Termination.

Many lawyers are concerned that unless there is a formal termination of the attorney client relationship, it continues. This negates that conclusion.

m. Interest.

I tell my clients that I am not a bank. I do not want to charge them interest, but, if forced to do so, I want to charge them a very high amount that will encourage them to pay me and borrow the money from the bank. If you have this in your fee agreements, you should also charge the interest if you aren't paid. It lets the client know you are serious. You can always waive the interest charge.

n. Document Retention.

This tells the client that you are not going to keep copies of all their documents. It is important that you furnish copies of the documents to the client and you may want to keep copies, but this lets them know that they need to be responsible to keep track of their own documents.

o. Full Family and Financial Information

This paragraph tells the client that they are responsible for giving you the information regarding their assets.

p. Tax Advice.

This is given to let clients know that under Circular 230, you are not going to furnish a tax opinion. You will still need to make the Circular 230 disclaimers in all of your written communications to you your client, however, this puts them on notice about this issue.

q. Email and Voicemail.

I have provided a consent for clients for using email. It is hard to say whether this is necessary, but it is a suggestion for our agreements.

Because we receive so many emails, this provides that no one should think I have received an email simply because they have sent it. It asks them to follow up with a live person to make sure the email or voicemail is actually received.

8. Representing Husband and Wife and Multiple Parties.

The State Bar of Texas has an excellent videotape regarding a hapless lawyer who prepares wills for a married couple. The husband later calls the lawyer and changes his will leaving all of his assets to his mistress. When he dies, his widow is very upset with the lawyer for preparing the new will for her husband and for not telling her about it.

The best way to avoid this trap, or at least let your clients know what will happen if that occurs, is to have them sign the joint representation advisory and consent document attached as Appendix F. While this document may not give four pages of conflicts of interest information, it certainly advises the married couple that you will not keep information confidential from the other spouse and that a separate lawyer would. When you are at the stage of having a married couple sign this agreement, you often have a good idea about whether or not you should undertake joint representation. When I explain this letter to clients, I give them a capsule description of the State Bar video to explain why I am asking them to sign this document. So far, I have never had a call from client who has signed this document to change the will to benefit a mistress.

The Texas Disciplinary Rules of Professional Conduct are written largely from the role of a lawyer as adversary. Rule 1.06 Tex.D.R. allow a lawyer to represent multiple parties in non-litigation situations if the lawyer reasonably believes the representation of each client will not be materially affected and each client consents to the representation after full disclosure of the existence, nature, implications and possible adverse consequences of the common representation and advantages involved. TEX. D.R. 1.06(c).

Comment 15 to the D.R. recognizes that a lawyer may be called upon to prepare wills for several family members and that conflicts of interest may arise "depending upon the circumstances". The Comment advises the lawyer to make the relationship clear.

In any multiparty context, you are in ethics jeopardy without a written agreement to which your clients consent, preferably in writing. With no specific agreement, you have a duty of confidentiality to each client under TEX. D.R. 1.05. You also have a duty to keep your client reasonably informed to be able to make informed decisions under TEX. D.R. 1.03 and to be loyal to the client under TEX. D.R. 1.06. You must document the fact that you aren't keeping matters confidential between your clients and that you aren't advocating one client's position over another's.

Whenever you are representing multiple parties, including a husband and wife, it is important to not only document the conflicts of interest and the other negatives to joint representation, but also the positives. A husband and wife or people who are forming a business want to use one lawyer because they know the work will be much less expensive and they will receive the product much more quickly than if they had an attorney representing each party. It is important to include in your agreement the fact that the parties want to use one attorney is because they believe it will be much less expensive and much less time consuming.

The American College of Trust and Estate Counsel (ACTEC) has recently publish the third edition of Engagement Letters - A Guide for Practitioners ("Guide"), which is attached in full as Appendix L. This is a wonderful resource to review any time you are representing multiple parties. The letters are lengthy, but thorough. The work represent the current thinking of some of our country's premier estate planning and probate attorneys. It is, however, a compromise document because it is multi-state in scope. There is a general checklist on page 4 - 8 of the Guide which is supplemented by specific checklists for each particular area. The Model Rules of Professional Conduct (MRPC) are a set of rules of professional conduct that have been adopted in various forms by different states. The ACTEC Commentaries to the MRPC serve as the ethical basis for the comments in the Guide. The Commentaries are not the same as our D.R.s, therefore you should also cross reference the D.R.s when reviewing the Guide.

9. Representing Fiduciaries.

TEX. D.R. 1.06 does not address this directly. Comment 15 to that rule provides: "in estate

administration it may be unclear whether the client is the fiduciary or is the estate or trust, including it beneficiaries. The lawyer should make clear the relationship to the parties involved." Even when that is done, subsequent conduct can cause the lawyer for the fiduciary to be tagged as the lawyer for the beneficiary. *Vinson & Elkins v. Moran*, 946 S.W.2d 381 (Tex. App. - Houston [14th Dist.] 1997, writ dism'd). A sample engagement letter is attached as Appendix L, Chapter 5 for the probate of an estate. A sample letter for the beneficiaries of an estate is attached as Appendix K. It is important to send this letter out when the beneficiaries and the fiduciary are different. It is possible to represent multiple fiduciaries in estate administration, however, it must be done with disclosure and the agreement of the parties. A sample letter is shown in Appendix H. The ACTEC Model checklists and engagement letters are attached and Appendix O which is our firm's probate engagement letter. Two interesting things contained in there are the Circular 230 language and some provisions that provide that no title searches will be made unless requested by the client.

10. Clients Under Disabilities.

TEX. D.R. 1.02(g) requires a lawyer to take reasonable action to secure the appointment of a guardian or other legal representative or to seek protective orders with the respect to a client whenever the lawyer reasonably believes that the client lacks legal competence and that the action needs to be taken to protect the client. TEX. D.R. 1.05(c)(4) allows an attorney to disclose confidential information in order to comply with the Texas Disciplinary Rules of Professional Conduct. Paragraph 17 of the Comment, TEX. D.R. 1.05, Paragraphs 12 and 13 to TEX. D.R. 1.02, and Paragraph 5 to TEX. D.R. 1.03 support the proposition that there is nothing wrong with seeking a guardianship or other help for your client when the client needs it.

The ACTEC sample engagement letters provide a sample paragraph to inform the client that this may happen. I recommend against putting this in a fee agreement. It may raise a duty on your part that is now supported by written agreement to seek help for your client. At least one trial court in Texas has ruled that someone that had a fiduciary duty to a client (in that case a trustee under an intervivos trust who was not to serve until the client became incapacitated) to determine when the client became incapacitated. This is an impossible situation for a lawyer. You may never see a client once you have prepared wills, revocable trusts, powers of attorney, etc. for the client. Clients move and change attorneys.

When you become aware that a client has become incapacitated, it is also a difficult situation. The disciplinary rules and mental health professionals recognize that there is no bright line between competence and incompetence and that individuals have varying degrees of competency. Alienating a long time client and, in some cases, friend, usually isn't worth it. Instead, you are perfectly within the disciplinary rules to inform a county court at law or statutory probate court judge of the issue. In one instance, in my practice in Washington County, the county court at law judge appointed an attorney to investigate. The end result was a good one and it did not involve my filing a request that my client have a guardian appointed for him.

On the other hand, there may be circumstances in which it is absolutely clear that you need to protect your client by initiating such a proceeding. This is one of the toughest judgment calls an attorney has to make.

11. Lawyer as Intermediary.

TEX. D.R. 1.07 recognizes that lawyers can enter into arrangements with multiple clients as an intermediary. D.R. 1.07 provides as follows:

> "(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."

A sample Agreement to Act as an Intermediary is attached in Appendix N.

Comment 4 to D.R. 107 provides that in some situations, a risk of failure of the intermediary representation is so great that the representation is clearly impossible. Further, if the relationship is already antagonistic, intermediary representation should not be done.

Although representation as an intermediary has risks, it is something that lawyers have always done. The lawyer acting for the family or for all the parties in a business transaction is a long-standing tradition. As long as all of the clients have been adequately informed and have consented to the representation in writing, the lawyer can proceed with the representation.

One very important aspect to help you in deciding upon representation of the parties as an intermediary is how well you know the parties and their prior dealings with each other. Even people whom you think you know well can surprise you when outside stresses produce changes in behavior. Any lawyer, however, must be more sensitive to a possibility of antagonism as the representation progresses. When antagonism arises, the lawyer should withdraw and do so by a letter to all of the represented parties. After the withdrawal, the lawyer can represent none of the parties. It is not unusual for the antagonistic client to tell the attorney that he is no longer antagonistic and would like the attorney to continue the representation. This statement by the client should be documented and signed by the client. The continued representation should be agreed to in writing by all clients once again. The cost of having multiple lawyers in a transaction is often the balm that soothes the antagonism between the parties.

12. Dealing with Belt and Smith.

The case of *Belt v. Oppenheimer, Blend, Hanson & Tate*, 192 S.W.3d 780 (2006) dramatically changed the landscape for estate planning attorneys. *Smith v. O'Donnell,* 288 S.W. 3d 417 (Tex. 2009) made it bad for probate attorneys. Having a good engagement agreement is only the first step in avoiding a *Belt* claim. Documentation of the file and written communication with the client are more important than ever. Sarah Pacheco has written an excellent article entitled: *"Protecting Ourselves: Attorney Liability Issues?"*. It can be found in the State Bar of Texas Online Library in the 2007 Estate Planning Strategies Course.

V. CONFLICTS OF INTEREST AND REFERRAL SOURCES

A. Conflicts of Interest.

The full discussion of determining when you do and do not have a conflict of interest is beyond the scope of this paper.

The first stop in making your determining is the Texas Disciplinary Rules of Professional Conduct (DR). Sections 1.06-1.13 of the DR provide the rules and commentary. If you have not read this in a while, it is a good idea to read the rules and the commentary on an annual basis and again whenever a potential conflict occurs.

You can also review the opinions of the Texas State Bar Committee on Professional Ethics which are available online at https://www.legalethicstexas.com/Ethics-Resources/Opinions.aspx.

As noted elsewhere in this paper, these opinions don't always follow case law, but they are a helpful way to stay out of conflict issues.

B. Dialogue for Conflict Determination.

It is important to determine if a conflicts exists before you learn very much about the case. As discussed elsewhere in this paper, you don't want to turn a potential client into a client before you intend to do so. If you do have a conflict, you may have to withdraw from representing everyone in the case. When called about a matter, stop the potential client from telling you all about the case. A statement like this is helpful: "The rules I practice under as a lawyer will not let me represent you if I have what these rules define as a conflict of interest. Before I can represent you as a client, I have to find out if there is a conflict. Please don't give me the details of the matter, just the names of the other individuals or companies involved and what kind of matter this is, like a real estate transaction, a desire to collect a bill, whatever it is. I

will do a check for conflicts and then let you know if I can represent you. "

The use of the words "the rules I practice under" is a much better phrase than "the ethics rules" or a similar phrase involving the word "ethics". Clients understand rules. When the word "ethics" is used, it can create the impression in the client's mind that you think the client wants you to do something that is wrong.

I hope you never have the experience I once had when I told a client I had a conflict. His response was that I was a wimp for not taking his case.

C. The Process of Conflict Checking.

The best system for checking conflicts can still miss something. If you are a solo, you only have to ask yourself and check your systems. If you are in a firm of more than one attorney, a best practice, in addition to checking your systems, is to inquire among all the lawyers in the firm if there is a conflict in your representing a potential client. Even if the conflict isn't one that would violate the DR's , there are often relationships, such as a friend or neighbor, that someone in the firm would rather not see the firm representing a party adverse to that individual or company.

In our firm, we have two systems that we review for checking conflicts: Worlddox and Microsoft Access Database Engine. Both systems can be word searched to determine if a potential client conflict exists. Neither of these systems are good for issue conflicts, but in most small firms, issue conflicts rarely arise.

When you determine that a conflict exists, tell the client something like the following: "As I told you before, I had to check to see if we had a conflict of interest in representing you. Unfortunately, we do. The rules I practice under as a lawyer prevent me from representing your interest in this matter." If you haven't done so, get their contact information so that you can send them a letter that informs them of your decision not to represent them.

Let the other members of your firm know that you have turned down the representation and have informed the potential client that you cannot represent them.

D. Keeping Track of and Thanking Referral Sources.

Something many attorneys neglect is to keep track of and thank their referral sources. A prompt note, phone call, email or letter can encourage your referral sources to refer someone else to you when the opportunity arises.

When someone comes to see you because of a referral from a friend or trusted advisor, they already believe you are the lawyer who can solve their problem. No website or advertising is half as good in instilling client confidence as a referral.

That is why you should take great care to thank and keep track of your referral sources.

Beyond the thank you is the idea of keeping track of who refers matters to you. The frequent referrer is a person of great value. You can have your assistant create a spreadsheet that tracks the following: referrer, referred client, type of matter, date, and amount involved. Call the frequent referral sources to find out if there is any way you can do a better job for the people they have referred to you. Ask them if they are familiar with the other services your firm offers just in case they aren't and don't hesitate to ask them for referrals for those matters.

VI. CONCLUSION.

The law that governs attorney's fee contracts is changing as rapidly as everything else in our society. This paper is an attempt to help you to represent your clients in an ethical manner and to communicate your fee agreements to them in a way that they can understand and that will be upheld by the courts. I welcome your comments regarding this paper and the sample fee agreements. If you think you have an agreement that is better than any of these, please send it to me. If you disagree with any of my conclusions, please let me know. Send me an e-mail, call me, or write me with your comments.

APPENDIX A – FIRM 1

Litigation & General Matters – Attorney Employment Contract – Retainer Agreement

I hereby employ the firm of FIRM 1 to represent me in connection with ______________________________ ____.

In consideration of this representation, I agree to pay at the offices of FIRM 1 (hereinafter called "Attorney"), in Nowhere, Texas, the following amounts: a fee of $___________per attorney hour for the time spent on the case for all work, including but not limited to pleadings, preparation for trial, research, telephone calls, drafting of documents, depositions, interrogatories and court appearance; a fee of $________per hour for support staff time. Each portion of a quarter hour is billed as a full quarter hour.

I promise to reimburse and indemnify Attorney for and against all sums that they may spend or incur in representing me such as Court costs, taking of depositions, the gathering and adducing of evidence, expert or otherwise, obtaining photographs and x-ray pictures, medical examinations and treatment, duplication expense, long distance telephone calls, certified mailing charges and travel.

I agree to pay all fees and costs on a monthly basis, with payment due upon receipt of a statement from the Attorney. This fee schedule will be valid for a period of one year from the date of this contract, but will be subject to change after that time.

I UNDERSTAND THAT THE ATTORNEY WILL USE HIS BEST EFFORTS IN REPRESENTING ME, BUT THAT THE SUCCESS OR OUTCOME OF THIS MATTER IS IN NO WAY GUARANTEED BY THE ATTORNEY. I UNDERSTAND AND AGREE THAT THE ATTORNEY WILL WITHDRAW FROM THE MATTER AND CEASE TO REPRESENT ME IF THE FEE IS NOT PAID IN THE AMOUNT AND TIME AS AGREED AND/OR IF I DO NOT COOPERATED IN THE PREPARATION AND TRIAL OF THIS CAUSE.

I agree to deposit the sum of $________as a retainer fee which shall be credited to my account. I will receive statements on a monthly basis which I will pay within ten (10) days from receipt of those statements. If I do not pay the statement, the Attorney can draw against the retainer fee, however, I agree to replenish the retainer fee within ten (10) days after it is drawn down by the Attorney so that the $_________retainer fee remains on account.

I promise to pay an additional amount which, when added to the retainer, will equal the attorney's estimate of the fee for the trial of this cause as an additional retainer fee prior to the trial of this cause and to make similar retainer deposits prior to any appeals. This estimated amount will be treated in the same manner as the initial retainer. The fee for services rendered will be based on the actual time devoted to the matter as described in the second paragraph of this contract and may or may not bear any relationship to the Attorney's estimate.

I understand that the Attorney cannot give me an estimate of the costs of this case. I understand that any case can be appealed after it is tried and new trials can be ordered or any case. I understand that the attorney's fees and costs can be very expensive.

I further agree that, in the event the fees are not paid as agreed upon, to have charged upon the following credit card any balance due the law firm:

____
Credit Card Type and Number on Credit Card

____
Expiration Date

____
____
Name and Billing Address for Card

I acknowledge receipt of the Texas Lawyer's Creed which is attached to this Contract.

I understand that one of the most important considerations which the law firm must have in accepting an engagement is whether the engagement will put it in conflict with any existing client interest. If such a conflict is discovered after the law firm has commenced work, the firm may be disqualified from continuing its representations of me. It is, therefore, very important that I reconsider all the interests which are involved to be certain that I have advised the firm fully in that regard. If, in the firm's judgment, the firm determines that a conflict of interest does exist, it will notify all affected clients and it will proceed in a manner consistent with the ethical standards contained in the Texas Disciplinary Rules of Professional Conduct (the "Disciplinary Rules").

I have read and understand the terms of this document.

SIGNED on ______________________, 20___.

____
Client

____
Client

Received from ____________________ the sum of $__________, on this the _________ day of __________________, 20___.

LAW FIRM 1

By: _________________________________

APPENDIX A – FIRM 1

Release Agreement

CLIENT ACKNOWLEDGES THAT THE CLIENT WAS ADVISED TO RETAIN INDEPENDENT LEGAL COUNSEL TO REPRESENT THE CLIENT IN CONNECTION WITH THE NEGOTIATION AND EXECUTION OF THIS AGREEMENT. THE CLIENT FURTHER ACKNOWLEDGES THAT CLIENT WAS ADVISED THAT THE LAW FIRM HAS A CONFLICT OF INTEREST THAT PREVENTS IT FROM REPRESENTING THE CLIENT IN ANY WAY WITH RESPECT TO THE NEGOTIATION AND/OR EXECUTION OF THIS AGREEMENT AND THAT THE LAW FIRM HAS NOT DONE SO.

This Agreement is made between _________________________ (hereinafter called the "Client") and LAW FIRM 1, a limited liability law partnership (hereinafter "LAW FIRM 1").

In consideration of the agreement contained herein and in consideration of other good and valuable consideration, the sufficiency of which is hereby acknowledged, the parties agree as follows:

1. LAW FIRM 1 hereby releases all rights to collect all fees due LAW FIRM 1 under the fee contract (attached as Exhibit A), except for $__________.

2. Client hereby releases all obligations of LAW FIRM 1 to perform any services under the fee contract attached as Exhibit A and agrees to immediately pay LAW FIRM 1 $___________for prior fees and expenses.

3. LAW FIRM 1 and Client hereby release, acquit and forever discharge each other from any and all liability, damages and/or injuries of any kind whatsoever, claims, demands, allegations, actions, and/or causes of action, whether same be known or unknown, anticipated or unanticipated, arising out of and/or in an y way relating to the contract which is attached as Exhibit A and the matters which are the subject of such contract. The foregoing release, acquittal, and discharge includes and extends to, but is not limited to, any and all claims arising from federal and/or state law, from statutory and/or common law, in contract and/or in tort, at law and/or in equity, including specifically, but not limited to, actions and/or claims for injuries and/or damages of any kind, including but not limited to legal malpractice, negligence, gross negligence, fraud, breach of fiduciary duty, whatsoever received or alleged to have been received either directly or indirectly by any of the parties.

EXECUTED this _____day of ___________________, 20___.

[client info]

LAW FIRM 1

By: ___________________________________

APPENDIX B – FIRM 2

Contingent Fee Contract and Power of Attorney

STATE OF TEXAS §

COUNTY OF ___________ §

AGREEMENT made by and between the law firm of LAW FIRM 2, 123 West Street, Nowhere, Texas, 77889. (the "Law Firm"), and ____, (the "Client"). The Client is entering into this agreement in ________________________(Capacity). The Law Firm and the Client are sometimes collectively hereinafter referred to as the "Parties". Any one of the Parties may be sometimes hereinafter referred to as a "Party".

1
SPECIAL DISCLOSURES

1.1. **CLIENT ACKNOWLEDGES THAT THE CLIENT WAS ADVISED TO RETAIN INDEPENDENT LEGAL COUNSEL TO REPRESENT THE CLIENT IN CONNECTION WITH THE NEGOTIATION AND EXECUTION OF THIS AGREEMENT. THE CLIENT FURTHER ACKNOWLEDGES THAT CLIENT WAS ADVISED THAT THE LAW FIRM HAS A CONFLICT OF INTEREST THAT PREVENTS IT FROM REPRESENTING THE CLIENT IN ANY WAY WITH RESPECT TO THE NEGOTIATION AND/OR EXECUTION OF THIS AGREEMENT AND THAT THE LAW FIRM HAS NOT DONE SO.**

1.2. **THE CLIENT AND LAW FIRM AGREE THAT ANY DISPUTES ARISING OUT OF OR CONNECTED WITH THIS AGREEMENT (INCLUDING BUT NOT LIMITED TO THE SERVICES PERFORMED BY ANY ATTORNEY UNDER THIS AGREEMENT) SHALL BE SUBMITTED TO CONFIDENTIAL BINDING ARBITRATION IN NOWHERE COUNTY, TEXAS IN ACCORDANCE WITH THE RULES OF THE AMERICAN ARBITRATION ASSOCIATION.**

1.3. **ALL LAWYERS IN TEXAS HAVE AN OBLIGATION TO MAINTAIN A HIGH STANDARD OF ETHICAL CONDUCT TOWARD THEIR CLIENTS AND OTHERS. TO ENFORCE THIS STANDARD, THE STATE BAR OF TEXAS INVESTIGATES AND PROSECUTES COMPLAINTS OF PROFESSIONAL MISCONDUCT AGAINST ATTORNEYS LICENSED IN TEXAS. IF YOU FEEL THAT MISCONDUCT MAY HAVE OCCURRED OR IF YOU HAVE QUESTIONS REGARDING THE DISCIPLINARY PROCESS, YOU MAY CALL OR WRITE THE STATE BAR OF TEXAS, P.O. BOX 12487, AUSTIN, TEXAS 78711, (512) 463-1381 OR 1-800-932-1900 (TOLL FREE).**

1.4. **THE CLIENT ACKNOWLEDGES THAT PRIOR TO SIGNING THIS AGREEMENT CLIENTS WERE GIVEN THE OPTION OF RETAINING THE LAW FIRM TO PROSECUTE THE LAWSUIT ON A NORMAL HOURLY RATE (PLUS COSTS AND EXPENSES INCURRED) BASIS BUT ELECTED INSTEAD TO RETAIN THE LAW FIRM TO PROSECUTE THE LAWSUIT PURSUANT TO THE TERMS AND CONDITIONS OF THIS CONTRACT.**

2
RECITALS

The Client is executing this Agreement for the purpose of retaining the Law Firm to represent her in connection with:

2.1 the recovery for _______________________________________.

The causes of action described in paragraph [s 2.1 through ____above] is/are sometimes hereinafter collectively referred to as the "Lawsuit".

3
THE AGREEMENT

NOW, THEREFORE, for and in consideration of the mutual covenants set forth in this agreement, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged and confessed by each Party, the Parties agree as follows:

3.1. The client hereby assigns, sells, conveys, and agrees to pay and deliver to the Law Firm the following contingent interest in the Lawsuit measured by the amount or recovery to be enjoyed, realized out of or collected from Lawsuit (whether in

money, other property, future relief, or other consideration), either through settlement, compromise or judgment (such amount of recovery is hereinafter referred to as the "Litigation Proceeds" and is more specifically defined below):

3.1.1 If, after the effective date of this Agreement, the Lawsuit is settled, thirty percent (30%) of the Litigation Proceeds;

3.1.2 If the Lawsuit is tried in the initial trial court, thirty-five percent (35%) of the Litigation Proceeds (for the purpose of this Agreement, the Lawsuit will be deemed to be "tried" if the Law Firm announces ready at a trial on the merits of the case or if any hearing approving a settlement agreement is contested);

3.1.3 If the judgment of the initial trial court is appealed to a Court of Civil Appeals, thirty-seven and one-half percent (37 ½ %) of the Litigation Proceeds (for the purpose of this agreement, the law suit will be deemed to be "appealed" if the first step in such appeal such as filing the cost bond by either side has been done). Client understands that a case may be tried and a settlement reached in principle but not documented by the time cost bonds and other filings are done which would increase the attorney's fee;

3.1.4 If the judgment of the Court of Civil Appeals is appealed to the Texas Supreme Court, forty percent (40%) of the Litigation Proceeds.

3.2. The Law Firm shall advance all expenses reasonably incurred for reports, travel expenses, long distance calls, investigation fees, expert and witness fees, medical examination fees, charts, photographs, deposition fees and costs, xerox and other document reproduction costs, postage charges, and other expenses reasonably incurred by them in the prosecution of the Lawsuit ("Litigation Expenses").

3.2.1 As a consequence of the Law Firm's payment of the Litigation Expenses, the Law Firm shall be entitled to reimbursement of all such Litigation Expenses from any Litigation Proceeds received prior to the application of any percentage fee described in this Agreement;

3.2.2 The Law Firm is expressly authorized, as a separate alternative fee (the "Alternative Fee"), to apply to any court, prior to trial on the merits, at its own cost, for the maximum amount of compensation , costs and Litigation Expenses allowed to Client (or to the Client's attorneys) by law and to receive any such amounts awarded as compensation for their services hereunder from any person referred to in the RECITAL paragraph above or from any trust purportedly created by the Client. Any Alternative Fee recovered under this paragraph shall be offset against any contingent fee payable to the Law Firm under this Agreement; provided however, that, if the Alternative Fee exceeds any contingent fee, the Law Firm shall be entitled to retain the entire Alternative Fee as compensation for its services (and shall receive no contingent fee);

3.2.3 The term "Litigation Proceeds" shall refer to a sum of money equal in amount to the fair market value of all property, relief, and consideration of every kind and in every form enjoyed, realized out of, or received (or to be enjoyed, realized out of, or received) by the Client as a proximate result of the Lawsuit including, but not limited to, compensatory damages, exemplary damages, attorney's fees (other than any Alternative Fee), prejudgment interest, and post judgment interest (whether through trial or settlement of the Lawsuit). The amount of Litigation Proceeds shall not be reduced by any income, gift or estate taxes incident to the recovered amount or by any attorney's fees, costs, damages, interest or other award that may be awarded by a judge or jury against the client.

3.3. The Parties agree that the Law Firm has been induced to enter into this Agreement by representation made by the Client (or her agents) regarding the facts of the case.

3.4. Notwithstanding any other provision in this Agreement (including, but not limited to paragraph 3.5 below), the Law Firm may withdraw as counsel (in which case this Agreement shall be null, void and of no effect) if after thoroughly investigating the facts incident to the Lawsuit it concludes that the Lawsuit either is without merit or the defendant or defendants do not have sufficient net worth to warrant prosecution of the Lawsuit. If the Law Firm were to withdraw pursuant to this paragraph the Client would owe no legal fees or litigation expenses to the Law Firm.

3.5. The Client agrees that the Law Firm may withdraw from its representation of the Client in connection with the Lawsuit if:

3.5.1 the Client insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument of an extension, modification, or reversal of existing law;

3.5.2 the Client insists that Law Firm pursue a course of conduct that is illegal or that is prohibited under the State Bar Rules;

3.5.3 the Client by other conduct renders it unreasonably difficult for Law Firm to carry out their employment;

3.5.4 the Client insists that Law Firm engage in conduct that is contrary to their judgment and advice, even if such conduct is not contrary to the State Bar Rules;

3.5.5 the Client deliberately disregards an agreement with Law Firm as to fees for services rendered or as to Litigation Expenses;

3.5.6 the Law Firm determines, in its sole discretion, after further investigation of the facts of the case, that the facts of the case are materially different from those represented to the Law Firm by the Client.

3.6. In the event that the Law Firm withdraws from representation pursuant to the applicable provisions of this Agreement, the Client agrees to sign all necessary documents to facilitate the withdrawal of the Law Firm from such representation immediately after written notification to the Client by the Law Firm of their intention to withdraw.

3.7. If the Law Firm withdraws from representation pursuant to the applicable provisions of this Agreement (except for subparagraph 3.5.6 in the preceding paragraph of this Agreement, in which case the Law Firm shall be entitled to no contingent interest) such withdrawal shall no in any way eliminate Law Firm's ownership of a contingent interest in the outcome of the Lawsuit (including but not limited to Law Firm's right to participate in and consent to any settlement of Lawsuit).

3.8. The Client may at any time and for any reasonable cause terminate the Law Firm's representation of Client with respect to Lawsuit; provided, however, that such termination shall not in any way eliminate Law Firm's ownership of a contingent interest in the outcome or the Lawsuit (including but not limited to Law Firm's right to participate in and consent to any settlement of Lawsuit).

3.9. If the Law Firm ceases to represent the Client pursuant to any provision of this Agreement, then the Law Firm shall no longer be liable to Client or to any third party for any costs or expenses incurred after the date of the termination of the Law Firm's representation. If any third party makes any claim against the Law Firm for any costs and expenses incurred by the Client after the date of the Law Firm has ceased to represent the Client, then the Client agrees to indemnify and hold the Law Firm harmless from any such cost and expenses and all expenses incurred, including but not limited to, all attorney's fees and litigation expenses and costs incurred by the Law Firm in seeking to enforce this Agreement.

3.10. The Law Firm agrees to faithfully perform the duties imposed upon the Law Firm as attorneys for Client in the prosecution of the Lawsuit. The Law Firm further agrees to use its best efforts to resolve the Lawsuit as soon as is reasonably possible.

3.11. The Law Firm agrees not to disclose any information regarding the whereabouts of the Client or her family to any third persons without the consent of the Client.

3.12. The Law Firm may, at the discretion and expense of the Law Firm, associate any other attorney or Law Firm in the prosecution of the Lawsuit and may assign all or any part of their contingent interest in this Lawsuit to any other such firm. Notwithstanding anything to the contrary in this paragraph, the Parties agree, however, that the Law Firm shall always be primarily responsible for the representation of the Client in connection with the Lawsuit.

3.13. The Client authorizes the Law Firm to try, compromise, settle and receive for and in Client's names, all damages or property to which Client may become entitled by reason of Lawsuit. Client agrees not to settle Lawsuit without the written consent of Law Firm, and Law Firm agrees not to settle Lawsuit without the written consent of the Client.

3.14. The provisions of this Agreement constitute a Power of Attorney coupled with an interest and shall survive and shall not be affected by the subsequent disability or incapacity of the Client.

3.15. The Client agrees to keep Law Firm advised of her location at all times, agrees to appear on reasonable notice at any and all depositions and court appearances and agrees to comply with all reasonable requests of Law Firm in connection with the preparation and presentation of the Lawsuit.

3.16. The Client specifically recognizes that the Law Firm has made no representation or warranty whatsoever regarding the probable outcome of the Lawsuit and have in no way guaranteed any recovery from the settlement or trial of the Lawsuit.

3.17. It is expressly understood and agreed that the mutual promises contained herein are the sole consideration for this Agreement, and that said considerations are contractual and not mere recitals, and that all agreements and understandings between the Parties are embodied and expressed herein.

3.18. The Parties agree to execute such other documents as might be reasonably necessary or appropriate to consummate and implement the terms of this Agreement.

3.19. This Agreement is executed in multiple counterparts, each one of which will be considered to be an original.

3.20. It is expressly understood and agreed that this Agreement shall be governed by, construed, interpreted, and enforced in accordance with the laws of the State of Texas and shall be performable in Nowhere County, Texas.

3.21. This Agreement may not be modified or amended except by a subsequent Agreement in writing signed by the Parties. The Parties may waive any of the conditions contained herein or any of the obligations of any other party. Any such waiver shall be effective only if in writing and signed by the party waiving such condition or obligation.

3.22. In the event that any of the Parties become involved in litigation in connection with any right, obligation, or duty set forth in this Agreement then, and in that event, the Party prevailing in such litigation shall receive from the other Party all expenses, costs and attorney's fees suffered or incurred by such party as a result of such litigation.

3.23. In the event that any of the Parties hereto shall breach any of the obligations imposed by this Agreement, then any other party shall be entitled to monetary damages by this Agreement, then any other party shall be entitled to monetary damages as a result of such breach. It is understood by the Parties, however, that monetary damages shall not be adequate recompense for any breach of this Agreement, and each of the Parties shall, in addition to monetary damages, be entitle to equitable relief.

3.24. This agreement is and shall be binding and inure to the benefit of the Parties and their respective heirs, executors, administrators, legal representatives, successors and assigns.

3.25. The effective date of this Agreement shall be the _________day of ____________________, 2006.

LAW FIRM 2

By:____
IMA LAWYER
State Bar No. 12345000
My Address

STATE OF TEXAS

COUNTY OF NOWHERE

This document was acknowledged before me on the _____day of _______________, 2006, by IMA LAWYER, President of LAW FIRM 2.

(Seal, if any, of notary)

____
(printed name of Notary)
My commission expires:______________________

____
(NAME OF CLIENT)

STATE OF TEXAS

COUNTY OF NOWHERE

This document was acknowledged before me on the ______ day of _______________, 2006, by _________________________(client).

(Seal, if any, of notary)

____
(printed name of Notary)
My commission expires:______________________

APPENDIX B – FIRM 2

Legal Representation Engagement Letter

________________, 20___

Name of Client
Address of Client

Re: Legal Representation Letter (the "Engagement Letter")

Dear **Name of Client:**

Thank you very much for allowing FIRM 2 (in this Agreement, the terms "Law Firm" and "we" refer to FIRM 2) the opportunity to represent you. As used in this Agreement, the term "Client" refers to you. The term "Parties" refers to both the Client and the Law Firm. This Legal Representation Engagement Agreement is referred to as the "Agreement" or "Contract" throughout this document.

SPECIAL DISCLOSURES

1. THIS AGREEMENT IS A LEGAL CONTRACT BETWEEN YOU AND THE LAW FIRM. YOU ARE ADVISED TO HAVE INDEPENDENT LEGAL COUNSEL REVIEW THIS CONTRACT ON YOUR BEHALF. THE LAW FIRM HAS A CONFLICT OF INTEREST THAT PREVENTS IT FROM REPRESENTING YOU IN CONNECTION WITH THE NEGOTIATION, PREPARATION, OR EXECUTION OF THIS AGREEMENT.

2. THE ESTABLISHMENT OF AN ATTORNEY-CLIENT RELATIONSHIP BETWEEN THE LAW FIRM AND YOU AS CLIENT IS CONTINGENT ON YOUR SIGNING THIS AGREEMENT AND RETURNING SAME TO THE LAW FIRM. IF YOU FAIL OR REFUSE TO SIGN THIS AGREEMENT AND/OR TO RETURN SAME TO THE LAW FIRM, THEN THE LAW FIRM SHALL NOT HAVE ANY OBLIGATION WHATSOEVER TO PROVIDE ANY LEGAL SERVICES TO YOU.

3. ARBITRATION: THE CLIENT AND LAW FIRM AGREE THAT ANY DISPUTES ARISING OUT OF OR CONNECTED WITH THIS AGREEMENT (INCLUDING BUT NOT LIMITED TO THE SERVICES PERFORMED BY ANY ATTORNEY UNDER THIS AGREEMENT) AND/OR THE LAW FIRM'S REPRESENTATION OF THE CLIENT SHALL BE RESOLVED BY CONFIDENTIAL BINDING ARBITRATION IN TRAVIS COUNTY, TEXAS IN ACCORDANCE WITH THE TEXAS GENERAL ARBITRATION ACT AND/OR CHAPTER 171 OF THE TEXAS CIVIL PRACTICE & REMEDIES CODE. ANY SUCH ARBITRATION PROCEEDING SHALL BE BINDING AND CONFIDENTIALLY CONDUCTED BEFORE A SINGLE ARBITRATOR AT JUDICIAL ARBITRATION AND MEDIATION SERVICES ("JAMS"), UNDER JAMS'S CURRENT COMPREHENSIVE RULES AND PROCEDURES. THE PARTIES WILL BEAR THEIR OWN COSTS. ANY PARTY TO ANY AWARD RENDERED IN SUCH ARBITRATION PROCEEDING MAY SEEK A JUDGMENT UPON THE AWARD AND THAT JUDGMENT MAY BE ENTERED BY ANY COURT HAVING JURISDICTION.

    3.1. ARBITRATION INVOLVES NUMEROUS ADVANTAGES AND DISADVANTAGES INCLUDING, BUT NOT LIMITED TO; (1) THE COST AND TIME SAVINGS FREQUENTLY FOUND IN ARBITRATION; (2) THE WAIVER OF SIGNIFICANT RIGHTS, SUCH AS THE RIGHT TO A JURY TRIAL; (3) THE POSSIBLE REDUCED LEVEL OF DISCOVERY; (4) THE RELAXED APPLICATION OF THE RULES OF EVIDENCE; AND (5) THE LOSS OF RIGHT TO A JUDICIAL APPEAL BECAUSE ARBITRATION DECISIONS CAN BE CHALLENGED ONLY ON VERY LIMITED GROUNDS. YOU SHOULD CAREFULLY DISCUSS EACH OF THESE WITH THE LEGAL COUNSEL WHO IS ADVISING YOU REGARDING THIS AGREEMENT.

4. ALL LAWYERS IN TEXAS HAVE AN OBLIGATION TO MAINTAIN A HIGH STANDARD OF ETHICAL CONDUCT TOWARD THEIR CLIENT AND OTHERS. TO ENFORCE THIS STANDARD, THE STATE BAR OF TEXAS INVESTIGATES AND PROSECUTES COMPLAINTS OF PROFESSIONAL MISCONDUCT AGAINST ATTORNEYS LICENSED IN TEXAS. IF YOU FEEL THAT MISCONDUCT MAY HAVE OCCURRED OR IF YOU HAVE QUESTIONS REGARDING THE DISCIPLINARY PROCESS, YOU MAY CALL OR WRITE THE STATE BAR OF TEXAS, P.O. BOX 12487, AUSTIN, TEXAS 78711, (512) 463-1381 OR 1-800-932-1900 (TOLL FREE).

RECITALS

5. As a part of the Law Firm's regular procedure in establishing a new client relationship, we would like to take this opportunity to set out the specific terms of our relationship. We request that you acknowledge your receipt and understanding of this letter by signing and returning the original to us at your earliest convenience.

SCOPE OF ENGAGEMENT

6. Based on confidential discussions with the Client and/or review of privileged documents supplied to the Law Firm by the Client, the scope of our initial engagement (the "Legal Representation") shall be limited to representation of the Client in connection with:

6.1. any claim or cause of action that he/she has against any fiduciary acting on her behalf;

6.2. any claim or cause of action that the trustee of any trust for his/her benefit may have against the executor of any estate to which such trust is a beneficiary;

6.3. any claim or cause of action that he/she has against any individual causing damage to the trust estate any trust to which he/she is a beneficiary;

6.4. any claim or cause of action that he/she has against any individual causing damage to any estate to which he/she is a beneficiary or to which a trust for his/her benefit is a beneficiary;

6.5. any claim or cause of action that he/she has against any third party who participates in a fiduciary's breach of fiduciary duty and causes damage to either him/her, a trust for his/her benefit, to an estate to which he/she is a beneficiary, or to an estate to which a trust for his/her benefit is a beneficiary;

6.6. any derivative claim or cause of action on behalf of the trustee or executor of any trust or estate to which the Client has any beneficial interest; and

6.7. any double derivative claim or cause of action on behalf of the executor of any estate in which any trust for the benefit of the Client is a beneficiary.

7. The Law Firm is not undertaking responsibility for matters outside this scope at this time; however, should you expressly request, and should we accept additional matters and responsibilities in the future, the provisions in this Agreement will govern our continuing relationship and any additional matters and responsibilities.

8. Our Law Firm does not provide income, estate, or gift tax advice to clients. To the extent that tax issues or questions arise during the scope of the engagement, Client must consult with their own CPA or other tax professional for advice.

RETAINER AND MONTHLY BILLS

9. **Retainer**. By signing this Agreement you are agreeing to pay the Law Firm an advance fee retainer in the amount of _______________thousand and NO/100 dollars ($________.00). The retainer should be returned to the Law Firm with your signed copy of this Agreement. This advance fee retainer will be retained in the Law Firm's trust account and applied against your final bill. If the amount of your final bill is less than the amount of your advance fee retainer, then the balance will be refunded to you without interest (You will not receive interest on your retainer. The interest goes to a State Bar fund that provides legal services to the indigent; it is not paid to the Law Firm). The Law Firm reserves the right to request Client to increase the retainer, over and above the retainer amount stated above, in the event there are anticipated, significant attorney's fees and expenses to be incurred during a particular month or for a particular stage of the case. For example, the Law Firm will require an additional retainer to cover the costs of preparing for and trying the case.

10. **Monthly Bills and Payment**. Even if you have a retainer on deposit with the Law Firm, you will still be expected to pay each bill sent to you upon receipt of the bill. If you do not pay our bill within thirty days of receipt, then the Law Firm reserves the right to offset the amount due against the retainer. If the Law Firm offsets the amount due against the retainer, Client must replenish the retainer within 20 days up to the amount as of the date the Law Firm made the offset.

ATTORNEYS' FEES AND EXPENSES

11. **Hourly rates**. The Law Firm's fees in this case are set on the basis of a baseline computation of billable hours multiplied by the attorney's hourly billing rate and then adjusted as provided below. For this engagement, the following are the hourly rates for the attorneys in the Law Firm:

    Attorney 1. – $500 per hour
    Attorney 2 – $400 per hour
    Attorney 3 – $275 per hour

    Our paralegal's rate ranges from $75 per hour to $150 per hour. Our normal hourly billing rates may increase on some future date.

12. **Billing Procedures**. The Law Firm's fees are set on the basis of what we consider to be a fair charge for the services rendered. We do not, however, bill on a strict hourly rate basis. We do use for guidance a baseline computation of our billable hours times our hourly billable rate as set forth above. We then compute a reasonable fee that takes into account such things as: (1) the time and labor required; (2) the novelty and difficulty of the questions involved in the legal representation; (3) the skill requisite to perform the legal service properly; (4) the likelihood, if apparent to the Client, that the acceptance of the particular employment will preclude other employment by the Law Firm; (5) the fee customarily charged in the locality for similar legal services; (6) the amount involved and the results obtained; (7) the time limitations imposed by the Client or by the circumstances; and (8) the nature and length of the professional relationship with the Client. Our billable hours may, and frequently are, adjusted either up or down to reflect these factors. If there is an adjustment that increases a charge pursuant to this paragraph, it will be reflected on the Client's monthly statement.

13. **Expenses**. In addition to all fees described above, any out-of-pocket expenses incurred by the Law Firm in connection with the Legal Representation will be billed to the Client as a separate item on the Client's monthly statement. Additional details on expenses can be provided on request. Invoices for Law Firm expenses (including, but not limited to, out of pocket expenses, travel expenses, deposition transcripts, transcripts of court proceedings, court filing fees, court costs, printing charges and other document reproduction charges, project-related expenses, long distance telephone charges, electronic discovery, electronic document management, litigation support services, electronic legal research, postage charges, courier charges, mediation costs, and title company fees) may be sent to you from time to time for immediate payment direct to our suppliers. When reasonably possible, we agree to allow you to arrange for any extraordinary costs for duplication of documents.

14. **Expert witnesses**. In the event that expert witnesses are required for the presentation of your case, Law Firm will locate expert witnesses, subject to Client's approval. Unless otherwise agreed in writing, Client agrees to engage and pay all expert witnesses directly.

15. **Payment of bills**. We will typically submit a bill to you on a monthly basis, and it is due and payable upon receipt. There may be occasions involving unforeseen circumstances when a bill will go unpaid. In such instances, we will attempt to work with you, if you communicate the nature of the delay to us and your explanation is reasonable. Any unpaid bills will accrue simple interest at a rate of 10% per annum beginning forty days after the date of the bill.

16. **Late expenses**. Occasionally, when a bill for a specific project is rendered near the conclusion of the matter, the posting of some time charges and expenses (such as telephone, copying, court costs, or similar items) may be delayed, or there may be an invoice which is not delivered to the Law Firm until after the matter has been finalized. In such cases, these "after closing" expenses will also be billed to you, even though you may have previously received a "final" bill.

17. **Attorney's fees from third parties**. Occasionally we will request reasonable attorney's fees from another party in a legal proceeding. Regardless of how any court rules with respect to the award of attorney's fees (or the reasonableness of legal fees requested in any pleading), the Client agrees to pay the Law Firm the fees set forth in this Agreement. If the Law Firm receives any compensation as the result of an award of attorney's fees, then the Law Firm will, in its discretion, either: (1) credit such receipt to the Client's unpaid bill or (2) reimburse the Client for the amount of the receipt (if, and only if, the Client does not owe the Law Firm any fees and/or expenses at the time that the receipt is received).

18. **Court-Approved Fees**. Some trial courts have a fee schedule and/or fee rules that differ from this Agreement. If a court awards Law Firm an amount less than the amount billed, under this Agreement, Client is responsible for the payment of the difference between the amount a court awards and the amount that the Law Firm billed you. If a court does not allow a particular charge or an amount of time billed for a particular service, or reduces the amount of time, Client is still responsible for all time and charges on the bill.

19. **Authorization and other attorneys**. By signing this agreement, you are authorizing the Law Firm to do whatever is reasonably necessary and legally and ethically appropriate, in our professional judgment, to represent you properly, and to incur the costs and expenses reasonably necessary to handle your matter. This includes the authorization and power to associate or employ such other persons or entities as we may deem necessary to assist us, such as support services,

technical experts, or other attorneys who are not members of our firm (either "local counsel" in a distant forum or contract legal services with attorneys in other firms in Austin). In the event that such persons described in this paragraph are required for the presentation of the case, the Law Firm will locate such persons, subject to Client's approval. Unless otherwise agreed in writing, Client agrees to directly engage and pay the persons or entities described in this paragraph.

20. **Use of cloud-based service**. The Law Firm will store Client's information and documents on a secure cloud-based service. By signing this Agreement, you are consenting to storage of your information and documents on the Law Firm's cloud-based service. While the Law Firm takes reasonable steps to secure Client information, it is not responsible for the failures and/or hacking of outside cloud-based service providers.

21. **Questions**. Should you have any questions or concerns regarding any bill, please contact us at your earliest convenience so that we may resolve any problems as quickly as possible. Your satisfaction with our legal services is very important to us.

THE ATTORNEY-CLIENT RELATIONSHIP

22. **Termination of Representation**. You have requested our advice and counsel as a part of our services to you. In the event that you fail to follow our advice, otherwise fail to cooperate reasonably with us, fail to communicate fully with us about your case, fail to comply with the terms of this Agreement, fail to pay any bill from us that is due and payable within thirty days of receipt, or for any other reason permitted under Texas rule or law, then we reserve the right to notify you in writing of our withdrawal from representation. Of course, at any time that you wish, you may cease to use our services by notifying us in writing. By signing this Agreement, Client specifically agrees to pay all outstanding fees and expenses incurred as of the date of Law Firm's withdrawal or the date the Client terminates Law Firm's services.

23. **No guarantee of success**. As you know, we cannot make representations to you regarding the probability of ultimate success in the Legal Representation. Similarly, we cannot guarantee any particular result; however, we do agree to exert in good faith our best reasonable, ethical and professional efforts on your behalf.

24. **Disclosure**. By signing this Agreement, Client specifically authorizes and instructs the Law Firm to provide the Client with all information regarding the subject matter of the Law Firm's representation.

25. **Return and destruction of documents**. At the end of the representation, we will return any original documents that you want returned. The Law Firm uses a copy service to scan your file. While this is an attempt to retain copies of most documents generated by the Law Firm, we cannot be held responsible in any way for failing to do so. Accordingly, we request that you retain all originals and copies you desire among your own files for future reference.

26. **Attorneys working on your case**. The Law Firm's attorneys work collaboratively on cases. It is the Law Firm's policy to assign particular tasks on cases in the most economically efficient manner. In that regard, multiple attorneys may work your case depending on the task and the stage of the case. If you have questions about your case, please contact the Law Firm and you will be connected to the appropriate attorney.

27. **Applicable Law**. The construction, validity, and enforceability of this Agreement shall be governed by Texas law.

28. **This Agreement Supersedes Prior Agreements**. This is the only Agreement of the Parties and replaces any alleged oral agreements or representations that either Party claims were made by the other Party. Any amendments or changes to this Agreement must be confirmed in writing between the Law Firm and the Client.

29. **Client's Obligation to Provide Information to the Law Firm**. Client agrees to keep the Law Firm promptly informed of Client's current address, phone numbers, and email addresses at all times. Client's failure to do so and/or failure to respond to communications from the Law Firm may result in the Law Firm withdrawing from this representation.

30. **Effective Date**. The effective date of this Agreement is the date that the Law Firm receives the stated retainer and a copy of this letter signed by the Client.

We truly appreciate the opportunity to represent you, and we look forward to continuing a mutually beneficial relationship. We are very much aware that we are in a service business and that you, as a client, are the lifeblood of our practice. If you do not feel that you understand any part of this Agreement, please call us. If any part of this Agreement is not acceptable to you, please discuss it with me. We are sending this letter to you so that you may know our policies and billing practices at the beginning of our relationship.

Cordially yours,

LAW FIRM 2

By: ______________________________
Attorney

AGREED:

____
Name of Client

APPENDIX C– FIRM 3

Engagement Letter

___________________, 20____

____
____
____

Re: Engagement Agreement

Dear _______________________:

LAW FIRM 3 welcomes you as a client. We look forward to a lasting professional relationship providing you with quality, efficient legal services.

We believe that a successful professional relationship begins with a mutual understanding of expectations about the services we will provide, legal fees, and other important aspects of our representation.

This letter will confirm our mutual understandings and agreements regarding the firm's provision of legal services to you in connection with the Estates. Our firm encourages open and candid communications with clients. Please let me know as soon as possible if you have any questions about this letter, or if you are concerned about any aspect of the representation.

Description and Scope of Services; Identification of Client. LAW FIRM 3 is being retained to represent you with regard to ____
____________________(*be specific*). You are our only client for this matter and we want to clarify the LAW FIRM 3 does not represent any other person or entity in connection with this matter.

Our representation is limited to this matter only, and the firm has not been retained to represent you generally or in connection with any other matter unless we modify this engagement letter by a subsequent letter agreement. The firm understands that we are to perform all reasonable services and take all such action as may be appropriate and necessary in our professional discretion to further your interests.

It is understood that the firm is being retained to provide legal services and that we are not responsible for providing business or financial advice to you.

Information and Documents. To enable the firm to provide effective legal services in this matter, it is essential that you agree to disclose to us fully and accurately all material facts pertaining to this matter, and to keep us informed of all developments related to this matter.

Attorneys Handling Your Representation. I will take principal responsibility for your legal work. Other attorneys in the firm will also work on this matter under my supervision. The firm also uses paralegals and legal assistants in providing professional services when we believe that their use will reduce legal costs and improve efficiency.

Legal Fees and Fee Estimates. LAW FIRM 3 charges for legal services will be based on the firm's hourly rates for attorneys representing you. My current hourly rate for this particular matter is $425.00, and _______________ current hourly rate for this matter is $300.00. The firm's hourly rates for attorneys and legal assistants are adjusted periodically, normally in January or February of each year. We will let you know in advance if our hourly rates are modified other than pursuant to the annual adjustment.

Clients at times request that we provide estimates of legal fees and expenses to be incurred in handling their representation. If the firm provides you now or in the future with an estimate of fees and expenses, we will do so only with your understanding and agreement that fee estimates by their nature are inexact and subject to uncertainty. The actual legal fees and expenses in handling this matter may exceed or fall below any estimates.

LAW FIRM 3 submits statements for legal fees on a monthly basis, or shortly after services are rendered or expenses incurred. Our intent is to keep you informed so that you can regularly monitor the fees and expenses incurred. · If you have questions or concerns about the fees and expenses, please contact us promptly. Unless you advise otherwise, the firm will assume that you generally approve of the level of representation provided in this matter.

<u>Costs and Expenses</u>. In addition to legal fees, the firm charges for out-of-pocket costs and expenses incurred in representing you. These include, but are not limited to, filing fees, travel, photocopies, facsimile copies, postage, overnight or special couriers, long distance telephone calls, court reporter costs, deposition fees and expert witness fees. In the very unlikely event that an expert witness is needed for the case, we will discuss the situation with you before proceeding with efforts to identify a suitable expert witness for the case. Likewise, please understand that the firm will not retain any expert witness without prior consultation and approval from you.

Most of these costs and expenses will be included in monthly statements to you. The firm may forward certain invoices to you for direct payment. Invoices typically forwarded to the client for direct payment include charges of third-party vendors, such as court reporter charges, deposition fees, expert witness fees, and filing service fees. If out-of-pocket expenses are significant, the firm may require an expense deposit from the client to be held in a designated account for payment of expenses.

<u>Payment of Fees and Expenses</u>. LAW FIRM 3's statements for fees and expenses are due upon receipt, and we expect that our monthly statements will be paid no later than thirty (30) days after receipt. By entering into this representation agreement, you agree to timely payment of the firm's invoices for fees and expenses related to the representation. If a statement is not paid within thirty (30) days after it is mailed to you, interest will accrue on the unpaid balance of that statement beginning on the thirty-first (31st) day and accruing thereafter at the rate of one percent (1 %) per month. Interest charges will apply to a specific monthly statement. Payments made on past-due accounts will be applied first to the oldest outstanding statements. If our statements are not paid reasonably soon after they are rendered, we reserve the right to stop work until your account with the firm is brought current and appropriate steps are taken to ensure prompt payments in the future. If we have to bring collections efforts for payment, you agree that you will pay the costs of these collection procedures, including reasonable attorney's fees incurred by us (whether paid to LAW FIRM 3 or to another firm that is retained by LAW FIRM 3).

We will require an initial retainer in the amount of $_______________ to be held in our client retainer account as a guarantee of payment on all outstanding balances owed by you to LAW FIRM 3.

<u>Conflicts</u>. You should be aware that the firm represents many other companies and individuals. It is possible that during the time the firm is representing you, some of our present or future clients will have disputes or transactions with you. By entering into this engagement letter, you agree that LAW FIRM 3 may continue to represent, or may undertake in the future to represent, existing or new clients in any matter that is not substantially related to our work for you even if the interests of such clients in those other matters are directly adverse. The firm agrees, however, that your prospective consent contained in the preceding sentence shall not apply in any instance where, as a result of our representation of you, we have obtained proprietary or other confidential information of a nonpublic nature, that, if known to such other client, could be used by such client to your material disadvantage in the other matter.

<u>Withdrawal or Termination</u>. Since LAW FIRM 3 will be providing professional services, our relationship may be terminated by either of us at any time for any reason, by written notice to the other party.

In particular, LAW FIRM 3 reserves the right to withdraw from our representation if you should fail to honor the terms of this engagement letter, fail to cooperate or follow our advice on a material matter, or if any fact or circumstance would, in our view, render our continuing representation unlawful, unethical, or ineffective. If the firm withdraws from further representation, or you terminate the relationship, you and the firm jointly agree to take necessary steps, including signing of documents such as pleadings consenting to substitution of counsel.

Expenses and other charges accrued on your behalf up to the date of termination by either the firm or the client will be payable under the payment terms of this agreement.

<u>Conclusion of Representation; Disposition of Files and Documents</u>. Unless previously terminated, LAW FIRM 3's representation of you will terminate when we send the final statement for services rendered in this matter. LAW FIRM 3 will retain documents you furnish to us in our client files for this matter. Please maintain your own copies of documents you furnish to us.

At the conclusion of this matter (or earlier if appropriate), please advise the firm as to which, if any, documents you wish us to return to you. LAW FIRM 3 may also keep copies for our records. The firm will retain or dispose of any remaining documents or other materials in accordance with the firm's record retention policy then in effect.

Post-Engagement Matters. You are engaging the firm to provide legal services in connection with the specific matter identified on page 1 of this letter. After completion of the matter, changes may occur in the applicable laws or regulations that could have an impact upon your future rights and liabilities. Unless you engage us to provide additional advice on issues arising from the matter, the firm will have no continuing obligation to advise you with respect to future legal developments. Further, unless you and the firm agree in writing to the contrary, LAW FIRM 3 will not monitor renewal or notice dates or other deadlines for this matter following the termination or completion of this engagement.

Guarantee Disclaimer. It is important that you understand and accept that the firm cannot make and has not made any guarantee regarding the outcome of this representation. Nothing in this agreement and no statements by LAW FIRM 3 staff or attorneys constitutes a promise as to results, or a guarantee. Any statements by the firm about the outcome of litigation or other legal proceeding are expressions of opinion only.

Grievances. The State Bar of Texas investigates and prosecutes professional misconduct by Texas attorneys. Although not every complaint against or dispute with an attorney involves professional misconduct, the Office of General Counsel of the State Bar of Texas will provide you with information about how to file a complaint. For more information, please call 1-800- 932-1900.

Miscellaneous Provisions. This agreement supersedes all prior oral or written agreements regarding LAW FIRM 3's representation of you. This agreement can be amended or modified only in writing. Nothing in this agreement is intended or shall be construed as impermissibly waiving or limiting the firm's or its attorneys' professional obligations to you or to the profession under the Disciplinary Rules of Professional Conduct adopted by the State Bar of Texas or other law, including the Sarbanes-Oxley Act of 2002. This agreement shall be binding upon you and the firm, and our respective heirs, executors, legal representatives, successors and assigns.

Conclusion. Once again, LAW FIRM 3 is pleased to have this opportunity to work with you. Please contact me as soon as possible if this agreement does not accurately reflect your understanding of the terms of our engagement. Corrections or changes must be in writing and initialed by you and by the firm.

To engage our services on the terms described above, we will require your written authorization to proceed and the requested $___________retainer. Please immediately, sign, date and return this engagement agreement along with the requested retainer. Upon receipt of your authorization and the retainer, we will ______________________________ ____ *(list the specific action(s) you will be taking).*

Should you have any questions, please call me. My telephone number at work is _________________________.

____

Attorney

APPROVED AND AGREED TO:

____

Cient

Date: ____________________________________

APPENDIX D – FIRM 4

Engagement Letter

____________________, 20____

PERSONAL & CONFIDENTIAL

Mr. Smith

Re: Smith Family Trusts

Dear Mr. Smith:

I enjoyed having the opportunity to meet you and I appreciate having this opportunity to be of service to you. We are indeed honored that you have chosen us to assist you with this matter. As I as sure, you understand matters of this gravity require certain formalities. This letter is intended to address two such matters, that of my firm's role in the case, and the terms of our compensation.

We would like to confirm our assignment from you with respect to the trusts. We are to do the following: ____
____.

We will bill you monthly and are to be paid on a monthly basis. The basis of our bills will primarily relate to the time we expend on an hourly rate basis, billed to the nearest quarter-hour. More than one attorney with our firm will be assisting with respect to this matter, and our attorneys all have varied hourly rates. Our hourly rates are set forth on the listing attached to this letter.

In addition to our fees, we anticipate incurring certain expenses. Expenses will include any of the following that may be incurred in our representation of you: court filing fees, certified copy fees, travel expenses, postage, photocopying expenses, messenger services, facsimile charges, and long distance telephone charges. These expenses will be listed separately on each invoice. Payment for these matters shall be handled in the same manner as our fees discussed above.

It is also expressly agreed that you will have the right to terminate our employment at any time, and we will have the right to resign as your attorneys at any time in accordance with the applicable rules of conduct for Texas attorneys. However, any such termination shall not constitute a release or waive of any of the remaining provisions of this fee agreement, nor will we released from any remaining ethical duties toward you such as the duty of maintaining the confidentiality of our communications.

In addition to the foregoing, we should mention that because of the number of clients that LAW FIRM 4 represents, and has or will represent, there is always the possibility that at some future time our firm will be asked to represent one or more of our firm's other clients in legal matters which are contrary to your interests. It is our agreement with each other that, after our representation of you is concluded, we will not be disqualified from accepting future unrelated matters for other firm clients whose interests may then be adverse to you.

Any dispute that may arise in connection with any and all aspects of the performance of our services or this fee agreement shall, on the written request of either party, be submitted to binding arbitration in accordance with appropriate statutes of the State of Texas and the Commercial Arbitration Rules of the American Arbitration Association. Judgment upon the award rendered by the arbitrators may be entered in any court having appropriate jurisdiction. We agree to act in good faith to select a single neutral arbitrator. If we are unable to do so within 90 days after one party notifies the other party, in writing, of a dispute or claim, then each party shall appoint one person as arbitrator, and a third neutral arbitrator shall be chosen by the two arbitrators previously selected by the parties. The third arbitrator shall then conduct the arbitration alone. It is provided, however, that if there is no agreement as to the third arbitrator within sixty (60) days after the notice is served, then the third arbitrator shall be selected by a district judge in Nowhere County, Texas, having subject matter jurisdiction over the dispute. In such event, all three arbitrators shall conduct the arbitration. It is further agreed that the expenses of arbitration shall be paid in such proportions as the arbitrators decide, except that the successful party in any proceeding seeking enforcement of the provisions of this agreement shall be entitled to receive from the party not prevailing reasonable and necessary attorney's fees and expenses, in addition to any other sums to which such successful party may be entitled. The arbitrators shall decide the identity of the successful party for purposes of the preceding sentence.

In the unlikely event that a member or employee of our firm is ever called upon to give testimony about any aspect of our representation of you in any matter other than a dispute about our fees, whether in deposition, hearing or trial, it is further agreed

that you will pay us legal fees at our then prevailing hourly rates for the time we dedicate to the preparation and participation in any such deposition, hearing or trial.

Your signature below will evidence your agreement to each and every term of this fee agreement. This is a binding legal document. Therefore, you may wish to obtain the advice of an independent attorney before you sign this letter. We ask that you return a signed copy of this letter after you have considered it (we have enclosed a second counterpart of this letter for that purpose).

Of course, we will be happy to answer any questions you may have about this letter. We sincerely appreciate having this opportunity to be of service to you.

Very truly yours,

LAW FIRM 4

____
Wera Lawyer,
For the Firm

I, ______________________, hereby agree to the engagement of the law firm of LAW FIRM 4, Nowhere, Texas, as co-counsel for me with respect to the above referenced matters. I hereby agree to the conditions and terms of the foregoing letter pertaining to the representation of LAW FIRM 4, including the payment of fees and expenses charged by such firm and the waiver of any future potential conflict.

____
Client

APPENDIX E – FIRM 5

Legal Representation Letter

______________________, 20___

Client Address

Re:

Dear Client:

This will confirm that you have asked LAW FIRM 5 to assist your clients and you with respect to certain tax and estate planning matters. As we discussed, our firm is pleased to represent you under the conditions set out below. The purpose of this letter is to set forth the terms of our engagement and confirm our discussions concerning our engagement and the work to be done.

Our representation at this time will include analysis of the current estate situation, consideration of the tax impact of the planned courses of action and recommendations for effective means of carrying out the courses of action. You understand that in order for us to give you proper advice, you must provide us with complete and accurate financial and family data and that we will rely on such data in doing your work.

This is a limited engagement for the consultation we discussed and we will have to agree upon any areas with respect to which we are to advise you or do work beyond what is outlined in this letter. If any additional assignment is undertaken, the general terms of this letter will continue to apply, except as may be otherwise agreed in writing. Further, it is agreed that LAW FIRM 5 reserves the right to continue to represent existing or new clients in any matter that is not substantially related to our work on this matter even if the interests of such clients in those other matters may be adverse to you.

As compensation for our services rendered and to be rendered you have agreed to pay reasonable attorneys fees, which will be determined according to our customary practices for advice to our clients. Our fees are to be based on the time spent by the attorneys, paralegals, and other support personnel involved in representing and advising you. For your information, the current hourly billing rates that I anticipate will be applicable to you file will range from $______an hour for my time to $______per hour for our paralegals. Such rates are adjusted by our firm annually, over time, and the rates quoted are for the current year. The time charges of others who might appropriately work on the file will generally fall within the range between my time and those of paralegals. In addition to our fees for legal services, we will bill for our expenses, including postage, photocopying, telephone and other communication charges, filing fees, messenger delivery and other miscellaneous out-of-pocket disbursements in accordance with our customary practices.

If the foregoing correctly reflects our agreements and your understandings, please acknowledge this agreement in the space provided below. We have enclosed two copies of this agreement, one for your files and one to be signed and returned to me. If you have any questions about the proposed engagement, please do not hesitate to call me.

Thank you for giving us this opportunity to provide these services for you. We look forward to working with you.

Sincerely yours,

____

Lawyer

Enclosure

AGREED and ACCEPTED:

____

Client's Name Date

CLIENT ACKNOWLEDGES THAT THE CLIENT WAS ADVISED TO RETAIN INDEPENDENT LEGAL COUNSEL TO REPRESENT THE CLIENT IN CONNECTION WITH THE NEGOTIATION AND EXECUTION OF THIS AGREEMENT. THE CLIENT FURTHER ACKNOWLEDGES THAT CLIENT WAS ADVISED THAT THE LAW FIRM HAS A CONFLICT OF INTEREST THAT PREVENTS IT FROM REPRESENTING THE CLIENT IN ANY WAY WITH RESPECT TO THE NEGOTIATION AND/OR EXECUTION OF THIS AGREEMENT AND THAT THE LAW FIRM HAS NOT DONE SO.

APPENDIX F

Joint Representation Advisory and Consent

Spouses can have differing, and sometimes conflicting, interests and objectives regarding their estate planning. For example, they may have different views on how property could pass after the death of one or both of them. In some situations, we may recommend that holdings be restructured to take advantage of available tax benefits, which may involve gifts from one spouse to the other. Some of these actions can affect the division of property in the event of divorce. These are just a few general examples. Each couple's situation is unique.

If you each had a separate lawyer, you would each have an advocate for your position and would receive totally independent advice. Information given to your own lawyer is confidential and cannot be obtained by your spouse without your consent.

That is not the case when one firm advises both of you. One firm cannot be an advocate for only one of you. Information that either of you gives to the firm relating to your planning cannot be kept from the other. We will have to immediately tell the other anything which one of you tells us that relates to the estate planning of either of you, since not to reveal such information to the other would be a violation of attorney-client joint relationship. If you ask us to continue to serve you jointly, our effort will be to assist in developing a coordinated overall plan and to encourage the resolution of differing interests in an equitable manner and in your mutual best interests.

There are advantages to having one firm represent both of you. It is usually much less expensive. The work is usually done much more quickly because there is no need to consult with another lawyer. And there is a better chance of coordinating the will and trust provisions for each spouse.

Some of the planning techniques such as community property conversions, post-nuptial partition agreements, irrevocable trusts, limited liability companies, and family limited partnerships are difficult or impossible to unwind on divorce. The unwinding can cause adverse tax consequences. The characterization of your property as community property, separate property or separate property with rights of community reimbursement is a very critical issue that can affect your beneficiaries in the future. If you think this will be an issue, you need to seek the advice of a family law attorney who is not a member of this firm before implementing any of these matters.

After considering these factors, each of you must decide whether you wish the firm to represent you jointly in connection with your estate planning and related matters. If you do, please review the statement that follows, sign and date it as indicated. If either of you ever wants to have the advice of separate counsel, please do so.

If you decide to obtain separate counsel from the beginning of your estate planning process, our firm would be happy to represent either of you.

CONSENT

We have carefully reviewed the foregoing Advisory. Each of us realizes that there may be areas where our interests and objectives may differ and areas of potential or actual conflict of interest between us in connection with our estate planning and related matters. We understand the advantages and disadvantages of having one firm represent us. We understand that either of us may retain separate, independent counsel in connection with these matters at any time. After careful consideration, each of us requests that ______________, represent us jointly in connection with our estate planning and related matters and each of us consents to that dual representation. Each of us also understands and agrees that all communications and information that ________________, receives from either one of us, or provides to either one of us, relating to these matters will be shared and disclosed by said firm with the other spouse.

DIVORCE

We understand that this joint representation ends upon either of us filing for divorce. If either of us files for divorce, and asks ______________ to change any of the documents reflected in the Estate Planning Services Employment Contract, _____________ will contact the other of us in writing to inform the other of us that ________________ is changing our documents, however, we agree that no other information should be disclosed to the other of us by _______________. Once a divorce between us is final, ______________ has no obligation to inform one of us that the other is changing his or her estate planning documents.

ALL CLIENTS SHOULD ALSO READ THE DOCUMENT ENTITLED "WARNING TO CLIENTS REGARDING JOINT TENANTS, SURVIVORSHIP, POD AND TRUSTEE ACCOUNTS".

Signed on ________________________, 20___

____________________________________	____________________________________
Client	Client

APPENDIX G

Estate Planning Representation Letter

PERSONAL AND CONFIDENTIAL ATTORNEY CLIENT PRIVILEGED
PLEASE READ VERY CAREFULLY

RE: Estate Planning Disclosure and Engagement Letter

Dear Client:

ARTICLE 1
Introduction

Pursuant to Firm policy, **and because I also think it is in your best interest**, I am sending you this engagement letter. The principal reason for the use of an engagement letter is the need for full disclosure in a world where such disclosure is now expected and required for ethical reasons, especially in an area as sensitive as estate planning. This is even more important where I may be representing a husband and wife.

It is not necessary to sign this engagement letter in advance of our initial meeting, but if you would like, you can bring it with you and give it to me then, or you may wait until after the meeting to make up your mind.

This letter is designed to set forth the terms of our engagement to perform estate planning for you. This engagement letter is designed to benefit us both. Among other things, it sets forth the scope of our mutual involvement in the estate planning process, so that neither of us will be undertaking obligations to each other that we did not intend to assume.

My understanding is that you are both U.S. citizens.

ARTICLE 2
Scope of Involvement And Terms of Engagement

This letter is a contract ("this Agreement"). Further, even if this letter is not signed —whether through oversight, or because it is misplaced, or other reason— you must understand that unless we otherwise agree in writing, then if I undertake to represent you or to perform legal services on your behalf nevertheless, and you consent to it, implicitly or explicitly, by allowing me to do so without advance written objection, then such representation or other work performed will be subject to the terms set forth in this letter.

The following is a list of what you and I agree to do and what we do not agree to do.

2.1 Engagement Does Not Cover State Laws Outside of Texas. I am licensed to practice law in Texas. I can give advice about Texas law and federal law (e.g., federal estate and gift tax). I cannot and will not give any advice, or be retained to give advice, regarding the law of any other jurisdiction.

2.2 Scope of Engagement. The Firm is hereby engaged by you to provide advice and consultation, as and when specifically requested, regarding legal matters associated with estate planning and specifically with regard to the drafting of an irrevocable trust designed to be able to invest in life insurance and to receive contributions that will qualify, within applicable limits, for the annual gift tax exclusion. Our engagement does not guaranty that the fiduciary can properly invest in life insurance, or that contributions to the trust will qualify for the annual exclusion, or that the assets in the trust will not be includable in your estate for estate tax purposes, given the inherent complexity of a trust of this nature, the uncertainties of the tax laws, and the fact that the IRS is not overly sympathetic towards this technique. Nevertheless, I will take such steps as I believe prudent and reasonable under the circumstances to achieve the desired ends, taking into account all of your intentions as expressed to me and the degree of risk you are willing to assume.

It is anticipated that I will prepare (perhaps among other things) Funeral Instructions, General and Universal Power of Attorney, HIPAA Authorization, Directive To Physician, Power of Attorney For Health Care Decisions, and

Appointment of Guardian Before the Need Arises, and Wills, for each of you. **Most importantly, I will be preparing a Revocable Living Trust designed to avoid estate taxes so long as either of you is alive, with a dynasty trust, for your children to last for as long as the law allows, following your death.**

To give you a more specific idea about how much really is involved from my end, in even a fairly rudimentary estate plan I submit that even a basic estate plan requires the preparation (and, as applicable, signing) most of the following documents:

- Preparation of engagement letter to client.
- Preparation of community property disclosure memo.
- Preparation of approximate fee schedule.
- Preparation of 1st information letter to client.
- Preparation of Estate Planning Techniques letter to client.
- Preparation of Estate Planning Time Table.
- Minimum of two hours worth of meetings with you.
- Preparation of database entering all essential data about the client, the fiduciaries the client wants and the estate plan itself. This takes a Legal Assistant probably four hours, and I will spend a minimum of two hours on the part dealing with the estate planning variables that fit the client's profile. One of the biggest problems of late is identifying what property is community and what is not. This may not be a problem if you have never been the recipient of a large gift, never inherited property, owned no property when you got married, have never lived outside Texas, etc., but fewer and fewer people these days fit that profile.
- Preparation of List letter to client, confirming the following information found in attachments.
    - Documents entitled "Identification of Client and Family List."
    - Documents entitled "List of Basic Estate Planning Documents to be Prepared."
    - Documents entitled "List of Fiduciaries."
    - Unless the estate is very small in value, a Financial Statement based upon a list of all of the client's significant assets (a highly necessary but very time-consuming undertaking usually performed by a Legal Assistant, with me reviewing the process periodically).
    - Diagram of Estate Plan.
    - Lawyer's Notes Outlining Special Drafting Needs.
    - Mock Estate Tax Return (if the estate is large).
    - Qualified Retirement Projections (if this appears to be a likely issue).
- Preparation of Will.
- Preparation of Revocable Living Trust.
- Preparation of Funeral Instructions.
- Preparation of General and Universal Power of Attorney.
- Preparation of HIPAA Authorization.
- Preparation of Directive To Physician.
- Preparation of Power of Attorney For Health Care Decisions.
- Preparation of Appointment of Guardian For your Estate and Person Before the Need Arises.
- Preparation of Appointment of Guardian For the Estate and Person of Your Minor Children, if there are any.
- Preparation of documents used as cover sheets to most of the above, which explain the documents. This is a form that usually does not require original drafting, so I don't include these in the number of documents totaled below, even though there are about 20 of them.
- Preparation of long letter to client transmitting these documents.
- Preparation of letter to witnesses explaining elements of testamentary capacity, to be signed by them.
- Preparation of Will execution checklist to be signed by me and initialed by secretary.
- Signing ceremony (1 to 2 hours).
- Scanning all signed documents and putting them on a CD for the client.
- Preparing an indexed tabbed three-ring notebook, organizing and reproducing copies of the above.
- Long exit letter to client explaining each document we have prepared, who has the originals of what documents and what needs to be done with documents, how trusts may be funded, whether or not and how tax identification numbers are to be obtained, explaining how revocable trusts are taxed.

- Preparation of audit checklist following signing of all documents to ensure that they were properly executed and to note where they are to be found.

In the case of a married couple, this amounts to at least 40 documents, because there are two of most documents mentioned above, most of which require one or more signatures. An error or ambiguity in any of them could cost you many times my fee; so a great deal of care and proofing is essential to avoid making even a simple mistake. Being perfect is impossible, but I like to spend at least the time necessary to reduce the odds of a mistake happening. And the bulleted items above are for a **basic** estate plan! I really don't know which of the documents could be left out if one were to seek to economize.

The basic revocable trust I use is quite sophisticated. Ordinarily it would contain creditor protected beneficiary controlled trusts to last for the rule against perpetuities, marital deduction and bypass subtrusts and generation skipping exempt subtrusts, broad powers of appointment (re-write provisions) and would be about 75 pages in length. One advantage (among many) it has over a will is that the client's assets placed in the trust do not have to be disclosed to the world on a probate inventory. My wealthy clients find this very important. The revocable trust is the only document that is amenable to simplification or elimination. So consider what is the minimum number of hours I can get away with spending. If I spend an hour, on average, on each one, it would be 40 hours. If I spend 15 minutes on each one it is still 10 hours.

2.3 **<u>Term of Engagement</u>**. This contract may be terminated by either Attorney or Client at any time, without penalty or liability. There is no implied representation that we can or will provide any further service beyond the engagement period and scope of service without first negotiating a new contract in writing. However, this Agreement will control all future work except to the extent we have otherwise agreed in writing. As a general rule, the "engagement period" will end at the very latest when the estate planning documents you ask us to draft have been signed, and, if applicable and if later, when any other undertaking we have specifically agreed to perform (e.g., beneficiary designation work, funding of trusts, etc.) has been completed to your satisfaction. (However, the engagement period may end before such date.) Further, in no event will the engagement period extend beyond five years. Notwithstanding the foregoing, if we actually perform substantial legal services for you after the time otherwise specified for the engagement to end, the terms of this engagement will be extended or re-invoked for the duration of such additional work, unless a new written contract between us has been signed. (It is my general practice to send a letter signaling the completion of the initial undertaking and end of the engagement period.)

2.4 **<u>Fees</u>**. Unless otherwise agreed, all services will be billed at an hourly rate. Attorney time for a partner is generally between $XXX and $XXXan hour, or less. My hourly rate usually does not exceed $XXXan hour. Associate rates are less than partners, and generally range between $XXX and $XXX an hour, depending on the experience level of the associate and the nature of the work being done. Paralegal (or Legal Assistant) time is billed at approximately $XX an hour. Ordinarily fees and expenses are billed monthly and are due within 30 days of receipt.

I want to emphasize that these rates vary in the discretion of the billing attorney, with the intent that you not be charged more than a reasonable fee for the services received. It is unusual for the costs of implementing a basic estate plan to exceed $XXX, and a basic estate plan for a husband and wife with a taxable estate will often be under $XXX, depending on the amount of work requested. My fee for an irrevocable annual withdrawal trust will usually run between $XXX and $XXX. In order that you will have some rough idea of what various estate planning documents costs, and the amount of work involved, I am attaching a very approximate fee schedule. I am doing this in an attempt to be helpful, but at the risk that you will think estate-planning documents are a commodity, which they are not.

I estimate that the total legal fees involved will not exceed $XXX, barring anything extraordinary.

Costs, travel, delivery, filing fees, etc., and other reimbursable expenses will be billed separately as accrued. **Please note that any estimate of total costs or legal fees does not include these items**, whether such estimate is listed here or in any schedule or separate document I give you that relates to fees or cost.

It is agreed that the foregoing rates are subject to periodic adjustments by the Firm based upon the attorney's responsibilities and experience and in response to overall Firm policy, but that such adjustments will not be more frequent than semi-annually. The hourly rates charged by attorneys or support staff will be reflected in statements furnished or by supplemental correspondence.

2.5 Coordinating Nonprobate Assets. Nonprobate assets are assets that do not pass under a Will. Examples would include life insurance, joint tenancy bank accounts, IRAs and deferred compensation arrangements (such as a benefit under a qualified plan).

Planning for these assets may be incidental in some cases, and of primary importance in others. Life insurance proceeds are generally includible in the estate of the owner and insured no matter who is the beneficiary (unless special measures are undertaken to divest the insured of all incidents of ownership during life). Since the proceeds are includible in the estate, they are subject to estate tax. The same is true of IRA and qualified plan benefits. And if the benefits are community property, a spouse will have an interest that must also be considered and coordinated. The proper coordination of nonprobate assets can be particularly important in order to take full advantage of the marital deduction and to shelter the unified credit.[1]

Unfortunately, the proper coordination of nonprobate assets can be the most expensive part of an estate plan, and many clients are not willing to pay a lawyer to make sure that all of the beneficiary designations are properly coordinated and that all changes have been properly recorded and accepted by the company or other institution providing the benefits. Further, we do not usually know in advance how much time will be required. In the case of IRA and employee benefit plans especially, we are not even sure whether a beneficiary designation will be effective, even if accepted, and this is particularly true with respect to the community property interest of a nonparticipant spouse. The tax effects attendant to a distribution under an IRA or employee benefit plan are often unsettled and uncertain, under the present state of the law, and again, this is particularly true with respect to the community property interest of a nonparticipant spouse. For these reasons and others we are forced to limit the scope of our involvement, and we cannot guaranty results.

We will not attempt to coordinate the beneficiary of your nonprobate assets with your overall estate plan, to the extent set forth below, unless you give us the information set forth below, and request such assistance in writing. However, even if you request our help, **this is one area where the scope of our involvement is definitely limited** and in which we cannot guaranty results. If you either do not get written confirmation from the insurance company or other institution that the change of beneficiary with respect to a particular policy or benefit has been made, or if you do not receive a copy of our letter attempting to make the change, it may be that the change has not been made, and, unless we hear from you in writing to the contrary, we will assume in that case that you do not wish for us to pursue the matter further on your behalf.

Because nonprobate assets can be an important part of the estate, our preference, but only if you request it in a separate writing, is to handle these items as follows:

a. **Financial Accounts**. If you will provide us with a copy of the last monthly or other periodic statement from each institution in which you have an account (bank, savings and loan, brokerage firm, etc.) we will prepare a form letter for you to sign instructing the institution about the preferred disposition of the account at death.

b. **Life Insurance**. If you will provide us with (i) a copy of each life insurance policy on your life, (ii) a copy of the last statement from the company showing current death benefits, cash values, etc., and (iii) a current beneficiary designation form, we will prepare the beneficiary designation for you to sign.

c. **IRAs and Employee Benefits**. If you will provide us with (i) a copy of the underlying document establishing each IRA or employee benefit plan in which you have an interest, (ii) a copy of the last statement or valuation showing your current benefit and (iii) a current beneficiary designation form, we will prepare the beneficiary designation for you to sign.

In each case (a), (b) and (c), if you request it in a separate writing, we may agree to forward that letter or beneficiary designation to the institution on your behalf, via certified mail, under our letterhead. If you do not receive a copy of such a letter, you should assume that we have not agreed to perform this service. Most beneficiary designation forms are woefully inadequate for proper estate planning, and so our practice is often (but not always) to prepare a form of our own and attach it to the company form. If you do not bring us an approved form, we will prepare our own form

[1] The applicable exclusion under the estate and gift tax credit is $2 million for each taxpayer in 2006-2008, and is scheduled to increase to $3.5 million by 2009. However, this amount is subject to change at any time by Congress and can also be reduced by lifetime gifts and tax elections made in the administration of an estate.

and submit it to the company, if you request. In either case, it is sometimes difficult to tell whether or not the company or institution has accepted the change. It can sometimes take hours of work and months of time to get these matters resolved satisfactorily, since large institutions often have the traditional mentality and resistance to change usually associated with large bureaucracies.

2.6 Not All Contingencies Will Be Covered By Estate Plan. Estate planning can be a time consuming and expensive process. No estate plan is bullet proof or fail safe. Few clients can afford to pay a lawyer to cover absolutely every contingency that could conceivably be addressed. There are practical limits. And yet, there is a foreseeable statistical likelihood that some clients or their beneficiaries will incur taxes or otherwise have their interests adversely affected because of circumstances, law, or language in a Will or trust. With the benefit of hindsight or otherwise, it will often be true that such outcome could have been avoided by more elaborate or different planning. Because the variety of events that could affect your estate plan is virtually without limit, whereas the time and cost that can reasonably be expended to plan for such events is definitely limited, the scope of our involvement cannot be open ended, and we expressly do not undertake to cover every issue that could affect your estate plan. Our commitment is to produce the documents that you actually sign. We do not commit to go beyond that, even if it turns out later that it would have been better if more work was done.

2.7 Who is Our Client/Use of Pronouns. Unless otherwise clearly indicated by the context, the words "Attorney," "the Firm," and all first person pronouns ("I", "we", etc.) used in this letter, refer to LAW FIRM, and to any person employed by or in partnership with any of them in the practice of law. (But see below regarding the contingency that an attorney may cease to be a member or employee of the Firm.)

The term "Client" or "you" refers to Husband and Wife, unless only one of you signs this engagement contract, in which case the term "Client" will refer solely to the person signing. We will assume no duty whatsoever to any other person or enterprise, nor any other member of your family, not identified as the Client above.

2.8 Attorney Ceasing to be Associated With the Firm. We agreed above that this Agreement may be terminated by either Attorney or Client at any time, without penalty or liability. In this regard, we wish to make you aware that from time to time, and for any number of reasons, an attorney who works for the Firm and who may be working on matters covered by this Agreement (whether as a partner, employee, or third-party contractor), may terminate his or her relationship with the Firm. Such termination (departure) may be voluntary or involuntary, either on the part of the attorney or the Firm. In that event, you may or may not wish to continue to employ that attorney in connection with the subject matter hereof. If, following such departure, and without direct or indirect solicitation by the departing attorney, you and the departing attorney, or some other law firm with whom the attorney has a relationship, enter into an attorney-client relationship regarding any of the matters covered under this Agreement, the Firm agrees to take whatever steps are reasonable and consistent with this Agreement to cooperate with the transition in order to mitigate any costs to you incurred as a direct result of such departure, provided that such cooperation does not include uncompensated legal fees in excess of $XXX. However, in return, you agree that, beyond the proffering of such cooperation, we will not be liable for any direct or indirect damages or expenses arising out of such departure.

2.9 Confidences. We will not disclose any information whatsoever to anyone other than you except as specifically permitted by you or impliedly authorized in order to fulfill representation. We reserve the right to refuse disclosure of confidential and privileged information under any condition or circumstance.

It is my understanding that we may routinely send copies of our correspondence to you to the following, though we reserve the right not to do so, if we think the communication is sensitive and otherwise privileged, or if to do so seems to us to possibly be inappropriate or contrary to your wishes:

{people who get copies}

Ordinarily, I will use my own discretion about who should be copied on correspondence, a list which may change, depending on the circumstances. However, if there is anyone you expressly do not want to receive a copy of correspondence, let me know and I will respect that wish. **Basically, I will consider all of our communications to be totally confidential, except as I believe necessary to further your interests.** This can be a fairly difficult decision to make at times, for reasons having to do with the preservation or loss of the attorney-client privilege. In a contested or litigated matter, I will be very sensitive. Otherwise, I may be less concerned about losing the privilege than I am with seeing to it that your interests are best served by making sure that all of your advisors and other interested parties

working for or with us are fully informed, "on the same page," so to speak. At times this will be absolutely necessary in order to properly represent your interests, and in that case, I can only hope that if a matter is discussed that we do not want to be discoverable in a lawsuit, the courts will respect my need to work and communicate with third parties in the course of my representation.

2.10 Not a Third-Party Beneficiary Contract. Our engagement to do estate planning for you is not for the benefit of third parties and is not a third-party beneficiary contract, in favor of your descendants, beneficiaries, or anyone else. We will be working for you alone.

2.11 Duty to Read and Review Documents. It will be your affirmative duty to give all documents prepared by us a comprehensive review both before and after they have been signed and before the engagement ends (and to submit the documentation to your accountant for his or her review), and to visit with me about any document or provision you do not understand. You will review the documents carefully and thoroughly and will call me with any changes to make within a few weeks of receipt. If you wish to schedule an appointment to discuss the documents prior to the date of execution, we should meet within that period. I will make any changes that you request within **2-3 weeks** of your request if at all possible. (But again, I cannot promise you an exact time, and you agree that if the work is not done timely, the sole remedy will be a rebate of the bill, if any, rather than liability for any other consequences.) You will schedule an appointment or appointments through my secretary[2] to discuss the documents with me and to have them signed by you after they meet your satisfaction.

Some of the documents we prepare may be complex to read and understand. Again, by signing this engagement letter, you promise that you will read and review the documents thoroughly before they are signed. No attorney is error-proof. Your thorough review of the documents is important to insure that I have followed your directions and objectives and that we have properly recorded all essential information. Any changes made due to our error will be made without cost to you.

2.12 Ownership of "the File." At your request, your papers and property given by you to us will be returned to you promptly upon receipt of payment for outstanding fees and costs. We will see to it that you have copies of all relevant correspondence and final legal documents that are connected with our representation of you. We will nevertheless, supply you with additional copies of correspondence and other documents previously given to you in the course of our representation, provided you reimburse us for the copying charges. It is agreed, however, that our own files, including notes, drafts, research materials, internal memoranda, and other lawyer work product, whether or not created during the course of our representation of you, will belong to the Firm, and will not be subject to copying or delivery to you.

2.13 Retention of Documents. Any documents retained by the Firm will be transferred to the person responsible for administering our records retention program. For various reasons, including the minimization of unnecessary storage expenses, we reserve the right to destroy or otherwise dispose of any such documents or other materials retained by us within a reasonable time after the termination of the engagement.

At the conclusion of our initial representation period, we will discuss with you whether you prefer for us to retain any original estate planning documents. It is commonly the case that we will retain the original of your Wills, for example. If you are retaining the originals, then they will be delivered to you at the conclusion of our initial representation period. If we retain any original documents, we will reserve the right to return them to you by delivering them to your last known address. **In this regard, you should be sure to provide us with a current address where you may be reached in case we are no longer able to keep the documents.** We may destroy any originals after ten years if we do not know of a mailing address where the documents may be returned at that time. We will retain photocopies of everything for at least five years. Although we may be retaining originals, we cannot assume responsibility for finding out whether or not there is a need to probate a will, deliver a document, etc., unless someone gives us actual notice of the need.

[2] My secretary is Irene Smith. Her direct line is (xxx) xxx-xxxx.

ARTICLE 3
Ethical Considerations and Conflicts of Interest

In beginning and completing your work, we will assume that the family, financial and other information you provide is complete and correct. We will assume that there are no conflicts of interest, other than as discussed in this engagement letter, and you affirmatively promise to disclose any conflicts that develop during the course of our representation.

3.1 Rules of Professional Conduct for Lawyers. There is a brochure prepared by the State Bar of Texas that answers some of the common questions about the duties that an attorney has to a client and about what a client can do if a rule of professional conduct has been violated. Copies of this brochure are freely available at the front desk of our office.

3.2 Joint Representation of Husband and Wife.

3.2(a) Potential Conflict of Interest. **Rule 1.06(b)** of the Texas Disciplinary Rules of Professional Conduct provides that as a general rule "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." This rule poses a nagging problem for a trust and estate lawyer, and experts have been agonizing for years over the resolution to the issue.

An argument can be made that in today's litigious society—where lawsuits are frequent and where it is assumed that if anything in life goes wrong someone must be sued—that every husband and wife has an inherent conflict of interest in estate planning for their family. This argument strikes some (including me) as extremely cynical; but you must remember that court cases are argued by litigation attorneys, and their perspective of as well as their monetary interest in our system of justice is different from those of us with an office practice. We deal with real people in day-to-day situations where, unlike the litigation attorney, the exception is not the rule.

Are your interests materially and directly adverse to one another? They could be; it depends on your circumstances and your attitudes, as much or more than on the law. You must help me make this determination, and in many ways you are in a better position than I am to decide this issue. Although there are a number of property law and other legal issues involved in estate planning, the question of whether the interest of a husband and wife are materially adverse to one another is primarily one of common sense for which you, in many respects, are perhaps better qualified than I to evaluate. If you feel that your interests are "materially and directly adverse" to one another then you must disclose this to me and only one of you should sign this letter, because in that case, I will decline to undertake the joint representation of you both.

By both of you signing this letter you will be representing to me that your interests are not "materially and directly adverse." If you are wrong in your conclusion regarding this issue, then by signing this letter you will be consenting to my joint representation of you both even if your interests are in fact materially and directly adverse.

3.2(b) Mutual Disclosure. **Rule 1.06(c)** reads: "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, if any."

If I undertake to represent you jointly it is because I reasonably believe my representation of each of you will not be materially affected by the conflict, if any. But I want you both, in any event, to be fully aware of the existence, nature, implication, and possible adverse consequences of the common representation and the advantages involved, if any. In this regard, I will send you, at the time I send the first draft of the estate planning documents, a diagram and memo that explains how property in Texas passes if a person does not have a Will.

3.2(c) Advantages and Disadvantages of Joint Representation. The advantages of joint representation include economy and the ability to coordinate an estate plan that obviously will affect you both but will also presumably be disclosed to each other as well as to me as your joint counsel. The disadvantages include the fact that by planning the estate jointly, one or both of you may feel compelled to adopt a plan that is different from what you might otherwise

implement in the privacy that separate representation affords; and further, if either of you owns separate property, an attorney that represents only you will be in a better position to further your interests in the event of a dispute over the proper characterization of the property as community or separate. **Moreover, if you have children by a prior marriage, your interests in benefitting them may not be identical and could be affected by the estate plan of your spouse**.

I am enclosing along with this letter a separate memorandum (entitled "Community Property Law") that briefly describes some of the more important rules of community and separate property law in Texas to help you to understand some of the issues and potential conflicts that could affect your decision about whether you feel joint representation is appropriate. I think you will find it interesting and informative, unless you are already aware of how the Texas community property law system works.

Note that either of you may ordinarily revoke or amend your Will or sign a new Will, without penalty or obligation. Occasionally clients execute what are known as election Wills or put provisions in a Will or trust for the benefit of a spouse contingent upon what the other spouse has done in his or her Will. If that is the case in the estate planning documents I prepare for you, I will take pains to make you aware of it. Each of you must assume the risk that the other may secretly revoke his or her Will or trust through the assistance of another lawyer, or that the surviving spouse will alter his or her estate plan after your death.

By each of you signing this letter each of you assumes the duty to report to me any fact or circumstance which may affect my impartial representation of you both, and any fact or circumstance that indicates that your interests are in conflict with one another.

Each of you are advised of the hazards of multi-party representation by one attorney. I cannot represent you both and be an advocate for one of you to the exclusion of the other. An attorney is required to be impartial, loyal, and to exercise independent judgment with regard to the client group as a whole. If I represent you jointly I may not promote the interest of one of you to the disadvantage of the other. An attorney may act as the common representative for more than one person in a common enterprise or endeavor for so long as their interests do not differ or potentially differ.

If I undertake to represent you jointly, both of you will have free access to any documents I prepare for either of you, and it must be understood that any communication that one of you makes to me will not be confidential with respect to your spouse. This is a condition of my undertaking joint representation.

It is theoretically possible for a lawyer to undertake the separate (as opposed to joint) representation of a husband and wife after full disclosure and if consent is obtained, but I have found that this is not only awkward but that it lacks some of the principal advantages that joint representation offers, such as the advantage offered by full disclosure of a commonly understood plan.

Each of you may serve as the spokesperson for all. I will assume in the absence of clear evidence to the contrary that each of you is communicating to the other respecting any conversations of a material nature that may occur between me and only one of you.

3.3 Duty to Ask Questions and to Understand Estate Plan. It is not uncommon for those who are passively involved in an estate planning endeavor to sign documents without thoroughly reading or understanding what they have signed. This cannot happen in this engagement. In signing this Agreement, each of you affirmatively represents and promises that you will read any documents I prepare, will ask questions when in doubt about the meaning of any document or term, and will not sign or rely upon a document prepared by me until you understand the document.

3.4 Duty to Ask Questions. It is not uncommon for those who are passively involved in a legal matter to sign documents without thoroughly reading or understanding what they have signed. This cannot happen in this engagement. In signing this Agreement, each of you affirmatively represents and promises that you will read the documentation, will ask questions when in doubt about the meaning of any document or term, and will not sign the documentation until you understand the documents.

3.5 Retainer. **We require an initial retainer of $XXX**. This retainer will be **applied to** the extent applicable and necessary for discharge of the last statement of the Firm following completion of our engagement (**i.e., it will NOT be applied against your initial billings**), with any remaining amount of the retainer to be refunded to you immediately following the closing of the Firm's representation of you and completion of the billing and settlement of the account.

However, a purpose of the deposited amount is to have on hand funds available for the discharge of past due billings, and if the deposited retainer is utilized for such purpose, an amount of at least the amount of the retainer will be required for the Firm to continue its representation of you. It is agreed that the retainer will be maintained by the Firm for your account, subject to the agreement for its utilization. Until utilized or refunded, we will hold the retainer in an IOLTA trust account (Texas Interest on Lawyers' Trust Account) under the Equal Access to Justice Program. See http://www.txiolta.org.)

3.6 **Involvement of C.P.A**. You are advised that your Certified Public Accountant should be involved in this planning. The failure to involve the accountant could result in subsequent confusion, time and cost when the accountant is asked to review your plan for the first time during tax season and in the course of the preparation of the added income and gift tax returns which may result from your planning. It will be your affirmative duty to involve your accountant, whose services will be necessary to maintain the plan, in the planning process. In this regard, please note that most gifts to trusts, and all outright gifts in excess of the annual exclusion, generally require the preparation and filing of a gift tax return. However, we will not be undertaking to prepare any tax returns, whether income or gift tax or any other, unless specifically requested to do so in writing, and then we will not be responsible for a return that is not actually prepared by us and signed by you, so that if you do not sign a return, it is understood that we did not undertake to prepare or file it.

3.7 **Changes in the Law/Periodic Review of Estate Plan**. We represent many, many, estate planning clients. It is virtually impossible to advise all of our clients of changes in the law, even if those changes directly affect an estate plan or the legality and effectiveness of any document that we may have prepared. Many years ago this may have been feasible, but in recent decades the Congressional penchant for spawning new legislation and changing old legislation makes this task simply too daunting. Nor can we assume responsibility for probating your Will if no one engages us and actually informs us of the need to do so. This is true whether or not we retain the original signed estate planning documents.

Although we may from time to time voluntarily contact you regarding your estate plan or the legality or effectiveness of a document that we may have prepared for you, we do not undertake to be legally bound to do so. Therefore, after a document has been signed, we will assume no further obligation with respect to it, whether or not we retain the original. This means, for example, that it will be necessary for you to keep in touch with us from time to time, if you wish for us to continue to represent you and if you wish to be informed of changes in the law and related matters.

3.8 **Multiple Counterparts**. This Agreement may be signed in duplicate (multiple counterparts), in which case, any one counterpart may be deemed an original for all purposes. I have signed both the printed copy and the photocopy, since both may be treated as originals under this Agreement.

3.9 **Return of One Contract**. If you find this Agreement acceptable, please sign one of the counterparts of this letter, and return it to me, along with the $5000 retainer.

3.10 **Enclosures**. Your copy of this letter is spiral bound (except for the magazine articles) and separated by index tabs. This is for your convenience and future ready reference. The printed copy of this letter is separate from the attachments, in order that you may easily sign and return it to me in the enclosed, stamped self-addressed envelope.

3.11 **Effect of Failure to Sign**. If you do not sign this Agreement, and another contract that is mutually agreeable and signed by me is not substituted in its place, and if I nonetheless proceed to act as your attorney with your apparent permission, I will assume that the failure to sign is an oversight unless you notify me otherwise in writing. Therefore, if I represent you with respect to the matters within the scope of this engagement letter, it will ordinarily be under the terms set forth above, unless this letter has been superseded by another one.

3.12 **IRS Circular 230 Disclosure**. IRS Circular 230 Disclosure (U.S. Federal Tax Advice): Any U.S. federal tax advice contained in this email (including any attachments) is not written in a form, nor is it intended, to satisfy the requirements for an opinion on which you (or any other taxpayer) may rely for the purpose of: avoiding penalties under the Internal Revenue Code of 1986, as amended; or promoting, marketing or recommending to another party a transaction (or matter) addressed in this email.

Yours very truly,

Joe Lawyer

If you accept the terms of this engagement letter please sign the original where indicated below, and return it to me **along with a $XXX retainer** as soon as reasonably convenient. For your convenience in this regard, I am enclosing a stamped, self addressed, return envelope. Your copy of the letter is spiral bound among the attachments and is marked by an index tab. Please retain the extra copy for your records.

TERMS OF AGREEMENT ACCEPTED BY CLIENT

Date Signed:________________________ ____
Husband

Date Signed:________________________ ____
Wife

Enclosures: Extra copy of this letter
Return envelope
Brochure: "What is an Estate Planning & Probate Law Board Certified Attorney?"
Article Regarding Generation Skipping Trusts
Memo entitled "Who Inherits in Texas When There is No Will"
Memo entitled "Community Property Law"
Approximate Fee Schedule

cc: Bookkeeping
people who get copies

APPENDIX H

Multi-Executor Conflict Waiver

____________________, 20___

Client 1 ____________________________

Client 2 ____________________________

Client 3 ____________________________

Re: *Estate of ______________________, Deceased,* In the County Court-at-Law of _________________County, Texas

Dear 1, 2, and 3:

THIS IS A LEGAL CONTRACT BETWEEN YOU AND THE LAW FIRM. YOU ARE ADVISED TO HAVE INDEPENDENT LEGAL COUNSEL REVIEW THIS CONTRACT ON YOUR BEHALF. THE LAW FIRM CANNOT REPRESENT YOU IN CONNECTION WITH THE NEGOTIATION, PREPARATION, OR EXECUTION OF THIS ENGAGEMENT LETTER.

I am sending you this letter because you need to understand I need to fully explain the consequences of joint representation. The **(number)** of you are appointed or are applying to be appointed as Independent Executors. You have asked me to represent all of you. I agree to represent **all/both** of you together, as an intermediary, because I reasonably believe that, at this point, the resolution of any conflicting issues that you may have can be accomplished in a mutually advantageous basis without the necessity of litigation between or among any of you; that each of you will be able to make independent, rational decisions in the matter if I adequately inform you; and that there is little risk of material prejudice to any of your interests by this joint representation.

You should, however, understand the following:

1. One of you might gain some advantage if you were represented by independent counsel and could freely consult with your own lawyer.

2. I cannot serve as an advocate for any one of you, but, instead, must assist all of you in pursuing your common interests as Co-Executors of this Estate, as a consequence of which each of you must be willing to make independent decisions concerning whether you should agree to the resolution of any conflicts that you may have among or between you.

3. I have to deal fairly and impartially with each of you; no information that I receive or that anyone in my office receives is confidential between or among you.

4. I will be required to disclose information to each of you if that information will materially affect the position of any of you or would work a fraud on any of you, even if you request me not to do so.

5. I will be required to correct any false or misleading statements or material omissions relating to my representation made by or on behalf of any of you, if the failure to do so would materially affect the position of any of you in this matter or would work a fraud on any of you even if requested not to do so.

6. I will be required to withdraw in the event any of you request me to or, if in my judgment or your judgment, I cannot move this Estate forward in an expeditious manner. I will not be able to continue representing any of you unless you later decide that we can enter into a joint representation agreement, again.

7. A major advantage to having one lawyer represent all of you is that it usually results in substantial savings of legal fees as well as time.

If this is satisfactory, please sign this document and return it to me. I cannot go forward on this matter until I receive a signed copy of this from all of you. Even though I have disclosed all of this information and much more to you, verbally, I need this to satisfy the rules that govern my work as a lawyer by sending this letter to you, having you sign it and return it to me before I get started. I am also sending you a copy of the Agreement for Representation-Probate regarding fees and other matters that supplements this agreement.

Sincerely yours,

LAWYER

AGREED and ACCEPTED:

______________________________	______________
Client 1	Date
______________________________	______________
Client 2	Date
______________________________	______________
Client 3	Date

Enclosure: Agreement for Representation – Probate

APPENDIX I

Litigation and General Matters Agreement

____________________, 20___

____
____
____

Re: ***Agreement for Representation for Litigation and General Matters***

Dear Client:

THIS IS A LEGAL CONTRACT BETWEEN YOU AND THE LAW FIRM. YOU ARE ADVISED TO HAVE INDEPENDENT LEGAL COUNSEL REVIEW THIS CONTRACT ON YOUR BEHALF. THE LAW FIRM CANNOT REPRESENT YOU IN CONNECTION WITH THE NEGOTIATION, PREPARATION, OR EXECUTION OF THIS ENGAGEMENT LETTER.

Please read this letter carefully. It describes the terms and conditions under which [Law Firm] will undertake to represent you in connection with the legal matter described below. Our firm policy requires that each client sign a copy of this letter, agreeing to the terms and conditions set forth below, before we can engage in any representation. The terms and conditions of our agreement for engagement are as follows:

1. Scope of Engagement.

1.1. **Description of Representation**. You are retaining and employing us as your attorneys, to represent and provide legal services to you in connection with ____ ____(all referred to in this agreement as the "Legal Matter"). This representation will include advising, counseling, negotiating, investigating, handling, prosecuting and/or defending such legal matters, to final settlement or adjudication. If you decide to engage us for additional legal matters, the terms and conditions of this agreement will apply to those matters as well but we will also require a separate written agreement specific to those matters which must be signed by you and us.

1.2. **Use of Other Consultants and Assistance**. By signing this agreement, you are authorizing us to do whatever is reasonably necessary and appropriate, in our professional judgment, to represent you properly, and to incur the costs and expenses reasonably necessary to handle your matter. This includes the authorization and power to associate or employ such other persons or entities as we may deem necessary to assist us, such as consultants, support services, technical experts, or other attorneys who are not members of our firm (either "local counsel" in a distant forum, or contract legal services with attorneys or legal assistants). You will be consulted before any professionals or other experts are hired by us. In an effort to reduce overall legal costs, we may utilize legal assistant personnel and other support staff whenever appropriate. All such services are performed under the direction and supervision of an attorney, and within our discretion and judgment.

2. Cooperation.

2.1 **Full Disclosure and Cooperation.** In order to enable us to effectively render the legal services contemplated by this agreement, you agree to fully and accurately disclose all facts and to keep us informed of all developments relating to the Legal Matter. We have to rely on the accuracy and completeness of the facts and information and that you and your agents provide to us because your bill would be very expensive if we have to independently verify everything you disclose to us. To the extent it is necessary for you or your representatives to attend meetings in connection with the Legal Matter, we will attempt to schedule them in cooperation with you. Likewise, you must give us adequate notice if you will not be able to attend a meeting or provide information as requested. You acknowledge and agree that it is important to cooperate with us in scheduling meetings, conducting phone calls, reviewing documents, and providing responses to requests for information from us or the professionals or experts that we may employ. You agree to cooperate with us, to the best of your ability, in order to successfully conclude our representation of you.

2.2 **Permission to Investigate Credit and Background**. You agree that we may investigate your personal and professional background and may check your credit history in deciding whether or not to represent you.

3. Fees.

3.1. **Basis for Fees**. Our firm's fees are based on the time spent by the lawyers and firm personnel on who work on the matter. You understand that, by accepting representation of you in this matter, we may have to forego representation of other clients with a resulting loss of fees. You also acknowledge that our fees are set on the basis of what we consider to be a fair and reasonable charge for the services rendered, based upon the time, labor and skill required to perform the legal services properly, as well as the fee customarily charged by other attorneys for similar legal services. The fee is not set by law, but is negotiable.

3.2. **Hourly Rates**. Our fees for legal services are based on the attached schedule.

Our hourly rates usually increase at the beginning of each calendar year to take into account current levels of legal experience, changes in overhead costs and other factors. This increase will most likely be in the range of $10 to $30 per hour.

You will be billed at the applicable hourly rate for all legal services that we provide. This may include legal research, drafting of pleadings, conferences, telephone conversations, preparation of documents, investigation of facts, preparing for and taking depositions, preparation for and appearances in court, and other tasks necessary to adequately handle the matter in controversy. You will also be billed for the time that we spend talking with you about the Legal Matter, sending you correspondence, or responding to requests for information from you or your representatives. An attorney's time involved in out-of-office representation will be measured from the time the attorney leaves the office until the attorney arrives back at the office. All time will be billed in minimum increments of one-quarter (1/4) hour, even though the time spent may be less than one-quarter (1/4) hour.

We reserve the right to deduct any outstanding fees, charges, expenses and interest that you owe us from any settlement or award to you in connection with the Legal Matter.

3.3. **Costs and Expenses**. In addition to our fees, you will be billed for other items incurred in connection with the performance of our legal services, such as filing fees, court costs, photocopying and other duplication costs, long distance telephone calls, facsimile transmissions, delivery charges, travel expenses, deposition costs, and specialized computer applications such as computerized legal research or public records searches. Unless special arrangements are otherwise made, the fees and expenses of other consultants and professionals (such as experts, investigators, accountants, appraisers, records handlers, consultants, or specialized or local legal counsel) incurred on your behalf will be billed directly to you, and you will be responsible for paying them. Also, all invoices for costs and expenses in excess of $200 will be forwarded to you for direct payments.

Occasionally, when a bill for a specific matter is rendered near the conclusion of the matter, posting of some time and charges (such as telephone, copying, court costs, or similar items) may be delayed, or there may be an invoice which is not delivered to us until after the legal matter has been finalized. In such cases, the "after closing" expenses will also be billed to you, even though you may have previously received what was designated as a "final" bill. You will be responsible for paying these "after closing" expenses.

3.4. **DEPOSIT**. IT IS OUR USUAL PRACTICE TO REQUIRE PAYMENT OF A DEPOSIT BEFORE WE BEGIN WORK FOR A CLIENT. WE HAVE ASKED THAT YOU REMIT AND MAINTAIN WITH US, DURING THE ENTIRE COURSE OF OUR REPRESENTATION OF YOU IN THIS MATTER, AN INITIAL DEPOSIT IN THE AMOUNT OF $_____________(THE "DEPOSIT"). WE WILL PLACE THE DEPOSIT INTO OUR TRUST ACCOUNT. WE WILL SEND YOU MONTHLY STATEMENTS FOR FEES AND EXPENSES. YOU AGREE TO PAY THE AMOUNT DUE IN FULL EACH MONTH. THE DEPOSIT WILL STAY ON DEPOSIT IN OUR TRUST ACCOUNT. UPON THE TERMINATION OF OUR SERVICES, WE WILL PROMPTLY REFUND THE DEPOSIT TO YOU, LESS ANY BALANCE FOR FEES AND EXPENSES UNPAID AS OF THE DATE OF OUR FINAL BILL.

WE RETAIN THE RIGHT AND DISCRETION TO REQUEST A SUPPLEMENTAL COST DEPOSIT, OVER AND ABOVE THE INITIAL DEPOSIT, IN THE EVENT OF AN INCREASE IN OUR ANTICIPATED FEES AND EXPENSES DURING THE COURSE OF REPRESENTING YOU. IF WE MAKE SUCH A REQUEST, YOU WILL AGREE TO PROMPTLY DELIVER THE ADDITIONAL DEPOSIT TO US.

3.5. **Monthly Statements**. We will normally submit a bill to you on a monthly basis, and it is due and payable upon receipt. Each lawyer and support staff personnel contemporaneously records the time required to perform services, and these time records are put into a computer that generates a monthly bill which we try to send out around the end of the month. This bill describes the services performed and the expenses incurred. We encourage you to review the bill and to contact us if you have any questions about the services described or the expenses incurred. If we do not hear from you, we will presume that you understand and approve of the charges included in the monthly statement. If you ask us to do so, we will bill you by email.

There may be occasions involving unforeseen circumstances when a bill will go unpaid. In such instances, we will attempt to work with you, if you communicate the nature of the delay to us. However, we expect you to pay us on time each month; we do not want to become your creditor.

3.6. **INTEREST ON PAST DUE AMOUNTS**. UNLESS WE OTHERWISE AGREE WITH YOU IN WRITING, UNPAID FEES AND EXPENSES WILL BE CONSIDERED PAST DUE IF NOT PAID WITHIN THIRTY (30) DAYS OF THE BILLING DATE. ALL PAST DUE AMOUNTS SHALL BEAR INTEREST AT THE RATE OF 1.5% PER MONTH (18% ANNUAL PERCENTAGE RATE), OR THE MAXIMUM RATE ALLOWED BY LAW, UNTIL PAID. INTEREST CHARGES WILL BE CALCULATED ON ALL PAST DUE AMOUNTS AND ADDED TO THE NEXT MONTH'S BILLING STATEMENT.

3.7. **Failure to Pay Fees**. You agree that we have no responsibility to perform any further work for you, if you fail to pay any monthly statement for fees and expenses (including bills for expenses received from third parties), or to timely respond to a request for a supplemental cost deposit, as stated above. By your signature on this engagement agreement, you also acknowledge and agree that, in accordance with Texas Law, we have a right to assert a lien against your files to secure payment of any unpaid amounts you owe us.

3.8. **Awards of Attorneys' Fees**. Occasionally, we will request reasonable attorneys' fees from another party in a legal proceeding. Regardless of how any court rules with respect to the award of attorneys' fees (or how the court rules on the reasonableness of legal fees requested in any pleading), you are agreeing to pay us the fees set forth in this engagement Agreement. If we receive any compensation as the result of an award of attorneys' fees, then we will, in our discretion, either: (1) credit such receipt to the amount of any unpaid bill, or (2) reimburse you for the amount of the receipt (if, and only if, you do not owe us any fees or expenses at the time that the attorneys' fees are received).

3.9. **Estimates of Fees**. During the course of our discussion with you about handling the Legal Matter, we may have provided you with certain estimates of the size of fees and expenses that will be required at certain stages. It is our firm policy to advise all of our clients that such estimates are our best guess, and that the fees and expenses required are ultimately a function of many conditions over which we have little or no control, particularly the extent to which the opposition files pretrial motions and engages in its own discovery. The reason why we submit bills to our clients on monthly basis, shortly after the services are rendered, is so that you will have a ready means of monitoring and controlling the legal costs you are incurring. If you believe the expenses are mounting too rapidly, you need to contact us immediately so that we can assist you in evaluating how they might be curtailed in the future. If we do not hear from you, you will be deemed to have approved of the overall level of activity on our part in this case on your behalf.

4. Conflicts of Interest. One of the most important considerations which we must have in accepting an engagement is whether the engagement will put us in conflict with any existing client interest. If we discover such a conflict after we have begun work for you, we may be disqualified from continuing our representation of you. You acknowledge that it is, therefore, very important for you to consider all the interests which are involved in the Legal Matter, to be certain that you have advised us fully in that regard. If we, in our judgment and discretion, determine that a conflict of interest does exist, we will notify you and all other affected clients, and will proceed in a manner consistent with the ethical standards contained in the Texas Disciplinary Rules of Professional Conduct (the "Disciplinary Rules").

5. Withdrawal from Representation.

5.1. **Withdrawal of Firm**. You have requested our advice and counsel as a part of our services to you. In order for our representation of you to be successful, it is important that you follow our advice, reasonably cooperate with us, and abide by the terms and conditions of this agreement. If any of the following events occur, we reserve the right to withdraw from representing you in this matter at any time:

(a) You insist that we present a claim or defense that is not warranted under existing law and cannot be supported by a good-faith argument for an extension, modification, or reversal of existing law;

(b) You seek to pursue an illegal course of action;

(c) You fail to follow our advice or to reasonably cooperate with us, or, by your conduct, you render it unreasonably difficult for us to represent you;

(d) You insist that we engage in a course of conduct that is illegal or that is prohibited under the lawyers' Disciplinary Rules;

(e) You insist that we engage in conduct that is contrary to our judgment and advice, but not prohibited under the Disciplinary Rules;

(f) You fail to timely pay statements for our fees, expenses or costs, or you otherwise fail to fulfill or abide by the terms and conditions of this agreement;

(g) We determine, in our sole judgment and discretion, after further investigation, that the facts related to the Legal Matter are materially different from those you represented to us and upon which our agreement to represent you was based; or

(h) We are required to withdraw due to a conflict in interest, because an attorney with the firm becomes a witness in the case, or for any other reason required under the Disciplinary Rules.

In any of these events, you agree that we may move to withdraw as your counsel in any suit in which we have made an appearance on your behalf or from any matter in which we are representing you, and that you will promptly execute any documents required to accomplish this.

If we withdraw for any reason, we will take reasonable steps to avoid foreseeable prejudice to your rights, including giving proper notice, allowing reasonable time for you to employ other counsel, delivering to you all papers and property to which you are entitled, and complying with applicable laws and rules.

5.2. **Withdrawal by You**. It is our desire and goal that you be satisfied with our legal services at all times. At any time you wish, however, you may cease to use our services by notifying us in writing. You will be still responsible for payment of any and all fees, expenses, and costs that have been incurred in connection with our representation of you prior to the date that we receive your written notice as well as the obligation to pay our then current hourly rates if we are called to testify or assist in another matter.

5.3. **Resolution of Case; Death or Dismissal of Parties**. In the event of a bona fide resolution of the Legal Matter by the parties, or in the event that our services are no longer necessary for any reason, you must pay us or make suitable arrangements for the payment of the total amount of all fees, expenses, and costs still outstanding before the signing and filing of the instruments necessary to resolve the matter or terminate our services. If you die or are declared legally incompetent while any outstanding amount is owed to us under this agreement, your estate or guardian will owe us for those amounts.

5.4. **Suit for Fees**. In the event of any dismissal, withdrawal, or termination of our representation of you under this agreement, you agree and understand that the terms of this engagement Agreement pertaining to the payment of fees, costs and/or expenses for our services rendered up to and including the date of such dismissal, withdrawal or termination of representation shall remain in full force and effect. If we are compelled to intervene in a pending Lawsuit or to initiate any subsequent Lawsuit in order to cover those fees, costs, and/or expenses, you agree to pay us, in addition to the fees, costs and/or expenses due us, any and all attorneys' fees, costs and/or expenses incurred in that legal action.

6. No Income Tax Advice. You understand that our representation does not include rendering any income tax advice to you or the preparation of any income tax returns. You must seek such advice from your accountant or other financial advisor.

7. FAVORABLE OUTCOME NOT GUARANTEED. ALTHOUGH WE WILL USE OUR BEST REASONABLE, ETHICAL AND PROFESSIONAL EFFORTS IN REPRESENTING YOU, WE CANNOT PREDICT OR GUARANTEE THE RESULTS OF OUR EFFORTS OR THE OUTCOME OF THE LEGAL MATTER. YOU UNDERSTAND THAT WE HAVE MADE NO REPRESENTATION CONCERNING THE SUCCESSFUL DETERMINATION OR RESOLUTION OF THE LEGAL MATTER OR RELATED CLAIMS OR THE FAVORABLE OUTCOME OR ANY LEGAL ACTION THAT IS OR MAY BE FILED, AND WE HAVE NOT GUARANTEED THAT WE WILL OBTAIN REIMBURSEMENT TO YOU OF ANY OF THE FEES, COSTS, AND/OR EXPENSES INCURRED BY YOU IN THE PROSECUTION OR DEFENSE OF THE LEGAL MATTER. YOU FURTHER EXPRESSLY ACKNOWLEDGE THAT ALL STATEMENTS FROM US ON THESE MATTERS ARE STATEMENTS OF OPINION ONLY.

8. Document Retention. Although we attempt to retain copies of most documents generated by our firm, we are not responsible in any way for keeping copies (electronic or otherwise). We ask that you keep all originals and copies that you desire among your own files, for future reference. If you do not keep the copies, we cannot be responsible for the document no long being able to be found.

9. Mediation. Before resorting to litigation or arbitration, any disputes arising out of or connected with this engagement agreement (including but not limited to the services performed by any attorney under this agreement) will be submitted to non-binding mediation in Washington County, Texas, in accordance with the rules for alternative dispute resolution set forth under Texas law. You and we will mutually cooperate to select the mediator to be used. Any and all information, negotiation, and results of the mediation will remain confidential. The mediation is not binding on either party.

10. Entire Agreement; Amendment. This engagement agreement constitutes the entire agreement between us with respect to the matters contained in it. This agreement may not be modified or revoked unless by a written agreement signed by both parties, which will be attached to this agreement and made a part of it.

11. **Controlling Law**. This agreement will be governed, construed, interpreted and enforced under the laws of the State of Texas.

12. **Complaints and Grievances**. All lawyers in Texas have an obligation to maintain a high standard of ethical conduct toward their clients and others. To enforce this standard, the State Bar of Texas investigates and prosecutes complaints of professional misconduct against attorneys licensed in Texas. Although not every complaint against or dispute with a lawyer involves professional misconduct, the State Bar office of General Counsel will provide you with information about how to file a complaint. If you feel that misconduct may have occurred, or if you have questions regarding the disciplinary process, you may call or write the State Bar of Texas, P.O. Box 12487, Austin, Texas 78711, (512) 463-1381 or 1-800-932-1900 (toll free). By your signature below, you acknowledge a receipt of the Texas Lawyer's Creed, which is attached to this agreement.

13. **Place for Performance**. You agree that the place for performance for the majority of work to be performed under this Agreement is in Washington County, Texas.

14. **Witness**. You understand that if any attorney in the firm is called as a witness or asked to assist others acting on your or your estate's behalf in a later proceeding, you bind yourself and your estate to compensate us at our then prevailing hourly rates which will be disclosed to you or the representative of your estate at the time.

15. **Optional Provisions Regarding Authorized Agents**. I agree that ____ is/are authorized by me to receive confidential information from the Attorney, but it is not intended by me to have that information disclosed to third persons.

I designate ____as my agent(s) to obtain legal services from or to act on advice rendered by the Law Firm on my behalf and to have all Claims & Litigation powers under Section 752.110, Texas Estates Code. This is intended to be a power of attorney. This power of attorney is not affected by the subsequent disability or incapacity of the principal.

16. **Electronic Mail and Voice Mail**. We use electronic mail ("email") and voice mail. Email is not a secure communication. If you use a work computer to send emails, your employer may have access to those emails. It is possible for third parties to illegally obtain information from emails. Please indicate below if we have your permission to communicate with you by email.

You should not consider that any communication by you to us by email or voice mail is received until it is acknowledged by a return email or telephone call by us. If your email or voice mail is not acknowledged in what you consider a reasonable amount of time, please follow up with a telephone call directly to us at the office. To effectively follow up on an unacknowledged email or voice mail to us at the office, you need to make sure you are speaking live to a person at the office (rather than by leaving a voice mail).

17. **Attorney Privacy and File Maintenance Policy**.

17.1 **Privacy Policy as to Social Security Numbers and other Private Information**:

a. SOCIAL SECURITY NUMBERS AND DRIVER'S LICENSE NUMBERS ARE ONLY USED AS NEEDED AND AS REQUIRED BY LAW.

b. THESE PRIVATE NUMBERS ARE USED TO IDENTIFY PARTIES WHETHER FOR INITIAL SERVICE OF COURT DOCUMENTS, FOR CERTAIN COURT ORDERS, IN REQUIRED REPORTS FILED WITH THE STATE OF TEXAS, OR FOR OTHER REQUIRED PURPOSES.

c. THESE PRIVATE NUMBERS RECEIVED FROM A CLIENT ARE CONFIDENTIAL AND ARE NOT RELEASED FROM THE FIRM UNLESS AUTHORIZED BY THE CLIENT OR REQUIRED BY LAW.

d. THE EMPLOYEES OF THE FIRM HAVE ACCESS TO THIS PERSONAL INFORMATION BUT SHALL NOT RELEASE IT WITHOUT ATTORNEY APPROVAL.

e. YOUR INFORMATION IS KEPT SECURE WITHIN THE FIRM IN FILE FOLDERS, FILE DRAWERS, AND COMPUTERS, UNTIL SUCH TIME THAT THE FILE INFORMATION IS RETIRED AND THE FILE REMOVED TO STORAGE IN COMPUTER FILES OR A LOCKED STORAGE FACILITY. THE CLIENT INFORMATION WILL EVENTUALLY BE DELETED.

17.2. **File Information**. During our representation of you, we will be sending you copies of all important contracts, pleadings, letters, notices and other material which we believe you should review. Our office strives to maintain these documents in digital (paperless) format, so more often these copies shall be in digital format, for ease of retention and portability. You should have a secure place to keep these documents. If you need additional paper copies at any time, we can make those at your expense

for our copy fees. Clients may control such costs by keeping digital copies. Should you believe your particular file requires an encryption, you should advise us of the form of such encryption. If our office is required to secure encryption software specifically for your case, the cost of that software shall be included in your bill.

17.3 **Document Retention**. You agree that we are not responsible for keeping copies of your documents. You agree to keep all originals and copies that you desire among your own files for future reference. You are advised to retain all confidential information or original documents from our file as received. You otherwise authorize us to destroy in a secure manner the information contained in our file when the legal service is complete.

17.4. **HIPAA Provisions**. Under Texas Health and Safety Code, Sec. 181.154 – HB 300, effective September 1, 2012, because we gather, store, and electronically transmit medical records (Protected Health Information – PHI) in the course of our representation of our clients, we are required to post a notice to clients that their protected health information is subject to electronic disclosure. Texas and federal law prohibits any electronic disclosure of a client's protected health information to any person without a separate authorization from the client or the client's legally authorized representative for each disclosure. This authorization for disclosure may be made in written or electronic form or in oral form if it is documented in writing by Attorney.

The authorization for electronic disclosure of protected health information described above is not required if the disclosure is made to another covered entity, as that term is defined by Section 181.001, Texas Health & Safety Code, or to a covered entity, as that term is defined by Section 602.001, Texas Insurance Code, for the purpose of treatment; payment; health care operations; performing an insurance or health maintenance organization function described by Section 602.053, Texas Insurance Code, or as otherwise authorized or required by state or federal law. In other words, no further release is necessary for electronic disclosure to other health care providers, insurance companies, governmental agencies, or defense lawyers representing adverse parties.

18. Social Media and Blogging. The success that we achieve may depend in large measure on a client's personal credibility, appeal, appearance, and integrity by those who may be in a position to review those characteristics, including judges, hearing examiners, opposing counsel, and potential jurors. The amount of information which appears online may dramatically influence those judgments. Lawyers are additionally under a duty not to destroy existing evidence, nor counsel you to impermissibly change your presence except in permissible ways.

Therefore, during the firm's representation of you, it is likely that we will review, with your assistance, your social media presence, which will include any and all of the following:

- Personal and/or business websites
- Professional profile accounts, such as Linked In
- Facebook accounts for you and any close family member
- Any internet blog or writings
- Active or recent Messaging apps including Twitter, Snapchat, Youtube, or other;
- Other social, professional or membership where you have an internet presence.

Our goal in this review is to effect permissible options, such as increasing privacy options, to remove items, such as certain photos, or albums, or postings which may reflect poorly on your judgment, or may be misconstrued by the viewer. Under no circumstances may you or the firm take a false position that those postings did not exist, nor take steps to permanently destroy such pre-existing evidence.

In certain situations, our advice may be to discontinue an account completely during this legal matter. Be aware that everything you post may be used against you, and your most regrettable post will be the one people often remember.

(i) Immediate steps:

a. Change passwords on all accounts (including email accounts) to strengthen them against hacking or unauthorized access. Do not share your new passwords with anyone, including family members.

b. Never post anything on line about this case, including events, advice, your feelings or frustrations, or the feelings of other family members. All such postings are fodder for opposing parties.

c. Never post financial information or communications with your attorneys or forward emails from our office to any third party, as that will risk destroying the legally privileged nature of such attorney-client communication.

(ii) Communication from Third Parties. Be especially wary of contacts from unknown people, especially those sending attachments which might contain malware. If you are in doubt, deleting the incoming email completely is the safest route.

(iii) <u>Blogging</u>: If you are required to post a blog as part of a business, follow these same instructions: never mention your case, its progress, communications or advice, or your personal sentiments. If you are not required to blog, consider greatly reducing entries, as again, your entries can be misconstrued or taken out of context in a way which damages your credibility.

(iv) <u>Posting in General</u>: Before using any social media, consider every negative connotation that could be attached. Depending on the subject of our representation, we will recommend various degrees of reduction regarding further posting of photos, videos, articles and other commentary. We will expect you to follow our advice in this regard.

19. ACKNOWLEDGMENT OF AGREEMENT. WE HAVE DISCUSSED WITH YOU THE TERMS AND CONDITIONS OF OUR ENGAGEMENT BECAUSE WE BELIEVE THAT YOU ARE ENTITLED TO KNOW OUR POLICIES, AND IN ORDER TO AVOID ANY MISUNDERSTANDINGS LATER. BY YOUR SIGNATURE BELOW, YOU ACKNOWLEDGE THAT, IN ADDITION TO YOUR HAVING READ THIS AGREEMENT IN ITS ENTIRETY, WE HAVE ANSWERED ANY QUESTIONS THAT YOU MAY HAVE CONCERNING THE AGREEMENT, AND THAT YOU UNDERSTAND THE AGREEMENT TO YOUR SATISFACTION AND UNDERSTANDING AND CONSIDER IT TO BE FAIR AND REASONABLE. BY YOUR SIGNATURE, YOU ALSO ACKNOWLEDGE THAT YOU HAVE BEEN ADVISED BY US TO RETAIN SEPARATE INDEPENDENT LEGAL COUNSEL TO REPRESENT YOU IN CONNECTION WITH THE NEGOTIATION AND EXECUTION OF THIS AGREEMENT AND THAT YOU HAVE HAD SUFFICIENT TIME TO DO SO. BY SIGNING BELOW, YOU ARE AGREEING TO THE TERMS AND CONDITIONS CONTAINED IN THIS ENGAGEMENT LETTER.

ACCEPTED:

CLIENT:

____ ________________________
Date

_______ Yes. I understand email is not a secure communication. We may communicate
Initial with you via email. Preferred Email Address: ____

_______ No. We may not communicate with you via email.
Initial

STATE OF TEXAS §
§
COUNTY OF WASHINGTON §

The foregoing instrument was acknowledged before me on the _____day of _______________________, 2019 by __________________________________.

____
Notary Public, State of Texas

LAW FIRM

By:____ ________________________
Date

Fee and Expense Schedule – 20XX

R. Hal Moorman	$XXX
Andrew J. Hefferly	$XXX
Christopher S. Hardy	$XXX

Emily G. De Young	$XXX
Support Staff	$XXX
Probate	$XX/$XX/$XXX
Law Clerks	$XX
Clerks	$XX

Expenses

Copying	15¢ per page in firm or cost of copy service
Incoming Fax; Local Outgoing Fax	15¢ per page
Outgoing Long Distance Fax	Long distance call expense plus ten percent
Long Distance Calls	Cost to firm plus ten percent
Other Expenses	Cost to firm
Costs Advance	Cost to firm

APPENDIX J

Estate Planning Engagement Letter (Fixed Fee)

Dear Client:

THIS IS A LEGAL CONTRACT BETWEEN YOU AND THE LAW FIRM. YOU ARE ADVISED TO HAVE INDEPENDENT LEGAL COUNSEL REVIEW THIS CONTRACT ON YOUR BEHALF. THE LAW FIRM CANNOT REPRESENT YOU IN CONNECTION WITH THE NEGOTIATION, PREPARATION, OR EXECUTION OF THIS ENGAGEMENT LETTER.

Services. I employ the firm of ________________________ (hereinafter called "Attorney"), to represent me in the preparation of simple wills / tax planning wills / wills with disclaimer trusts / special needs trust wills / durable powers of attorney / medical powers of attorney / directives to physicians / designations of guardian / designation of guardian for child-incapacity / designation of agent for burial / irrevocable life insurance trust / revocable or living trust with pourover wills / Buy-Sell Agreement / Family Limited Partnership / 2503(c) Trust for Minors / Beneficiary Designations for Insurance Policies, IRAs and Other Retirement Plans **(does not include dealing with the insurance company or IRA provider to implement the designation – this will be an additional charge determined on an hourly rate basis)** / Qualified Personal Residence Trust (QRPT) / Private Foundation / Sale to intentionally Defective Trusts / Review of Account Designations on all bank and brokerage accounts and dealing with the insurance company or IRA provider to implement the beneficiary designation **(this will be charged on an hourly rate basis as shown on the attached schedule and, if chosen, will not be included in any lump sum fee)**, other: ____________________ ____ ____________________. (Items circled are services requested)

The estate planning techniques listed above are not intended to be a comprehensive list of estate planning techniques. The attorney and I have reviewed and discussed these and other alternatives. I have elected to use only those techniques circled or written in above and no others.

Out of Office Signing. I understand that the attorney wants me to sign these documents at the attorney's office to make sure they are signed properly. If the documents are to be signed at a location other than the attorney's office, the expenses and time involved will be billed at the rates shown on the attached sheet and are in addition to the other fees quoted in this letter.

For Married Clients. I also realize that the characterization of property as separate, community, or separate with community rights of reimbursement is important. I understand that agreements such as community property conversion agreements and post-nuptial partition agreements can clarify and change the nature of property. I have elected to do only that which is circled or written in above and nothing else.

Fees. In consideration of this representation, I agree to pay at the offices of MOORMAN TATE, LLP, in Brenham, Texas, the following: $__________________________. This fee covers the initial conference, the planning and preparation of a draft of the documents, a conference regarding any misspelled names or typographical errors, and a final conference to explain and sign the documents. If there are more changes because of changes requested by me other than what was requested in the initial conference, if the information I supply is inaccurate or incomplete, if I request other work than that described herein, if I do not give complete information to prepare the documents at the initial conference, or if I fail to sign the documents before sixty (60) days after I receive them, I will be charged for the changes, additional work, the additional conference(s) to get complete information, or any time spent on this matter at the rates shown on the attached sheet. Each portion of a quarter hour is billed as a full quarter hour. All work is done and all fees are payable in Brenham, Texas. The hourly rates usually increase at the beginning of each calendar year to take into account current levels of legal experience, changes in overhead costs, and other factors. This increase will most likely be in the range of $10 to $50 per hour. Costs paid to third parties are billed at cost.

Payment Terms. I agree to pay all of the fee immediately. I agree to sign the documents within sixty (60) days after I receive them. If I fail to do so, all work done after that date will be charged on the hourly rate basis described above. I agree that one-half of any fixed fee is earned after the initial conference. The remainder of the lump sum fee is earned when the documents are prepared.

Permission to Investigate Credit and Background. I agree that the Attorney may investigate my personal and professional background and may check my credit history in deciding whether or not to represent me.

Citizenship and Document Review. I agree to read the documents thoroughly and notify the Attorney of any misspelled names or other errors obvious to me. Unless otherwise indicated on the contract, I am a United States citizen.

Schedule A of IRS Form 8971. If you have received a Schedule A of IRS Form 8971, it is extremely important that we receive a copy of that document if you are making a gift, a contribution to a trust or a tax-free contribution to a corporation, partnership, LLC or other business entity. We need to have this before you make any transfers.

Witness. I understand that if the Attorney is called as a witness or asked to assist others acting on my or my estate's behalf in a later proceeding, I bind myself and my estate to compensate the Attorney at the Attorney's then-prevailing hourly rates.

Mediation. In the unlikely event I have a disagreement with the Attorney, before resorting to litigation or arbitration, any disputes arising out of or connected with this engagement agreement (including but not limited to the services performed by Attorney under this agreement) will be submitted to mediation in Washington County, Texas, in accordance with the rules for alternative dispute resolution set forth under Texas law. I and Attorney will mutually cooperate to select the mediator to be used. Any and all information, negotiation, and results of the mediation will remain confidential.

Confidentiality. I understand that, generally, all information I provide to the Attorney will be kept confidential and will not be disclosed to persons outside the Attorney's office without my consent. However, I authorize the Attorney to discuss my estate planning and share my confidential information: (1) with other of my professional advisors (such as CPAs, financial planners, insurance agents, etc.); (2) with persons named as an agent, trustee or other fiduciary in estate planning documents signed by me or prepared at my request; and (3) whenever my mental capacity is in question, with my children and other immediate family members, my health care providers, and other interested persons.

Other clients. I agree that under the rules that govern the practice of law, the Attorney can continue to represent existing and new clients regarding their estate planning or other matters even if these other clients are related to me (professionally or personally). I understand that, without prior permission, the Attorney will not reveal any confidential information of mine to these other clients and the Attorney will not relate any of the confidential information of the other clients to me. Regarding other immediate family members (immediate family members means parents and children), if they call the Attorney, the Attorney will first seek my permission to represent the other immediate family members. I will let the Attorney know if there is a conflict between my desires and the desires of these other immediate family members to the extent I am aware of any conflict. I also understand that if the Attorney becomes aware of a conflict, the Attorney will withdraw from representation of the last immediate family member who has hired the Attorney and will continue to represent the other immediate family member that the Attorney represented first.

Future legal services. I understand that changes likely will occur in tax, property, probate, and other laws which could impact my estate plan. The Attorney cannot economically review my file to determine the impact of changes in the law. Changes likely will occur in my own family, in marital circumstances, and in my finances, all of which could impact my estate plan. I understand I should contact the Attorney to have my plan reviewed regularly and I will be charged by the Attorney at the then prevailing hourly rates to answer questions and review my documents or estate plan.

Termination. I have the right to fire the Attorney at any time and the Attorney has the right to resign as my attorney at any time. The Attorney's active role, as my attorney, will terminate when my documents are signed. However, no termination will waive any of the remaining provisions of this agreement, including: (1) my agreement to pay the Attorney for all work performed prior to termination, (2) my consent to complete disclosure of confidential information to me and to others (to the extent authorized above), (3) the Attorney's ethical duties to me, such as the Attorney's duty not to disclose my confidential matters to third parties (except as authorized above), and (4) the obligation of my estate to compensate the Attorney if called as a witness in a later proceeding.

INTEREST ON PAST DUE ACCOUNTS. UNPAID FEES AND EXPENSES WILL BE CONSIDERED PAST DUE IF NOT PAID WITHIN THIRTY (30) DAYS OF THE BILLING DATE. I AGREE TO PAY INTEREST ON PAST DUE AMOUNTS AT THE RATE OF 1.5 % PER MONTH (18% ANNUAL PERCENTAGE RATE), OR THE MAXIMUM RATE ALLOWED BY LAW, WHICHEVER IS LESS, UNTIL PAID. INTEREST CHARGES WILL BE CALCULATED ON ALL PAST DUE AMOUNTS AND ADDED TO THE NEXT MONTH'S BILLING STATEMENT.

Full Family and Financial Information. I have provided or have had others provide full family and financial information to the Attorney. I realize the documents prepared are based on this information I have supplied and are only as good as the information provided.

Place for Performance. The place for performance of this Agreement is Washington County, Texas.

Circular 230. I may ask the Attorney's advice regarding federal tax issues. The Internal Revenue Service (IRS) does not allow me to rely on informal tax advice rendered before I file my tax return to avoid tax penalties. If I want to rely on the Attorney's federal tax advice to avoid federal tax penalties, the IRS requires the Attorney to issue formal written tax opinions regarding the tax issue(s). Formal written tax opinions are not within the scope of this engagement. The IRS rules also prohibit someone else from using the advice the Attorney provides to me. All communications from the Attorney are intended for my use only and include, and are intended to reflect, in substance, the following notice:

> Treasury Circular 230 Disclosure: to the extent this communication contains any statement of tax advice, such statement is not intended or written to be used, and cannot be used, by any person for the purpose of, or as the basis for, avoiding tax penalties that may be imposed on that person. This communication if not intended to be used, and cannot be used for the purpose of promoting, marketing, or recommending to another party any matter addressed in this communication. This legend is attached pursuant to U.S. Treasury Regulations governing tax practice, to comply with requirements imposed by the Internal Revenue Service.

I will let the Attorney know if I want a formal, legal opinion regarding tax issues. I agree to sign a separate engagement letter with the Attorney to show I want such an opinion. I understand that the cost of such an opinion will be substantial given the IRS requirements.

Complaints and Grievances. All lawyers in Texas have an obligation to maintain a high standard of ethical conduct toward their clients and others. To enforce this standard, the State Bar of Texas investigates and prosecutes complaints of professional misconduct against attorneys licensed in Texas. Although not every complaint against or dispute with a lawyer involves professional misconduct, the State Bar office of General Counsel will provide you with information about how to file a complaint. If I feel that misconduct may have occurred, or if I have questions regarding the disciplinary process, I may call or write the State Bar of Texas, P.O. Box 12487, Austin, Texas 78711, (512) 463-1381 or 1-800-932-1900 (toll free). By my signature below, I acknowledge a receipt of the Texas Lawyer's Creed, which is attached to this agreement.

Electronic Mail. We use electronic mail ("email") and voice mail. Email is not a secure communication. If you use a work computer to send emails, your employer may have access to those emails. It is possible for third parties to illegally obtain information from emails. Please indicate below if we have your permission to communicate with you by email.

You should not consider that any communication by you to us by email or voice mail is received until it is acknowledged by a return email or telephone call by us. If your email or voice mail is not acknowledged in what you consider a reasonable amount of time, please follow up with a telephone call directly to us at the office. To effectively follow up on an unacknowledged email or voice mail to us at the office, you need to make sure you are speaking live to a person at the office (rather than by leaving a voice mail).

Privacy Policy as to Social Security Numbers and other Private Information:

a. SOCIAL SECURITY NUMBERS AND DRIVER'S LICENSE NUMBERS ARE ONLY USED AS NEEDED AND AS REQUIRED BY LAW.

b. THESE PRIVATE NUMBERS ARE USED TO IDENTIFY PARTIES WHETHER FOR INITIAL SERVICE OF COURT DOCUMENTS, FOR CERTAIN COURT ORDERS, IN REQUIRED REPORTS FILED WITH THE STATE OF TEXAS, OR FOR OTHER REQUIRED PURPOSES.

c. THESE PRIVATE NUMBERS RECEIVED FROM A CLIENT ARE CONFIDENTIAL AND ARE NOT RELEASED FROM THE FIRM UNLESS AUTHORIZED BY THE CLIENT OR REQUIRED BY LAW.

d. THE EMPLOYEES OF THE FIRM HAVE ACCESS TO THIS PERSONAL INFORMATION BUT SHALL NOT RELEASE IT WITHOUT ATTORNEY APPROVAL.

e. YOUR INFORMATION IS KEPT SECURE WITHIN THE FIRM IN FILE FOLDERS, FILE DRAWERS, AND COMPUTERS, UNTIL SUCH TIME THAT THE FILE INFORMATION IS RETIRED AND THE FILE REMOVED TO STORAGE IN COMPUTER FILES OR A LOCKED STORAGE FACILITY. THE CLIENT INFORMATION WILL EVENTUALLY BE DELETED.

File Information. During Attorney's representation of me, Attorney will be sending me copies of all important contracts, pleadings, letters, notices and other material which Attorney believes I should review. Attorney strives to maintain these documents in digital (paperless) format, so more often these copies shall be in digital format, for ease of retention and portability. I should have a secure place to keep these documents. If I need additional paper copies at any time, Attorney can make those at my expense for Attorney's copy fees. I may control such costs by keeping digital copies. Should I believe my particular file requires an encryption, I will advise Attorney of the form of such encryption. If Attorney is required to secure encryption software specifically for my case, the cost of that software shall be included in my bill.

Document Retention. I agree the Attorney is not responsible to keep copies of my documents. I agree to keep all originals and copies that I desire among my own files for future reference. I am advised to retain all confidential information or original documents from Attorney's file as received. I otherwise authorize Attorney to destroy in a secure manner the information contained in Attorney's file when the legal service is complete.

HIPAA Provisions. Under Texas Health and Safety Code, Sec. 181.154 – HB 300, effective September 1, 2012, because we gather, store, and electronically transmit medical records (Protected Health Information – PHI) in the course of our representation of our clients, we are required to post a notice to clients that their protected health information is subject to electronic disclosure. Texas and federal law prohibits any electronic disclosure of a client's protected health information to any person without a separate authorization from the client or the client's legally authorized representative for each disclosure. This authorization for disclosure may be made in written or electronic form or in oral form if it is documented in writing by Attorney.

The authorization for electronic disclosure of protected health information described above is not required if the disclosure is made to another covered entity, as that term is defined by Section 181.001, Texas Health & Safety Code, or to a covered entity, as that term is defined by Section 602.001, Texas Insurance Code, for the purpose of treatment; payment; health care operations; performing an insurance or health maintenance organization function described by Section 602.053, Texas Insurance Code, or as otherwise authorized or required by state or federal law. In other words, no further release is necessary for electronic disclosure to other health care providers, insurance companies, governmental agencies, or defense lawyers representing adverse parties.

Optional Provisions Regarding Authorized Agents. I agree that ____ ______________________________is/are authorized by me to receive confidential information from the Attorney, but it is not intended by me to have that information disclosed to third persons.

I designate ______________________________________as my agent(s) to obtain legal services from or to act on advice rendered by the Law Firm on my behalf and to have all Claims & Litigation powers under Section 752.110, Texas Estates Code. This is intended to be a power of attorney. This power of attorney is not affected by the subsequent disability or incapacity of the principal.

NOTE: MARRIED COUPLES SHOULD ALSO READ AND SIGN THE ATTACHED JOINT REPRESENTATION ADVISORY AND CONSENT.

ALL CLIENTS SHOULD ALSO READ THE DOCUMENT ENTITLED "WARNING TO CLIENTS REGARDING JOINT TENANTS, SURVIVORSHIP, POD AND TRUSTEE ACCOUNTS".

I have read and understand the terms of this document.

SIGNED on _________________________, 2014

____ ____

Client Client

_______ Yes. I understand that email is not a secure communication.
Initial You may communicate with me via email.
Preferred Email Address: ____

_______ No. Please do not communicate with me via email.
Initial

STATE OF TEXAS §
§

COUNTY OF WASHINGTON §

The foregoing instrument was acknowledged before me on the _____day of _______________________, 2019 by ________________________________(client).

____
Notary Public, State of Texas

STATE OF TEXAS §
§
COUNTY OF WASHINGTON §

The foregoing instrument was acknowledged before me on the _____day of _______________________, 2019 by ________________________________(client).

____
Notary Public, State of Texas

Received the sum of $__________in the form of check/cash on _________________________, 201___.

APPENDIX J-1

Estate Planning Engagement Letter
(Hourly Rate and Fixed Fee)

Dear Client:

THIS IS A LEGAL CONTRACT BETWEEN YOU AND THE LAW FIRM. YOU ARE ADVISED TO HAVE INDEPENDENT LEGAL COUNSEL REVIEW THIS CONTRACT ON YOUR BEHALF. THE LAW FIRM CANNOT REPRESENT YOU IN CONNECTION WITH THE NEGOTIATION, PREPARATION, OR EXECUTION OF THIS ENGAGEMENT LETTER.

Services. I employ the firm of ________________________(hereinafter called "Attorney"), to represent me in the preparation of drafts of simple wills / tax planning wills / wills with disclaimer trusts / special needs trust wills / durable powers of attorney / medical powers of attorney / directives to physicians / designations of guardian / designation of guardian for child-incapacity / designation of agent for burial / irrevocable life insurance trust / revocable or living trust with pourover wills/ Buy-Sell Agreement / Family Limited Partnership / 2503(c) Trust for Minors / Beneficiary Designations for Insurance Policies, IRAs and Other Retirement Plans (does not include dealing with the insurance company or IRA provider to implement the designation – this will be an additional charge determined on an hourly rate basis) / Qualified Personal Residence Trust (QRPT) / Private Foundation / Sale to intentionally Defective Trusts / Review of Account Designations on all bank and brokerage accounts and dealing with the insurance company or IRA provider to implement the beneficiary designation (this will be charged on an hourly rate basis as shown on the attached schedule and, if chosen, will not be included in any lump sum fee), other: ________________________________
____.
(Items circled are services requested)

The estate planning techniques listed above are not intended to be a comprehensive list of estate planning techniques. The attorney and I have reviewed and discussed these and other alternatives. I have elected to use only those techniques circled or written in above and no others.

Out of Office Signing. I understand that the attorney wants me to sign these documents at the attorney's office to make sure they are signed properly. If the documents are to be signed at a location other than the attorney's office, the expenses and time involved will be billed at the rates shown on the attached sheet and are in addition to the other fees quoted in this letter.

For Married Clients. I also realize that the characterization of property as separate, community, or separate with community rights of reimbursement is important. I understand that agreements such as community property conversion agreements and post-nuptial partition agreements can clarify and change the nature of property. I have elected to do only that which is circled or written in above and nothing else.

Fees. In consideration of this representation, I agree to pay at the offices of __________________, in ______________, Texas, as follows: (i) a fixed fee for the preparation of a draft of the documents of $____________ and (ii) on an hourly rate basis for all conferences, research and the finalization of documents to be billed at the rates shown on the attached sheet. Each portion of a quarter hour is billed as a full quarter hour. All work is done and all fees are payable in Brenham, Texas. The hourly rates usually increase at the beginning of each calendar year to take into account current levels of legal experience, changes in overhead costs and other factors. This increase will most likely be in the range of $10 to $30 per hour. Costs paid to third parties are billed at cost.

Payment Terms. I agree to pay all of the fixed fee immediately. I agree to sign the documents within sixty (60) days after I receive them. If I fail to do so, all work done after that date will be charged on the hourly rate basis described above. I agree that one-half of any fixed fee is earned after the initial conference. The remainder of the lump sum fee is earned when the documents are prepared.

For work done outside of the fixed fee, the hourly rates are earned as the work is done.

Permission to Investigate Credit and Background. I agree that the Attorney may investigate my personal and professional background as well as check my credit history in deciding whether or not to represent me.

Citizenship and Document Review. I agree to read the documents thoroughly and notify the Attorney of any misspelled names or other errors obvious to me. Unless otherwise indicated on the contract, I am a United States citizen.

Schedule A of IRS Form 8971. If you have received a Schedule A of IRS Form 8971, it is extremely important that we receive a copy of that document if you are making a gift, a contribution to a trust or a tax-free contribution to a corporation, partnership, LLC or other business entity. We need to have this before you make any transfers.

Payment Terms. I agree to pay half the fixed fee immediately and the other half upon the receipt of the documents. I agree to pay the hourly rates when billed.

Witness. I understand that if the Attorney is called as a witness or asked to assist others acting on my or my estate's behalf in a later proceeding, I bind myself and my estate to compensate the Attorney at the Attorney's then-prevailing hourly rates.

Mediation. In the unlikely event I have a disagreement with the Attorney, before resorting to litigation or arbitration, any disputes arising out of or connected with this engagement agreement (including but not limited to the services performed by Attorney under this agreement) will be submitted to mediation in Washington County, Texas, in accordance with the rules for alternative dispute resolution set forth under Texas law. I and Attorney will mutually cooperate to select the mediator to be used. Any and all information, negotiation, and results of the mediation will remain confidential.

Confidentiality. I understand that, generally, all information I provide to the Attorney will be kept confidential and will not be disclosed to persons outside the Attorney's office without my consent. However, I authorize the Attorney to discuss my estate planning and share my confidential information: (1) with other of my professional advisors (such as CPAs, financial planners, insurance agents, etc.); (2) with persons named as an agent, trustee or other fiduciary in estate planning documents signed by me or prepared at my request; and (3) whenever my mental capacity is in question, with my children and other immediate family members, my health care providers, and other interested persons.

Other clients. I agree that under the rules that govern the practice of law, the Attorney can continue to represent existing and new clients regarding their estate planning or other matters even if these other clients are related to me (professionally or personally). I understand that, without prior permission, the Attorney will not reveal any confidential information of mine to these other clients and the Attorney will not relate any of the confidential information of the other clients to me. Regarding other immediate family members (immediate family members means parents and children), if they call the Attorney, the Attorney will first seek my permission to represent the other immediate family members. I will let the Attorney know if there is a conflict between my desires and the desires of these other immediate family members to the extent I am aware of any conflict. I also understand that if the Attorney becomes aware of a conflict, the Attorney will withdraw from representation of the last immediate family member who has hired the Attorney and will continue to represent the other immediate family member that the Attorney represented first.

Future legal services. I understand that changes likely will occur in tax, property, probate, and other laws which could impact my estate plan. The Attorney cannot economically review my file to determine the impact of changes in the law. Changes likely will occur in my own family, in marital circumstances, and in my finances, all of which could impact my estate plan. I understand I should contact the Attorney to have my plan reviewed regularly and I will be charged by the Attorney at the then prevailing hourly rates to answer questions and review my documents or estate plan.

Termination. I have the right to fire the Attorney at any time and the Attorney has the right to resign as my attorney at any time. The Attorney's active role, as my attorney, will terminate when my documents are signed. However, no termination will waive any of the remaining provisions of this agreement, including: (1) my agreement to pay the Attorney for all work performed prior to termination, (2) my consent to complete disclosure of confidential information to me and to others (to the extent authorized above), (3) the Attorney's ethical duties to me, such as the Attorney's duty not to disclose my confidential matters to third parties (except as authorized above), and (4) the obligation of my estate to compensate the Attorney if called as a witness in a later proceeding.

INTEREST ON PAST DUE ACCOUNTS. UNPAID FEES AND EXPENSES WILL BE CONSIDERED PAST DUE IF NOT PAID WITHIN THIRTY (30) DAYS OF THE BILLING DATE. I AGREE TO PAY INTEREST ON PAST DUE AMOUNTS AT THE RATE OF 1.5 % PER MONTH (18% ANNUAL PERCENTAGE RATE),

OR THE MAXIMUM RATE ALLOWED BY LAW, WHICHEVER IS LESS, UNTIL PAID. INTEREST CHARGES WILL BE CALCULATED ON ALL PAST DUE AMOUNTS AND ADDED TO THE NEXT MONTH'S BILLING STATEMENT.

Full Family and Financial Information. I have provided or have had others provide full family and financial information to the Attorney. I realize the documents prepared are based on this information I have supplied and are only as good as the information provided.

Place for Performance. The place for performance of this Agreement is Washington County, Texas.

Circular 230. I may ask the Attorney's advice regarding federal tax issues. The Internal Revenue Service (IRS) does not allow me to rely on informal tax advice rendered before I file my tax return to avoid tax penalties. If I want to rely on the Attorney's federal tax advice to avoid federal tax penalties, the IRS requires the Attorney to issue formal written tax opinions regarding the tax issue(s). Formal written tax opinions are not within the scope of this engagement. The IRS rules also prohibit someone else from using the advice the Attorney provides to me. All communications from the Attorney are intended for my use only and include, and are intended to reflect, in substance, the following notice:

> Treasury Circular 230 Disclosure: to the extent this communication contains any statement of tax advice, such statement is not intended or written to be used, and cannot be used, by any person for the purpose of, or as the basis for, avoiding tax penalties that may be imposed on that person. This communication if not intended to be used, and cannot be used for the purpose of promoting, marketing, or recommending to another party any matter addressed in this communication. This legend is attached pursuant to U.S. Treasury Regulations governing tax practice, to comply with requirements imposed by the Internal Revenue Service.

I will let the Attorney know if I want a formal, legal opinion regarding tax issues. I agree to sign a separate engagement letter with the Attorney to show I want such an opinion. I understand that the cost of such an opinion will be substantial given the IRS requirements.

Complaints and Grievances. All lawyers in Texas have an obligation to maintain a high standard of ethical conduct toward their clients and others. To enforce this standard, the State Bar of Texas investigates and prosecutes complaints of professional misconduct against attorneys licensed in Texas. Although not every complaint against or dispute with a lawyer involves professional misconduct, the State Bar office of General Counsel will provide you with information about how to file a complaint. If I feel that misconduct may have occurred, or if I have questions regarding the disciplinary process, I may call or write the State Bar of Texas, P.O. Box 12487, Austin, Texas 78711, (512) 463-1381 or 1-800-932-1900 (toll free). By my signature below, I acknowledge a receipt of the Texas Lawyer's Creed, which is attached to this agreement.

Electronic Mail. We use electronic mail ("email") and voice mail. Email is not a secure communication. If you use a work computer to send emails, your employer may have access to those emails. It is possible for third parties to illegally obtain information from emails. Please indicate below if we have your permission to communicate with you by email.

You should not consider that any communication by you to us by email or voice mail is received until it is acknowledged by a return email or telephone call by us. If your email or voice mail is not acknowledged in what you consider a reasonable amount of time, please follow up with a telephone call directly to us at the office. To effectively follow up on an unacknowledged email or voice mail to us at the office, you need to make sure you are speaking live to a person at the office (rather than by leaving a voice mail).

Attorney Privacy and File Maintenance Policy. LAW FIRM PRIVACY POLICY AS TO SOCIAL SECURITY NUMBERS AND OTHER PRIVATE INFORMATION:

a. SOCIAL SECURITY NUMBERS AND DRIVER'S LICENSE NUMBERS ARE ONLY USED AS NEEDED AND AS REQUIRED BY LAW.

b. THESE PRIVATE NUMBERS ARE USED TO IDENTIFY PARTIES WHETHER FOR INITIAL SERVICE OF COURT DOCUMENTS, FOR CERTAIN COURT ORDERS, IN REQUIRED REPORTS FILED WITH THE STATE OF TEXAS, OR FOR OTHER REQUIRED PURPOSES.

c. THESE PRIVATE NUMBERS RECEIVED FROM A CLIENT ARE CONFIDENTIAL AND ARE NOT RELEASED FROM THE FIRM UNLESS AUTHORIZED BY THE CLIENT OR REQUIRED BY LAW.

d. THE EMPLOYEES OF THE FIRM HAVE ACCESS TO THIS PERSONAL INFORMATION BUT SHALL NOT RELEASE IT WITHOUT ATTORNEY APPROVAL.

e. YOUR INFORMATION IS KEPT SECURE WITHIN THE FIRM IN FILE FOLDERS, FILE DRAWERS, AND COMPUTERS, UNTIL SUCH TIME THAT THE FILE INFORMATION IS RETIRED AND THE FILE REMOVED TO STORAGE IN COMPUTER FILES OR A LOCKED STORAGE FACILITY. THE CLIENT INFORMATION WILL EVENTUALLY BE DELETED.

File Information. During Attorney's representation of me, Attorney will be sending me copies of all important contracts, pleadings, letters, notices and other material which Attorney believes I should review. Attorney strives to maintain these documents in digital (paperless) format, so more often these copies shall be in digital format, for ease of retention and portability. I should have a secure place to keep these documents. If I need additional paper copies at any time, Attorney can make those at my expense for Attorney's copy fees. I may control such costs by keeping digital copies. Should I believe my particular file requires an encryption, I will advise Attorney of the form of such encryption. If Attorney is required to secure encryption software specifically for my case, the cost of that software shall be included in my bill.

Document Retention. I agree the Attorney is not responsible to keep copies of my documents. I agree to keep all originals and copies that I desire among my own files for future reference. I am advised to retain all confidential information or original documents from Attorney's file as received. I otherwise authorize Attorney to destroy in a secure manner the information contained in Attorney's file when the legal service is complete.

HIPAA Provisions. Under Texas Health and Safety Code, Sec. 181.154 – HB 300, effective September 1, 2012, because we gather, store, and electronically transmit medical records (Protected Health Information – PHI) in the course of our representation of our clients, we are required to post a notice to clients that their protected health information is subject to electronic disclosure. Texas and federal law prohibits any electronic disclosure of a client's protected health information to any person without a separate authorization from the client or the client's legally authorized representative for each disclosure. This authorization for disclosure may be made in written or electronic form or in oral form if it is documented in writing by Attorney.

The authorization for electronic disclosure of protected health information described above is not required if the disclosure is made to another covered entity, as that term is defined by Section 181.001, Texas Health & Safety Code, or to a covered entity, as that term is defined by Section 602.001, Texas Insurance Code, for the purpose of treatment; payment; health care operations; performing an insurance or health maintenance organization function described by Section 602.053, Texas Insurance Code, or as otherwise authorized or required by state or federal law. In other words, no further release is necessary for electronic disclosure to other health care providers, insurance companies, governmental agencies, or defense lawyers representing adverse parties.

Optional Provisions Regarding Authorized Agents. I agree that ______________________________________ ________________________________is/are authorized by me to receive confidential information from the Attorney, but it is not intended by me to have that information disclosed to third persons.

I designate ____ as my agent(s) to obtain legal services from or to act on advice rendered by the Law Firm on my behalf and to have all Claims & Litigation powers under Section 752.110, Texas Estates Code. This is intended to be a power of attorney. This power of attorney is not affected by the subsequent disability or incapacity of the principal.

NOTE: MARRIED COUPLES SHOULD ALSO READ AND SIGN THE ATTACHED JOINT REPRESENTATION ADVISORY AND CONSENT.

ALL CLIENTS SHOULD ALSO READ THE DOCUMENT ENTITLED "WARNING TO CLIENTS REGARDING JOINT TENANTS, SURVIVORSHIP, POD AND TRUSTEE ACCOUNTS".

I have read and understand the terms of this document.

SIGNED on __________________________, 2012

____	____
Client	Client

_______ Yes. I understand that email is not a secure communication.
Initial You may communicate with me via email.
Preferred email address: ____

_______ No. Please do not communicate with me via email.
Initial

STATE OF TEXAS §
§
COUNTY OF WASHINGTON §

The foregoing instrument was acknowledged before me on the _____day of _______________________, 2019 by ____________________________(client).

____
Notary Public, State of Texas

STATE OF TEXAS §
§
COUNTY OF WASHINGTON §

The foregoing instrument was acknowledged before me on the _____day of _______________________, 2019 by ____________________________(client).

____
Notary Public, State of Texas

20XX FEE AND EXPENSE SCHEDULE
FEES – HOURLY RATES - STANDARD

FEES

R. Hal Moorman	$XXX
Andrew J. Hefferly	$XXX
Christopher S. Hardy	$XXX
Emily G. De Young	$XXX
Support Staff	$XXX
Probate	$XX/$XX/$XXX
Law Clerks	$XX
Clerks	$XX

EXPENSES

Photocopies	XX¢ per page in firm, or cost of copy service
Color Photocopies	$X.00 per copy, or cost of copy service
Incoming Fax; Local Outgoing Fax	XX¢ per page
Outgoing Long Distance Fax	Long distance call expense + 10%
Long Distance Calls	Cost to firm + 10%
Other Expenses	Cost to firm
Costs Advanced	Cost to firm
Mileage	.51 per mile

APPENDIX J-2

Estate Planning Engagement Letter
(Hourly Rate)

Dear Client:

THIS IS A LEGAL CONTRACT BETWEEN YOU AND THE LAW FIRM. YOU ARE ADVISED TO HAVE INDEPENDENT LEGAL COUNSEL REVIEW THIS CONTRACT ON YOUR BEHALF. THE LAW FIRM CANNOT REPRESENT YOU IN CONNECTION WITH THE NEGOTIATION, PREPARATION, OR EXECUTION OF THIS ENGAGEMENT LETTER.

Services. I employ the firm of _________________(hereinafter called "Attorney"), to represent me in the preparation of drafts of simple wills / tax planning wills / wills with disclaimer trusts / special needs trust wills / durable powers of attorney / medical powers of attorney / directives to physicians / designations of guardian / designation of guardian for child-incapacity / designation of agent for burial / irrevocable life insurance trust / revocable or living trust with pourover wills/ Buy-Sell Agreement / Family Limited Partnership / 2503(c) Trust for Minors / Beneficiary Designations for Insurance Policies, IRAs and Other Retirement Plans (does not include dealing with the insurance company or IRA provider to implement the designation – this will be an additional charge determined on an hourly rate basis) / Qualified Personal Residence Trust (QRPT) / Private Foundation / Sale to intentionally Defective Trusts / Review of Account Designations on all bank and brokerage accounts and dealing with the insurance company or IRA provider to implement the beneficiary designation (this will be charged on an hourly rate basis as shown on the attached schedule), other: ____
____. (Items circled are services requested)

The estate planning techniques listed above are not intended to be a comprehensive list of estate planning techniques. The attorney and I have reviewed and discussed these and other alternatives. I have elected to use only those techniques circled or written in above and no others.

Out of Office Signing. I understand that the attorney wants me to sign these documents at the attorney's office to make sure they are signed properly. If the documents are to be signed at a location other than the attorney's office, the expenses and time involved will be billed at the rates shown on the attached sheet.

For Married Clients. I also realize that the characterization of property as separate, community, or separate with community rights of reimbursement is important. I understand that agreements such as community property conversion agreements and post-nuptial partition agreements can clarify and change the nature of property. I have elected to do only that which is circled or written in above and nothing else.

Fees. In consideration of this representation, I agree to pay at the offices of _____________________, in _______________, Texas on an hourly rate basis for all conferences, research and the preparation and finalization of documents to be billed at the rates shown on the attached sheet. Each portion of a quarter hour is billed as a full quarter hour. All work is done and all fees are payable in ________________, Texas. The hourly rates usually increase at the beginning of each calendar year to take into account current levels of legal experience, changes in overhead costs and other factors. This increase will most likely be in the range of $10 to $30 per hour. Costs paid to third parties are billed at cost.

Deposit. It is Attorney's usual practice to require payment of a deposit before Attorney begins work for a client. Attorney has asked that I remit and maintain with Attorney, during the entire course of Attorney's representation of me in this matter, an initial deposit in the sum of $_______________(the "Deposit"). Attorney will place the deposit into Attorney's trust account. It will be applied to Attorney's final billing statement for fees and expenses, or, in Attorney's discretion, to any past due monthly statement. Upon the termination of Attorney's services, Attorney will promptly refund the deposit to me, less any balance for fees and expenses unpaid as of the date of Attorney's final bill. Attorney will send me monthly statements for fees and expenses. I agree to pay the amount due in full each month. The deposit will stay on deposit in Attorney's trust account.

Attorney retains the right and discretion to request a supplemental cost deposit, over and above the initial deposit, in the event of an increase in anticipated fees and expenses during the course of representing me. If Attorney makes such a request, I agree to promptly deliver the additional deposit to Attorney.

Permission to Investigate Credit and Background. I agree that the Attorney may investigate my personal and professional background as well as check my credit history in deciding whether or not to represent me.

Citizenship and Document Review. I agree to read the documents thoroughly and notify the Attorney of any misspelled names or other errors obvious to me. Unless otherwise indicated on the contract, I am a United States citizen.

Schedule A of IRS Form 8971. If you have received a Schedule A of IRS Form 8971, it is extremely important that we receive a copy of that document if you are making a gift, a contribution to a trust or a tax-free contribution to a corporation, partnership, LLC or other business entity. We need to have this before you make any transfers.

Payment Terms. I agree to pay the fees and expenses when billed.

Witness. I understand that if the Attorney is called as a witness or asked to assist others acting on my or my estate's behalf in a later proceeding, I bind myself and my estate to compensate the Attorney at the Attorney's then-prevailing hourly rates.

Mediation. In the unlikely event I have a disagreement with the Attorney, before resorting to litigation or arbitration, any disputes arising out of or connected with this engagement agreement (including but not limited to the services performed by Attorney under this agreement) will be submitted to mediation in Washington County, Texas, in accordance with the rules for alternative dispute resolution set forth under Texas law. I and Attorney will mutually cooperate to select the mediator to be used. Any and all information, negotiation, and results of the mediation will remain confidential.

Confidentiality. I understand that, generally, all information I provide to the Attorney will be kept confidential and will not be disclosed to persons outside the Attorney's office without my consent. However, I authorize the Attorney to discuss my estate planning and share my confidential information: (1) with other of my professional advisors (such as CPAs, financial planners, insurance agents, etc.); (2) with persons named as an agent, trustee or other fiduciary in estate planning documents signed by me or prepared at my request; and (3) whenever my mental capacity is in question, with my children and other immediate family members, my health care providers, and other interested persons.

Other clients. I agree that under the rules that govern the practice of law, the Attorney can continue to represent existing and new clients regarding their estate planning or other matters even if these other clients are related to me (professionally or personally). I understand that, without prior permission, the Attorney will not reveal any confidential information of mine to these other clients and the Attorney will not relate any of the confidential information of the other clients to me. Regarding other immediate family members (immediate family members means parents and children), if they call the Attorney, the Attorney will first seek my permission to represent the other immediate family members. I will let the Attorney know if there is a conflict between my desires and the desires of these other immediate family members to the extent I am aware of any conflict. I also understand that if the Attorney becomes aware of a conflict, the Attorney will withdraw from representation of the last immediate family member who has hired the Attorney and will continue to represent the other immediate family member that the Attorney represented first.

Future legal services. I understand that changes likely will occur in tax, property, probate, and other laws which could impact my estate plan. The Attorney cannot economically review my file to determine the impact of changes in the law. Changes likely will occur in my own family, in marital circumstances, and in my finances, all of which could impact my estate plan. I understand I should contact the Attorney to have my plan reviewed regularly and I will be charged by the Attorney at the then prevailing hourly rates to answer questions and review my documents or estate plan.

Termination. I have the right to fire the Attorney at any time and the Attorney has the right to resign as my attorney at any time. The Attorney's active role, as my attorney, will terminate when my documents are signed. However, no termination will waive any of the remaining provisions of this agreement, including: (1) my agreement to pay the Attorney for all work performed prior to termination, (2) my consent to complete disclosure of confidential information to me and to others (to the extent authorized above), (3) the Attorney's ethical duties to me, such as the Attorney's duty not to disclose my confidential matters to third parties (except as authorized above), and (4) the obligation of my estate to compensate the Attorney if called as a witness in a later proceeding.

INTEREST ON PAST DUE ACCOUNTS. UNPAID FEES AND EXPENSES WILL BE CONSIDERED PAST DUE IF NOT PAID WITHIN THIRTY (30) DAYS OF THE BILLING DATE. I AGREE TO PAY INTEREST ON PAST DUE AMOUNTS AT THE RATE OF 1.5 % PER MONTH (18% ANNUAL PERCENTAGE RATE), OR THE MAXIMUM RATE ALLOWED BY LAW, WHICHEVER IS LESS, UNTIL PAID. INTEREST CHARGES WILL BE CALCULATED ON ALL PAST DUE AMOUNTS AND ADDED TO THE NEXT MONTH'S BILLING STATEMENT.

Full Family and Financial Information. I have provided or have had others provide full family and financial information to the Attorney. I realize the documents prepared are based on this information I have supplied and are only as good as the information provided.

Place for Performance. The place for performance of this Agreement is Washington County, Texas.

Circular 230. I may ask the Attorney's advice regarding federal tax issues. The Internal Revenue Service (IRS) does not allow me to rely on informal tax advice rendered before I file my tax return to avoid tax penalties. If I want to rely on the Attorney's federal tax advice to avoid federal tax penalties, the IRS requires the Attorney to issue formal written tax opinions regarding the tax issue(s). Formal written tax opinions are not within the scope of this engagement. The IRS rules also prohibit someone else from using the advice the Attorney provides to me. All communications from the Attorney are intended for my use only and include, and are intended to reflect, in substance, the following notice:

> Treasury Circular 230 Disclosure: to the extent this communication contains any statement of tax advice, such statement is not intended or written to be used, and cannot be used, by any person for the purpose of, or as the basis for, avoiding tax penalties that may be imposed on that person. This communication if not intended to be used, and cannot be used for the purpose of promoting, marketing, or recommending to another party any matter addressed in this communication. This legend is attached pursuant to U.S. Treasury Regulations governing tax practice, to comply with requirements imposed by the Internal Revenue Service.

I will let the Attorney know if I want a formal, legal opinion regarding tax issues. I agree to sign a separate engagement letter with the Attorney to show I want such an opinion. I understand that the cost of such an opinion will be substantial given the IRS requirements.

Complaints and Grievances. All lawyers in Texas have an obligation to maintain a high standard of ethical conduct toward their clients and others. To enforce this standard, the State Bar of Texas investigates and prosecutes complaints of professional misconduct against attorneys licensed in Texas. Although not every complaint against or dispute with a lawyer involves professional misconduct, the State Bar office of General Counsel will provide you with information about how to file a complaint. If I feel that misconduct may have occurred, or if I have questions regarding the disciplinary process, I may call or write the State Bar of Texas, P.O. Box 12487, Austin, Texas 78711, (512) 463-1381 or 1-800-932-1900 (toll free). By my signature below, I acknowledge a receipt of the Texas Lawyer's Creed, which is attached to this agreement.

Electronic Mail. We use electronic mail ("email") and voice mail. Email is not a secure communication. If you use a work computer to send emails, your employer may have access to those emails. It is possible for third parties to illegally obtain information from emails. Please indicate below if we have your permission to communicate with you by email.

You should not consider that any communication by you to us by email or voice mail is received until it is acknowledged by a return email or telephone call by us. If your email or voice mail is not acknowledged in what you consider a reasonable amount of time, please follow up with a telephone call directly to us at the office. To effectively follow up on an unacknowledged email or voice mail to us at the office, you need to make sure you are speaking live to a person at the office (rather than by leaving a voice mail).

Privacy Policy as to Social Security Numbers and other Private Information.

a. SOCIAL SECURITY NUMBERS AND DRIVER'S LICENSE NUMBERS ARE ONLY USED AS NEEDED AND AS REQUIRED BY LAW.

b. THESE PRIVATE NUMBERS ARE USED TO IDENTIFY PARTIES WHETHER FOR INITIAL SERVICE OF COURT DOCUMENTS, FOR CERTAIN COURT ORDERS, IN REQUIRED REPORTS FILED WITH THE STATE OF TEXAS, OR FOR OTHER REQUIRED PURPOSES.

c. THESE PRIVATE NUMBERS RECEIVED FROM A CLIENT ARE CONFIDENTIAL AND ARE NOT RELEASED FROM THE FIRM UNLESS AUTHORIZED BY THE CLIENT OR REQUIRED BY LAW.

d. THE EMPLOYEES OF THE FIRM HAVE ACCESS TO THIS PERSONAL INFORMATION BUT SHALL NOT RELEASE IT WITHOUT ATTORNEY APPROVAL.

e. YOUR INFORMATION IS KEPT SECURE WITHIN THE FIRM IN FILE FOLDERS, FILE DRAWERS, AND COMPUTERS, UNTIL SUCH TIME THAT THE FILE INFORMATION IS RETIRED AND THE FILE REMOVED TO STORAGE IN COMPUTER FILES OR A LOCKED STORAGE FACILITY. THE CLIENT INFORMATION WILL EVENTUALLY BE DELETED.

File Information. During Attorney's representation of me, Attorney will be sending me copies of all important contracts, pleadings, letters, notices and other material which Attorney believes I should review. Attorney strives to maintain these documents in digital (paperless) format, so more often these copies shall be in digital format, for ease of retention and portability. I should have a secure place to keep these documents. If I need additional paper copies at any time, Attorney can make those at my expense for Attorney's copy fees. I may control such costs by keeping digital copies. Should I believe my particular file requires an encryption, I will advise Attorney of the form of such encryption. If Attorney is required to secure encryption software specifically for my case, the cost of that software shall be included in my bill.

Document Retention. I agree the Attorney is not responsible to keep copies of my documents. I agree to keep all originals and copies that I desire among my own files for future reference. I am advised to retain all confidential information or original documents from Attorney's file as received. I otherwise authorize Attorney to destroy in a secure manner the information contained in Attorney's file when the legal service is complete.

HIPAA Provisions. Under Texas Health and Safety Code, Sec. 181.154 – HB 300, effective September 1, 2012, because Attorney gathers, stores, and electronically transmits medical records (Protected Health Information – PHI) in the course of Attorney's representation of Attorney's clients, Attorney is required to post a notice to clients that their protected health information is subject to electronic disclosure. Texas and federal law prohibits any electronic disclosure of a client's protected health information to any person without a separate authorization from the client or the client's legally authorized representative for each disclosure. This authorization for disclosure may be made in written or electronic form or in oral form if it is documented in writing by Attorney.

The authorization for electronic disclosure of protected health information described above is not required if the disclosure is made to another covered entity, as that term is defined by Section 181.001, Texas Health & Safety Code, or to a covered entity, as that term is defined by Section 602.001, Texas Insurance Code, for the purpose of treatment; payment; health care operations; performing an insurance or health maintenance organization function described by Section 602.053, Texas Insurance Code, or as otherwise authorized or required by state or federal law. In other words, no further release is necessary for electronic disclosure to other health care providers, insurance companies, governmental agencies, or defense lawyers representing adverse parties.

Optional Provisions Regarding Authorized Agents. I agree that ____ is/are authorized by me to receive confidential information from the Attorney, but it is not intended by me to have that information disclosed to third persons.

I designate ____ as my agent(s) to obtain legal services from or to act on advice rendered by the Law Firm on my behalf and to have all Claims & Litigation powers under Section 752.110, Texas Estates Code. This is intended to be a power of attorney. This power of attorney is not affected by the subsequent disability or incapacity of the principal.

NOTE: MARRIED COUPLES SHOULD ALSO READ AND SIGN THE ATTACHED JOINT REPRESENTATION ADVISORY AND CONSENT.

ALL CLIENTS SHOULD ALSO READ THE DOCUMENT ENTITLED "WARNING TO CLIENTS REGARDING JOINT TENANTS, SURVIVORSHIP, POD AND TRUSTEE ACCOUNTS".

I have read and understand the terms of this document.

SIGNED on _________________________, 2019

____ ____

Client Client

________ Yes. I understand that email is not a secure communication.
You may communicate with me via email.
Initial Preferred email address: ____

________ No. Please do not communicate with me via email.
Initial

STATE OF TEXAS §
§
COUNTY OF WASHINGTON §

The foregoing instrument was acknowledged before me on the _____day of ________________________, 2019 by ______________________________(client).

____
Notary Public, State of Texas

STATE OF TEXAS §
§
COUNTY OF WASHINGTON §

The foregoing instrument was acknowledged before me on the _____day of ________________________, 2019 by ______________________________(client).

____
Notary Public, State of Texas

2019 FEE AND EXPENSE SCHEDULE
FEES – HOURLY RATES - STANDARD

FEES

R. Hal Moorman	$XXX
Andrew J. Hefferly	$XXX
Christopher S. Hardy	$XXX
Emily G. De Young	$XXX
Support Staff	$XXX
Probate	$XX/$XX/$XXX
Law Clerks	$XX
Clerks	$XX

EXPENSES

Photocopies	XX¢ per page in firm, or cost of copy service
Color Photocopies	$X.00 per copy, or cost of copy service
Incoming Fax; Local Outgoing Fax	XX¢ per page
Outgoing Long Distance Fax	Long distance call expense + 10%
Long Distance Calls	Cost to firm + 10%
Other Expenses	Cost to firm
Costs Advanced	Cost to firm
Mileage	.58 per mile

APPENDIX K

Letter to Beneficiaries When Representing Executor

________________, 20____

Beneficiary 1

Beneficiary 2

Re: Estate of John Doe, Deceased

Dear Mr. Beneficiary 1 and Ms. Beneficiary 2:

Please accept my condolences on your father's death.

Enclosed please find some correspondence and documents regarding your father's estate. We will be filing the will for probate as a muniment of title.

As you know the will leaves all of your father's estate to your mother. I am enclosing a copy of the will for your information.

Because I am representing your mother as executor of the estate in this matter, I cannot represent you. To the extent you have any questions about what we will be doing in this estate, I would be happy to answer them. I cannot, however, give you any legal advice. You will need to obtain your own legal representation to the extent you believe it is advisable to do so.

Sincerely yours,

LAWYER

ACTEC Engagement Letters – A Guide for Practitioners, Third Edition 2017

(reproduced with permission)

Script for Receptionist – Estate Planning

MEMO

TO: Anyone answering the telephone and making appointments for Hal

FROM: Hal

DATE: ________________, 20___

RE: Estate Planning Appointments

When someone calls to make an appointment for estate planning services, please tell them the following:

"Mr. Moorman has asked me to tell you that part of properly preparing a will or trust is that the lawyer must have a good knowledge of what you have and what it is worth. Pleased be assured that all of this information is kept in strict confidence. For that reason, we ask that you bring along a current financial statement. It does not have to be in the same form that you would submit to a bank, but simply a list of what you have and what it is worth.

If you have any of the following documents, please bring them with you to your appointment. These will help Mr. Moorman in planning your estate.

1. Copies of any current wills or trusts you have established;
2. Copies of any prior gift tax returns;
3. Information regarding amounts and beneficiary designations of life insurance, retirement plans and IRA accounts."

If the person indicates it will take them a while to get this together, encourage them to come in with the information that they have and not delay in making the appointment.

If they indicate they don't want to disclose financial information, immediately tell them that's fine, also, and that Mr. Moorman will discuss this with them in the meeting.

If they ask about costs, tell them the following: "The fee depends on how complicated your estate is and what you want to have done. Mr. Moorman will meet with you at no charge or obligation for 15 minutes to determine what needs to be done and will quote a fee for his services. If that fee is not acceptable, then there's no obligation on you part."

If you have any questions about this memo, please let me know.

APPENDIX N

Intermediary Agreement

_______________, 20____

CONSENT TO ATTORNEY REPRESENTATION AS AN INTERMEDIARY

The undersigned are parties to a business transaction and have asked the law firm of Moorman Tate, LLP to represent all of them in documenting the transaction and in discussions of the transaction.

Each of the undersigned understands that when an attorney acts as an intermediary for a number of parties, it is impossible for the attorney to zealously represent each of the parties. The advantage to common representation is less expense in terms of attorney's fees. The risks involved in such representation are that the attorney cannot pursue the interests of each client, that the attorney may not be able to adequately view each client's interest to the extent that independent counsel for each client would be able to, and that the attorney cannot keep confidences of one client from another client, the attorney-client privilege being waived as to the clients involved in the common representation. Each of the undersigned agrees the attorney has made himself available for further consultation with each client concerning the implications of common representation, including the advantages and risks involved, and the effect on the attorney-client privileges.

The attorney reasonably believes that the matter can be resolved without the necessity of contested litigation on terms compatible with the undersigned's best interests, that each of the undersigned will be able to make adequate 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. The attorney reasonably believes that common representation can be undertaken impartially and without improper effect on other responsibilities that the lawyer has to any of the undersigned. If any of the undersigned believe that any of the matters contained in this document are incorrect, he or she should not sign this agreement and should obtain independent counsel. **Each of the undersigned should consult independent counsel regarding this Consent Agreement.**

Alternate 1

While acting as intermediary, the attorney will consult with each of the undersigned concerning the decision to be made and the considerations relevant in making them, so that each of the undersigned can make adequately informed decisions.

Alternate Two

Because of time constraints involved each of the undersigned agree that * may act as the agent for all of the undersigned, consulting with the attorney on behalf of all of the undersigned.

All of the undersigned agree to keep themselves informed by contacting * in all of these matters

Remaining Language for Either Alternative

The firm will withdraw as intermediary if any of the undersigned so requests or if any of the conditions stated in this letter is no longer satisfied. Upon withdrawal, the firm shall not continue to represent any of the clients in the matter that is the subject of this agreement.

DATED this ______day of _____________________, 200_ and signed in multiple counterparts.

____

____

____

APPENDIX O

Probate Employment Contract

[Letterhead of Law Firm]

Dear Client:

THIS IS A LEGAL CONTRACT BETWEEN YOU AND THE LAW FIRM. YOU ARE ADVISED TO HAVE INDEPENDENT LEGAL COUNSEL REVIEW THIS CONTRACT ON YOUR BEHALF. THE LAW FIRM CANNOT REPRESENT YOU IN CONNECTION WITH THE NEGOTIATION, PREPARATION, OR EXECUTION OF THIS ENGAGEMENT LETTER.

Please read this letter carefully. It describes the terms and conditions under which ________________________ will undertake to represent you in connection with the legal matter described below. Our firm policy requires that each client sign a copy of this letter, agreeing to the terms and conditions set forth below, before we can engage in any representation. The terms and conditions of our agreement for engagement are as follows:

1. Scope of Engagement.

1.1. **Description of Representation**. You are retaining and employing us as your attorneys, to represent and provide legal services to you in connection with the probate of the Estate of ____(all referred to in this agreement as the "Legal Matter"). This representation will include advising, counseling, negotiating, investigating, handling, prosecuting and/or defending such legal matters, to final settlement or adjudication. We will need to identify and value all of the assets owned whether or not they pass through probate. If you decide to engage us for additional legal matters, the terms and conditions of this agreement will apply to those matters as well, unless an agreement specific to those matters is signed by you and us. We will not be considered to be engaged for other matters without a written agreement.

1.2. **Use of Other Consultants and Assistance**. By signing this agreement, you are authorizing us to do whatever is reasonably necessary and appropriate, in our professional judgment, to represent you properly, and to incur the costs and expenses reasonably necessary to handle your matter. This includes the authorization and power to associate or employ such other persons or entities as we may deem necessary to assist us, such as consultants, support services, technical experts, or other attorneys who are not members of our firm (either "local counsel" in a distant forum, or contract legal services with attorneys or legal assistants). You will be consulted before any professionals or other experts are hired by us. In an effort to reduce overall legal costs, we may utilize legal assistant personnel and other support staff whenever appropriate. All such services are performed under the direction and supervision of an attorney, and within our discretion and judgment.

1.3. **Notify Beneficiaries**. Under Section 308.002 of the Texas Estates Code, you must notify all beneficiaries of the estate that the will has been probated and the estate administration has commenced with you as independent executor. We will be sending them a copy of the will. In doing so, we will make it clear that we represent only you. We will not disclose other information that you have confided in us without your consent to do so.

NOTE: MAY STRIKE ONE OR BOTH OF THE FOLLOWING

1.4. **Option Regarding Multiple Executors**. As independent co-executors of the estate, you have joint responsibility for the estate administration. Although there is no reason for us to anticipate any disagreement, it is possible that you might develop differences of opinion during the course of the administration of the estate on issues that might subsequently arise. Because you have requested us to represent you jointly, while we can discuss the issues and the advantages and disadvantages of your different positions, we cannot advocate one of your positions over the other, at least if we determine that both positions properly discharge your duties as independent co-executors. If you each had your own attorney, that attorney could advocate your position over the other co-executors and your individual attorney could keep matters that you disclose to that attorney confidential. This firm cannot keep confidences of one executor from the other. If actual conflict did arise between you of such a nature that it becomes impossible for us to fully represent you jointly, we would have to withdraw from further joint representation and advise you to obtain separate independent counsel. In that event, we would submit a statement for legal services rendered up to the date of

such withdrawal. In order to undertake this joint representation, there must be full disclosure and sharing at all times with each of you of all information concerning the estate. There are advantages to having one firm represent you. It is usually much less expensive. The work is usually done much more quickly. This is because there are no conferences and negotiations with other lawyers. ALL EXECUTORS MUST ALSO SIGN A SEPARATE MULTI-EXECUTOR CONFLICT WAIVER.

1.5. **Option Where Dual Representation of Executor and Beneficiaries**. Further, given that ________________________________is also a beneficiary of the estate, we can represent you jointly as independent co-executors and ________________________________ as a beneficiary so long as our dual representation does not involve a conflict of in. If any conflict were to arise, ________________________________ would have to consider

engaging separate independent legal counsel to represent his personal interests.

2. Cooperation.

2.1 **Full Disclosure and Cooperation**. In order to enable us to effectively render the legal services contemplated by this agreement, you agree to fully and accurately disclose all facts and to keep us informed of all developments relating to the Legal Matter. We necessarily must rely on the accuracy and completeness of the facts and information and that you and your agents provide to us. To the extent it is necessary for you or your representatives to attend meetings in connection with the Legal Matter, we will attempt to schedule them in cooperation with you. Likewise, you must give us adequate notice if you will not be able to attend a meeting or provide information as requested. You acknowledge and agree that it is important to cooperate with us in scheduling meetings, conducting phone calls, reviewing documents, and providing responses to requests for information from us or the professionals or experts that we may employ. You agree to cooperate with us, to the best of your ability, in order to successfully conclude our representation of you.

2.2 **Permission to Investigate Credit and Background**. You agree and acknowledge that we may investigate your personal and professional background and we may check your credit history in deciding whether or not to represent you.

3. Fees.

3.1. **Basis for Fees**. Our firm's fees are based on the time spent by the lawyers and firm personnel on who work on the matter. You understand that, by accepting representation of you in this matter, we may have to forgo representation of other clients with a resulting loss of fees. You also acknowledge that our fees are set on the basis of what we consider to be a fair and reasonable charge for the services rendered, based upon the time, labor and skill required to perform the legal services properly, as well as the fee customarily charged by other attorneys for similar legal services. The fee is not set by law, but is negotiable.

3.2. **Hourly Rates**. Our fees for legal services are based on the attached schedule.

Our hourly rates usually increase at the beginning of each calendar year to take into account current levels of legal experience, changes in overhead costs and other factors. This increase will most likely be in the range of $10 to $30 per hour.

You will be billed at the applicable hourly rate for all legal services that we provide. This may include legal research, drafting of pleadings, conferences, telephone conversations, preparation of documents, investigation of facts, preparing for and taking depositions, preparation for and appearances in court, and other tasks necessary to adequately handle the matter in controversy. You will also be billed for the time that we spend talking with you about the Legal Matter, sending you correspondence, or responding to requests for information from you or your representatives. An attorney's time involved in out-of-office representation will be measured from the time the attorney leaves the office until the attorney arrives back at the office. All time will be billed in minimum increments of one-quarter (1/4) hour, even though the time spent may be less than one-quarter (1/4) hour.

3.3. **Costs and Expenses**. In addition to our fees, you will be billed for other items incurred in connection with the performance of our legal services, such as filing fees, court costs, photocopying and other duplication costs, long distance telephone calls, facsimile transmissions, delivery charges, travel expenses, deposition costs, and specialized

computer applications such as computerized legal research or public records searches as provided in the attached

schedule. Unless special arrangements are otherwise made, the fees and expenses of other consultants and professionals (such as experts, investigators, accountants, appraisers, records handlers, consultants, or specialized or local legal counsel) incurred on your behalf will be billed directly to you, and you will be responsible for paying them. Also, all invoices for costs and expenses in excess of $200 will be forwarded to you for direct payments.

Occasionally, when a bill for a specific matter is rendered near the conclusion of the matter, posting of some time and charges (such as telephone, copying, court costs, or similar items) may be delayed, or there may be an invoice which is not delivered to us until after the legal matter has been finalized. In such cases, the "after closing" expenses will also be billed to you, even though you may have previously received what was designated as a "final" bill. You will be responsible for paying these "after closing" expenses.

3.4. **DEPOSIT**. IT IS OUR USUAL PRACTICE TO REQUIRE PAYMENT OF A DEPOSIT BEFORE WE BEGIN WORK FOR A CLIENT. WE HAVE ASKED THAT YOU REMIT AND MAINTAIN WITH US, DURING THE ENTIRE COURSE OF OUR REPRESENTATION OF YOU IN THIS MATTER, AN INITIAL DEPOSIT IN THE SUM OF $________________ (THE "DEPOSIT"). WE WILL PLACE THE DEPOSIT INTO OUR TRUST ACCOUNT. IT WILL BE APPLIED TO OUR FINAL BILLING STATEMENT FOR FEES AND EXPENSES, OR, IN OUR DISCRETION, TO ANY PAST DUE MONTHLY STATEMENT. UPON THE TERMINATION OF OUR SERVICES, WE WILL PROMPTLY REFUND THE DEPOSIT TO YOU, LESS ANY BALANCE FOR FEES AND EXPENSES UNPAID AS OF THE DATE OF OUR FINAL BILL. WE WILL SEND YOU MONTHLY STATEMENTS FOR FEES AND EXPENSES. YOU AGREE TO PAY THE AMOUNT DUE IN FULL EACH MONTH. THE DEPOSIT WILL STAY ON DEPOSIT IN OUR TRUST ACCOUNT.

WE RETAIN THE RIGHT AND DISCRETION TO REQUEST A SUPPLEMENTAL COST DEPOSIT, OVER AND ABOVE THE INITIAL DEPOSIT, IN THE EVENT OF AN INCREASE IN OUR ANTICIPATED FEES AND EXPENSES DURING THE COURSE OF REPRESENTING YOU. IF WE MAKE SUCH A REQUEST, YOU WILL AGREE TO PROMPTLY DELIVER THE ADDITIONAL DEPOSIT TO US.

3.5. **Monthly Statements**. We will normally submit a bill to you on a monthly basis, and it is due and payable upon receipt. Each lawyer and support staff personnel contemporaneously records the time required to perform services, and these time records are put into a computer that generates a monthly bill which we try to send out around the end of the month. This bill describes the services performed and the expenses incurred. We encourage you to review the bill and to contact us if you have any questions about the services described or the expenses incurred. If we do not hear from you within five days after the bill is mailed, we will presume that you understand and approve of the charges included in the monthly statement.

There may be occasions involving unforeseen circumstances when a bill will go unpaid. In such instances, we will attempt to work with you, if you communicate the nature of the delay to us. However, we expect you to pay us on time each month; we do not want to become your creditor.

We reserve the right to deduct any outstanding fees, charges, expenses and interest that you owe us from any settlement or award to you in connection with the Legal Matter.

3.6. **INTEREST ON PAST DUE AMOUNTS. UNLESS WE OTHERWISE AGREE WITH YOU IN WRITING, UNPAID FEES AND EXPENSES WILL BE CONSIDERED PAST DUE IF NOT PAID WITHIN THIRTY (30) DAYS OF THE BILLING DATE. ALL PAST DUE AMOUNTS SHALL BEAR INTEREST AT THE RATE OF 1.5 % PER MONTH (18% ANNUAL PERCENTAGE RATE), OR THE MAXIMUM RATE ALLOWED BY LAW, UNTIL PAID. INTEREST CHARGES WILL BE CALCULATED ON ALL PAST DUE AMOUNTS AND ADDED TO THE NEXT MONTH'S BILLING STATEMENT.**

3.7. **Failure to Pay Fees**. You agree that we are relieved from the responsibility of performing any further work for you, should you fail to pay any monthly statement for fees and expenses (including bills for expenses received from third parties), or to timely respond to a request for a supplemental cost deposit, as stated above. By your signature on this engagement agreement, you also acknowledge and agree that, in accordance with Texas Law, we have a right to assert a lien against your files to secure payment of any unpaid amounts you owe us.

3.8. **Awards of Attorneys' Fees**. Occasionally, we will request reasonable attorneys' fees from another party in a legal proceeding. Regardless of how any court rules with respect to the award of attorneys' fees (or the reasonableness

of legal fees requested in any pleading), you are agreeing to pay us the fees set forth in this engagement Agreement. If we receive any compensation as the result of an award of attorneys' fees, then we will, in our discretion, either: (1) credit such receipt to the amount of any unpaid bill, or (2) reimburse you for the amount of the receipt (if, and only if, you do not owe us any fees or expenses at the time that the attorneys' fees are received).

3.9. **Estimates of Fees**. We cannot give you an estimate of fees in this matter. The fees and expenses required are ultimately a function of many conditions over which we have little or no control, particularly the extent to which the opposition files pretrial motions and engages in its own discovery. The reason why we submit bills to our clients on monthly basis, shortly after the services are rendered, is so that you will have a ready means of monitoring and controlling the legal costs you are incurring. If you believe the expenses are mounting too rapidly, you need to contact us immediately so that we can assist you in evaluating how they might be curtailed in the future. If we do not hear from you, you will be deemed to have approved of the overall level of activity on our part in this case on your behalf.

4. Conflicts of Interest

One of the most important considerations which we must have in accepting an engagement is whether the engagement will put us in conflict with any existing client interest. If we discover such a conflict after we have begun work for you, we may be disqualified from continuing our representation of you. You acknowledge that it is, therefore, very important for you to consider all the interests which are involved in the Legal Matter, to be certain that you have advised us fully in that regard. If we, in our judgment and discretion, determine that a conflict of interest does exist, we will notify you and all other affected clients, and will proceed in a manner consistent with the ethical standards contained in the Texas Disciplinary Rules of Professional Conduct (the "Disciplinary Rules").

5. Withdrawal from Representation

5.1. **Withdrawal of Firm**. You have requested our advice and counsel as a part of our services to you. In order for our representation of you to be successful, it is important that you follow our advice, reasonably cooperate with us, and abide by the terms and conditions of this agreement. In any of the following events, we reserve the right to withdraw from representing you in this matter at any time:

(a) You insist that we present a claim or defense that is not warranted under existing law and cannot be supported by a good-faith argument for an extension, modification, or reversal of existing law;

(b) You seek to pursue an illegal course of action;

(c) You fail to follow our advice or to reasonably cooperate with us, or, by your conduct, you render it unreasonably difficult for us to represent you;

(d) You insist that we engage in a course of conduct that is illegal or that is prohibited under the lawyers' Disciplinary Rules;

(e) You insist that we engage in conduct that is contrary to our judgment and advice, but not prohibited under the Disciplinary Rules;

(f) You fail to timely pay statements for our fees, expenses or costs, or you otherwise fail to fulfill or abide by the terms and conditions of this agreement;

(g) We determine, in our sole judgment and discretion, after further investigation, that the facts related to the Legal Matter are materially different from those you represented to us and upon which our agreement to represent you was based; or

(h) We are required to withdraw due to a conflict in interest, because an attorney with the firm becomes a witness in the case, or for any other reason required under the Disciplinary Rules.

In any of these events, you agree that we may move to withdraw as your counsel in any suit in which we have made an appearance on your behalf or from any matter in which we are representing you, and that you will promptly execute any documents required to accomplish this.

If we withdraw for any reason, we will take reasonable steps to avoid foreseeable prejudice to your rights, including giving proper notice, allowing reasonable time for your to employ other counsel, delivering to you all papers and property to which you are entitled, and complying with applicable laws and rules.

5.2. **Withdrawal by You**. It is our desire and goal that you be satisfied with our legal services at all times. At any time you wish, however, you may cease to use our services by notifying us in writing. You will be still responsible for payment of any and all fees, expenses, and costs that have been incurred in connection with our representation of you prior to the date that we receive your written notice.

5.3. **Resolution of Case; Death or Dismissal of Parties**. In the event of a bona fide resolution of the Legal Matter by the parties, or in the event that our services are no longer necessary for any reason, you must pay us or make suitable arrangements for the payment of the total amount of all fees, expenses, and costs still outstanding before the signing and filing of the instruments necessary to resolve the matter or terminate our services. If you die or are declared legally incompetent while any outstanding amount is owed to us under this agreement, your estate or guardian will owe us for those amounts.

5.4. **Suit for Fees**. In the event of any dismissal, withdrawal, or termination of our representation of you under this agreement, YOU AGREE AND UNDERSTAND THAT THE TERMS OF THIS ENGAGEMENT AGREEMENT PERTAINING TO THE PAYMENT OF FEES, COSTS AND/OR EXPENSES FOR OUR SERVICES RENDERED UP TO AND INCLUDING THE DATE OF SUCH DISMISSAL, WITHDRAWAL OR TERMINATION OF REPRESENTATION SHALL REMAIN IN FULL FORCE AND EFFECT. If we are compelled to intervene in a pending Lawsuit or to initiate any subsequent Lawsuit in order to cover those fees, costs, and/or expenses, you agree to pay us, in addition to the fees, costs and/or expenses due us, any and all attorneys' fees, costs and/or expenses incurred in that legal action.

6. No Asset Valuation or Title Search/Income Tax/Federal Estate Tax Return

6.1. **No Asset Valuation or Title Search**. You understand that our representation does not include valuation of any assets, nor do we claim to have expertise in this area. We will advise you to retain appropriate experts, such as accountants, financial advisors, or real estate or business appraisers, to assist in this regard. We do not automatically determine the validity of income and expense figures supplied to us by others or attempt to verify other underlying data, unless that is relevant to the issues involved in our representation. We will not search titles unless you ask us to do so. If there are questions in your mind concerning any of these issues, you should discuss them with us and authorize us to retain appropriate experts to provide assistance on your behalf.

6.2. **No Income Tax Advice**. You understand that our representation does not include rendering any income tax advice to you or the preparation of any income tax returns. You must seek such advice from your accountant or other financial advisor.

6.3 **Federal Estate Tax Return**. We will be advising you whether or not a federal estate tax return (IRS Form 706) is required. If required, we will prepare the return. Even though not required, it may be advisable to file a federal estate tax return. Once we are able to determine the size of the estate, we will write you advising you of your options.

6.4 **IRS Form 8971**. If required and if we are filing an IRS Form 706, we will prepare and file the IRS Form 8971 and its Schedule A (whether one or more), "Information Regarding Beneficiary Acquiring Property from a Decedent" (basis report) and will be transmitting a Schedule A to each recipient beneficiary.

7. Favorable Outcome Not Guaranteed

ALTHOUGH WE WILL USE OUR BEST REASONABLE, ETHICAL AND PROFESSIONAL EFFORTS IN REPRESENTING YOU, WE CANNOT PREDICT OR GUARANTEE THE RESULTS OF OUR EFFORTS OR THE OUTCOME OF THE LEGAL MATTER. YOU UNDERSTAND THAT WE HAVE MADE NO REPRESENTATION CONCERNING THE SUCCESSFUL DETERMINATION OR RESOLUTION OF THE LEGAL MATTER OR RELATED CLAIMS OR THE FAVORABLE OUTCOME OR ANY LEGAL ACTION THAT IS OR MAY BE FILED, AND WE HAVE NOT GUARANTEED THAT WE WILL OBTAIN REIMBURSEMENT TO YOU OF ANY OF THE FEES, COSTS, AND/OR EXPENSES INCURRED BY YOU IN THE PROSECUTION OR DEFENSE OF

THE LEGAL MATTER. YOU FURTHER EXPRESSLY ACKNOWLEDGE THAT ALL STATEMENTS FROM US ON THESE MATTERS ARE STATEMENTS OF OPINION ONLY.

8. Mediation

Before resorting to arbitration, any disputes arising out of or connected with this engagement agreement (including but not limited to the services performed by any attorney under this agreement) will be submitted to mediation in Washington County, Texas, in accordance with the rules for alternative dispute resolution set forth under Texas law. You and we will mutually cooperate to select the mediator to be used. Any and all information, negotiation, and results of the mediation will remain confidential.

9. Entire Agreement; Amendment

This engagement agreement constitutes the entire agreement between us with respect to the matters contained in it. This agreement may not be modified or revoked unless by a written agreement signed by both parties, which will be attached to this agreement and made a part of it.

10. Complaints and Grievances

All lawyers in Texas have an obligation to maintain a high standard of ethical conduct toward their clients and others. To enforce this standard, the State Bar of Texas investigates and prosecutes complaints of professional misconduct against attorneys licensed in Texas. Although not every complaint against or dispute with a lawyer involves professional misconduct, the State Bar office of General Counsel will provide you with information about how to file a complaint. If you feel that misconduct may have occurred, or if you have questions regarding the disciplinary process, you may call or write the State Bar of Texas, P.O. Box 12487, Austin, Texas 78711, (512) 463-1381 or 1-800-932-1900 (toll free). By your signature below, you acknowledge a receipt of the Texas Lawyer's Creed, which is attached to this agreement.

11. Circular 230

You may ask our advice regarding federal tax issues. The Internal Revenue Service (IRS) does not allow you to rely on informal tax advice rendered before you file your tax return to avoid tax penalties. If you want to rely on our federal tax advice to avoid federal tax penalties, the IRS requires us to issue formal written tax opinions regarding the tax issue(s). Formal written tax opinions are not within the scope of this engagement. The IRS rules also prohibit someone else from using the advice we provide to you. All communications from us are intended for your use only and include, and are intended to reflect, in substance, the following notice:

> Treasury Circular 230 Disclosure: to the extent this communication contains any statement of tax advice, such statement is not intended or written to be used, and cannot be used, by any person for the purpose of, or as the basis for, avoiding tax penalties that may be imposed on that person. This communication is not intended to be used, and cannot be used for the purpose of promoting, marketing, or recommending to another party any matter addressed in this communication. This legend is attached pursuant to U.S. Treasury Regulations governing tax practice, to comply with requirements imposed by the Internal Revenue Service.

You will let us know if you want a formal, legal opinion regarding tax issues. You agree to sign a separate engagement letter with us to show you want such an opinion. You understand that the cost of such an opinion will be substantial given the IRS requirements.

12. Place for Performance

The place for the performance of the majority of the work to be done under this Agreement is in __________________ County, Texas.

13. Witness

You understand that if any attorney in the firm is called as a witness or asked to assist others acting on your or your estate's behalf in a later proceeding, you bind yourself and your estate to compensate us at our then prevailing hourly rates.

14. Optional Provisions Regarding Authorized Agents

I agree that ____ is/are authorized by me to receive confidential information from the Attorney, but it is not intended by me to have that information disclosed to third persons.

I agree that ____ has/have authority to obtain legal services or act on advice rendered by the Attorney on my behalf.

15. Electronic Mail and Voice Mail

We use electronic mail ("email") and voice mail. Email is not a secure communication. If you use a work computer to send emails, your employer may have access to those emails. It is possible for third parties to illegally obtain information from emails. Please indicate below if we have your permission to communicate with you by email.

You should not consider that any communication by you to us by email or voice mail is received until it is acknowledged by a return email or telephone call by us. If your email or voice mail is not acknowledged in what you consider a reasonable amount of time, please follow up with a telephone call directly to us at the office. To effectively follow up on an unacknowledged email or voice mail to us at the office, you need to make sure you are speaking live to a person at the office (rather than by leaving a voice mail).

16. Attorney Privacy and File Maintenance Policy

LAW FIRM PRIVACY POLICY AS TO SOCIAL SECURITY NUMBERS AND OTHER PRIVATE INFORMATION:

a. SOCIAL SECURITY NUMBERS AND DRIVER'S LICENSE NUMBERS ARE ONLY USED AS NEEDED AND AS REQUIRED BY LAW.

b. THESE PRIVATE NUMBERS ARE USED TO IDENTIFY PARTIES WHETHER FOR INITIAL SERVICE OF COURT DOCUMENTS, FOR CERTAIN COURT ORDERS, IN REQUIRED REPORTS FILED WITH THE STATE OF TEXAS, OR FOR OTHER REQUIRED PURPOSES.

c. THESE PRIVATE NUMBERS RECEIVED FROM A CLIENT ARE CONFIDENTIAL AND ARE NOT RELEASED FROM THE FIRM UNLESS AUTHORIZED BY THE CLIENT OR REQUIRED BY LAW.

d. THE EMPLOYEES OF THE FIRM HAVE ACCESS TO THIS PERSONAL INFORMATION BUT SHALL NOT RELEASE IT WITHOUT ATTORNEY APPROVAL.

e. YOUR INFORMATION IS KEPT SECURE WITHIN THE FIRM IN FILE FOLDERS, FILE DRAWERS, AND COMPUTERS, UNTIL SUCH TIME THAT THE FILE INFORMATION IS RETIRED AND THE FILE REMOVED TO STORAGE IN COMPUTER FILES OR A LOCKED STORAGE FACILITY. THE CLIENT INFORMATION WILL EVENTUALLY BE DELETED.

File Information. During our representation of you, we will be sending you copies of all important contracts, pleadings, letters, notices and other material which we believe you should review. We strives to maintain these documents in digital (paperless) format, so more often these copies shall be in digital format, for ease of retention and portability. You should have a secure place to keep these documents. If you need additional paper copies at any time, we can make those at your expense for our copy fees. We may control such costs by keeping digital copies. Should you believe a particular file requires an encryption, you will advise us of the form of such encryption. If we are required to secure encryption software specifically for your case, the cost of that software shall be included in your bill.

Document Retention. You agree we are not responsible to keep copies of your documents. You agree to keep all originals and copies that you desire among your own files for future reference. You am advised to retain all confidential information or original documents from our file as received. You otherwise authorize us to destroy in a secure manner the information contained in our file when the legal service is complete.

HIPAA Provisions. Under Texas Health and Safety Code, Sec. 181.154 – HB 300, effective September 1, 2012, because we gather, store, and electronically transmit medical records (Protected Health Information – PHI) in the course of our representation of our clients, we are required to post a notice to clients that their protected health information is subject to electronic disclosure. Texas and federal law prohibits any electronic disclosure of a client's protected health information to any person without a separate authorization from the client or the client's legally authorized representative for each disclosure. This authorization for disclosure may be made in written or electronic form or in oral form if it is documented in writing by us.

The authorization for electronic disclosure of protected health information described above is not required if the disclosure is made to another covered entity, as that term is defined by Section 181.001, Texas Health & Safety Code, or to a covered entity, as that term is defined by Section 602.001, Texas Insurance Code, for the purpose of treatment; payment; health care operations; performing an insurance or health maintenance organization function described by Section 602.053, Texas Insurance Code, or as otherwise authorized or required by state or federal law. In other words, no further release is necessary for electronic disclosure to other health care providers, insurance companies, governmental agencies, or defense lawyers representing adverse parties.

17. **Texas Lawyer's Creed**. Please see the Texas Lawyer's Creed attached.

18. **Acknowledgment of Agreement**

WE HAVE DISCUSSED WITH YOU THE TERMS AND CONDITIONS OF OUR ENGAGEMENT BECAUSE WE BELIEVE THAT YOU ARE ENTITLED TO KNOW OUR POLICIES, AND IN ORDER TO AVOID ANY MISUNDERSTANDINGS LATER. BY YOUR SIGNATURE BELOW, YOU ACKNOWLEDGE THAT, IN ADDITION TO YOUR HAVING READ THIS AGREEMENT IN ITS ENTIRETY, I HAVE ANSWERED ANY QUESTIONS THAT YOU MAY HAVE CONCERNING THE AGREEMENT, AND THAT YOU UNDERSTAND THE AGREEMENT AND CONSIDER IT TO BE FAIR AND REASONABLE. BY YOUR SIGNATURE, YOU ALSO ACKNOWLEDGE THAT YOU HAVE BEEN ADVISED BY US TO RETAIN INDEPENDENT LEGAL COUNSEL TO REPRESENT YOU IN CONNECTION WITH THE NEGOTIATION AND EXECUTION OF THIS AGREEMENT AND THAT YOU HAVE HAD SUFFICIENT TIME TO DO SO. BY SIGNING BELOW, YOU ARE AGREEING TO THE TERMS AND CONDITIONS CONTAINED IN THIS ENGAGEMENT LETTER.

Signed on ______________________________, ________.

ACCEPTED:

____ ____

Client Client

_______ Yes. I understand email is not a secure communication. You may communicate with me via email.
Initial Preferred email address ____

_______ No. Please do not communicate with me via email.
Initial

Received the sum of $__________in the form of check/cash on ________________________, 20____.

20XX FEE AND EXPENSE SCHEDULE
FEES – HOURLY RATES - STANDARD

FEES

R. Hal Moorman	$XXX
Andrew J. Hefferly	$XXX
Christopher S. Hardy	$XXX
Emily G. De Young	$XXX
Support Staff	$XXX
Probate	$XX/$XX/$XXX
Law Clerks	$XX
Clerks	$XX

EXPENSES

Photocopies	XX¢ per page in firm, or cost of copy service
Color Photocopies	$X.00 per copy, or cost of copy service
Incoming Fax; Local Outgoing Fax	XX¢ per page
Outgoing Long Distance Fax	Long distance call expense + 10%
Long Distance Calls	Cost to firm + 10%
Other Expenses	Cost to firm
Costs Advanced	Cost to firm
Mileage	.58 per mile

APPENDIX P

Thomas Baird Contract

ATTORNEY: [“Attorney”, “I”, “we”, “our”, or “us”]

BAIRD, CREWS, SCHILLER & WHITAKER, P.C.
401 North 3rd Street, 2nd Floor
Post Office Box 1260
Temple, Texas 76503-1260
(254) 774-8333
(254) 774-9353 (fax)
Website: www.bcswlaw.com

CLIENT: [“Client”, “you”, or “your”]

Thank you for selecting Baird, Crews, Schiller & Whitaker, P.C. (“BCSW”) as counsel to represent you. We value the relationships we build with our clients and believe that it will be mutually beneficial to have a clear understanding of our engagement. Accordingly, this Engagement Agreement confirms our representation and your authorization for us to act on your behalf. If you have any questions concerning this Engagement Agreement, please do not hesitate to contact me.

Any reference herein to this Engagement Agreement will include its following incorporated attachments:

- Credit Card Authorization for your use if your desired payment is Visa or MasterCard.
- Our Terms of Engagement for Legal Services ("Terms of Engagement") which provides additional information, disclosures, and conditions regarding our legal services, our relations with our clients, our billing and payment arrangements, potential conflicts and other matters. These Terms of Engagement will apply to all matters on which we may represent you, except as you and we may otherwise expressly agree.
- A copy of the Texas Lawyer’s Creed – A Mandate for Professionalism, which establishes the standards of professionalism for the legal profession; although some of its provisions may not be applicable to your representation situation. We pledge that the legal services we render will be in accordance with The Texas Lawyer's Creed -- A Mandate for Professionalism to the extent the provisions are applicable.
- Notice to Clients, which provides the contact information for the State Bar of Texas regarding any ethical or disciplinary complaint directed to a lawyer’s conduct.
- A Schedule of Services for our fixed fee services as well as other expenses of which we are currently aware.

Please review this Engagement Agreement carefully. If this Engagement Agreement is not consistent with your understanding of our engagement in any respect, or if you have any questions concerning the nature and terms of our engagement, please contact me promptly so that we can address your concerns at the outset.

SCOPE OF ENGAGEMENT. We understand that BCSW is being engaged to represent you in connection with business-planning matters (which may include preparation of formation documents for business entities, transaction documents, buy-sell arrangements, and transfer documents); as well as other related services and documents; and to address those additional matters for which BCSW expressly agrees to provide representation.

PROFESSIONAL SERVICES AND EXPENSES. Our professional fees for legal services, other than the services described as fixed-fee work, will be determined by the amount of time our attorneys spend on this engagement and based on their applicable hourly rates in effect at the time our invoices are rendered. I will coordinate and direct the work on this engagement. My present applicable hourly rate for this matter is $400.00. The current hourly rate for legal assistants and paralegals ranges from $100-225 per hour.

During the course of our engagement, it may be necessary or advisable to delegate work to other attorneys, in which case we will advise you of their identity and their hourly rates. Our hourly rates may be adjusted from time to time, and we will advise you of any such adjustments within a reasonable time.

A description of the services included in the “fixed-fee” work we will be rendering for you are indicated on the attached Schedule of Services. The fixed fee is payable upon our completion of the primary business-planning documents.

INVOICES AND PAYMENTS. We will render invoices to you monthly for legal services, expenses, and other charges.

OUR AGREEMENT. In providing legal services to you, absent timely advice from you to the contrary, we will act in reliance upon the understanding that this Engagement Agreement reflects our mutual understanding with respect to the terms of our retention. Nevertheless, you must communicate a written acceptance of this Engagement Agreement as further confirmation of our understanding and of the terms of our engagement.

Please know that this Engagement Agreement is of significant legal importance. Any attorney's service to a client should always be structured so that the attorney has no interest, other than the client's interest, in the outcome of any procedure or recommendation. This Engagement Agreement is the only exception to that rule – this Engagement Agreement is the only time when the interest of our firm may be in conflict with your own. This Engagement Agreement will govern our relationship. It is important that you resolve any question or doubt you may have about this Engagement Agreement before you sign this Engagement Agreement. If in doubt, we recommend that you seek the opinion of a qualified attorney or other trusted advisor as to your rights under this Engagement Agreement. You will never offend us or jeopardize our relationship in seeking a review of our work and a second opinion from qualified legal and tax counsel. This will be true at any time during our working relationship. The capitalized words defined in this Engagement Agreement have the same meaning in the Terms of Engagement and other attachments.

We further agree that you may retain another lawyer to assist in this matter. We all agree that any other lawyer so retained will be your lawyer also and will be a part of your legal team, for all purposes, including but not limited to attorney-client communications, work product, and all confidential and privileged matters incident to this matter and engagement.

START AND END DATE. This engagement will begin on the date this letter is signed and delivered unless we agree to undertake the engagement sooner. Unless terminated earlier by you or us, this engagement will end 30 days after the business-planning documents are signed.

ACCEPTANCE OF ENGAGEMENT. If this Engagement Agreement is acceptable to you, please sign where indicated below. Your acceptance of this Engagement Agreement will indicate that you have read and agree to the terms stated in this Engagement Agreement. Each person or organization identified as Client must communicate a written acceptance of this Engagement Agreement. Delivery and acceptance may be by regular mail or delivered electronically. An instrument delivered by electronic transmission will be considered to be an original.

This Engagement Agreement is signed to be effective ____________, 2018.

____
Attorney

____
Client

CREDIT CARD AUTHORIZATION	
I authorize Baird, Crews, Schiller & Whitaker, P.C. (“Firm”) to charge all amounts owed by me to the Firm to my (circle one) MasterCard / Visa card #___________________________________, which has an expiration date of ______________________, security code _____. The name on my card is ______________________________. If there any questions, I can be reached at the following daytime phone number: ___________________________.	
	____ Signature

Terms of Engagement for Legal Services – [Client]

WELCOME. Thank you for selecting BCSW to represent you. These Terms of Engagement are an addendum to our Engagement Agreement, which together set forth the basis upon which BCSW will provide legal services to you. We believe it is important to establish clearly the basic terms of our engagement at the outset. Accordingly, if you have any questions concerning these Terms of Engagement, please contact the lawyer responsible for your engagement so that your questions or concerns may be promptly addressed and resolved.

INTRODUCTION. You have engaged BCSW to provide legal services as previously described in this Engagement Agreement. The Engagement Agreement, which includes these Terms of Engagement and other attachments, confirms the nature, scope, and terms of our engagement. Absent a contrary agreement between us, we will understand that our Engagement Agreement and other attachments supersede any prior oral understandings between us and together form the contract for our initial engagement and any subsequent assignments that we may mutually agree upon.

OUR LAWYER - CLIENT RELATIONSHIP. BCSW has been engaged to represent only the Client named in this Engagement Agreement, even if someone other than our Client, including an insurer, is responsible for paying, or has agreed to pay, BCSW's statements. We do not assume the representation of any person, family member, or business organization not listed above as Client. Accordingly, absent a specific, separate engagement to represent such other persons or entities, (1) if our Client is an individual, BCSW has not agreed to represent, and is not representing, any person not so identified or any affiliated entity; (2) if our Client is a corporation, limited liability company, partnership, joint venture, or other entity, BCSW has not agreed to represent, and is not representing, any constituent of the Client, including directors, managers, officers, employees, managing agents, partners, members, shareholders, affiliates (including parents and subsidiaries), or other persons associated with the Client; and, (3) if our Client is a trade association or other member organization, BCSW has not agreed to represent, and is not representing, any director, officer, member of or other entity represented by the Client or any other constituent of the Client. Before entering into this engagement, we reserve the right to obtain waivers of any potential conflict from parties not listed as "Client" who may be affected by this transaction.

In addition, BCSW's engagement to represent you is limited to the matter or matters described in this Engagement Agreement and to any additional matters for which we expressly agree in writing to provide legal representation. There is no implied representation that we can or will provide any further service beyond the engagement period and the scope of service without first negotiating a new Engagement Agreement. Any change as to scope of work or extension of the engagement period must be in writing to be binding.

You acknowledge that BCSW has not provided you with legal advice concerning the terms and conditions of this Engagement Agreement.

NO GUARANTEE OF RESULTS. Either at the beginning or during the course of our representation, we may express our opinions or beliefs concerning the matter or various courses of action and the results that might be anticipated. Any such statement made by any attorney or employee of BCSW is intended to be an expression of opinion only, based on information available to us at the time, and must not be construed by you as a promise or guarantee of any particular result.

SCOPE OF ENGAGEMENT. BCSW represents you in connection with the matter referenced in this Engagement Agreement. BCSW does not represent you in connection with any income tax implications or give any income tax advice. You are advised that your Certified Public Accountant should be involved in this planning. Failure to involve the accountant could result in subsequent confusion, time, and cost when the accountant is asked to review your plan for the first time during tax season and in the course of the preparation of the added income and gift-tax returns which may result from your planning.

OUR CHARGES FOR LEGAL SERVICES

A. Legal Fees. Our statements for professional services will be based upon the fee arrangement as reflected in this Engagement Agreement with you. In most cases, our statements for professional services will be substantially based upon the time spent by professionals, including lawyers, paralegals, and other staff members operating under the supervision of lawyers, who perform services on your behalf. The hourly rates for those individuals are based upon their expertise and experience. Hourly rates for our lawyers vary across BCSW and currently range from $250 to $400. Our hourly rate for paralegals and other professional staff members also varies and currently range from $100 to $225. Time spent on your matters will include meetings with you and others; traveling; considering, preparing, and working on documents, pleadings, and other papers; written and electronic correspondence; and making and receiving telephone calls. Whether or not a matter proceeds to completion, we will charge you for work done and expenses incurred, unless otherwise agreed.

Our hourly rates are periodically reviewed and adjusted. In preparing our statements for professional services, we will use our hourly rates in effect when such services were rendered.

Where requested, we may provide you an estimate of the overall costs that may be incurred in connection with a particular engagement. Any such estimate is necessarily based on a number of uncertain factors and future developments and may be influenced by your conduct and decisions and by the actions of third parties. Accordingly, any estimate we provide shall not constitute a promise or agreement that we will render the necessary services within a specific time or for a fixed amount. BCSW's statements for professional services will be based on our billing policies, as set forth herein, and the charges reflected in such statements may vary from any estimates previously given.

Some reasons for exceeding an estimate provided may include the occurrence of any of the following:

- Delivery of incomplete information, instructions, and late delivery of information.
- "Change-of-mind" redrafts of one or more of the documents. Changes made due to our misinterpretation of your instructions or a drafting error will be made at no additional charge.
- Out-of-town meetings or other work requiring traveling to another location that exceeds the time estimate indicated in the attached Schedule of Services.
- Any service, including a scheduled service, which continues beyond the term of this contract.

B. Disbursements. You will be billed for disbursements and other charges relating to our professional services. You agree to reimburse BCSW for any and all expenses incurred in connection with your legal matter. With respect to disbursements incurred on your behalf to vendors and other third parties for incidental expenses (such as postage, filing fees, messenger delivery and transportation services, and travel expenses), you will be billed at our invoiced cost. With respect to internally-generated and other charges (such as photo and/or electronic copying), you may be billed for charges in effect when the charge is incurred. Where the nature of our engagement requires the retention of third parties (e.g., expert witnesses, accountants, actuaries, or other consultants, mediators or arbitrators), we will obtain your approval for such retention, and we will forward their statements for services and expenses directly to you for payment.

C. **Other BCSW Charges**. Where, with notice to you, we have engaged another person, firm, entity, or organization to assist us in an engagement, we will include their charges in our statement for professional services unless you ask us to arrange for the other entity to invoice you separately. Examples of these type services would be valuation services, conveyance of title in states other than Texas, accounting services, etc. If you are billed directly for the charges or the charges are given to you to pay, you agree to make prompt, direct payments of the charges.

OUR BILLING AND PAYMENT ARRANGEMENTS

A. Billing. It is BCSW's general practice to render statements for professional services and related charges on a monthly basis. This will be an itemized statement setting forth in reasonable detail the services by the attorney on behalf of the Client and any costs which have been incurred and/or advanced by the attorney on behalf of the Client in the matter as referenced in this Engagement Agreement. We will send a final statement after completion of our work. Our statements will be delivered to you either in person, electronically (email or facsimile), or by U.S. Mail. If you prefer to receive your statement by email, it will be your responsibility to insure we have the correct email address to which to send your statement.

B. Payment. Unless you have made some other arrangement with our firm, we will expect payment of our statements to be made within ten (10) days of your receipt of our statement, without regard to the consummation of any proposed transaction or the outcome of any matter. You may pay your statement by cash, check, Visa, or MasterCard. We do not accept any other credit card. If you would prefer that we automatically charge your bill to your Visa or MasterCard, please fill out and sign the Credit Card Authorization included with this Engagement Agreement, and we will automatically charge the amount owing on the bill to your credit card.

In the event our statements are not paid in a timely fashion, we reserve the right to terminate our representation of you. Under such circumstances, you agree to consent to, and not oppose, such termination and to sign a substitution of counsel and/or such other document as may be reasonably necessary to effect BCSW's termination of our attorney-client relationship. The termination of our attorney-client relationship shall not affect your ongoing responsibility for any fees or other charges incurred as of the date of our notice of termination.

C. Third Party Payment Responsibility. Unless we receive joint instructions to the contrary, we will send our entire bill for fees and disbursements for organizing the entity to Client Holdings, LP. You should enter into a written agreement for reimbursement of Client Holdings, LP. When you have reached an agreement on this subject, we will discuss with you whether we can ethically draft the agreement. If not, we will recommend an independent attorney for you. We cannot provide advice to any of you regarding any claim against another for indemnity or reimbursement of fees and disbursements billed by us in connection with this representation. Once the entity is formed and operating, we will bill the entity directly.

If an insurer or other third party undertakes to pay any portion of BCSW's bills, you will remain responsible for payment of any amounts billed by BCSW and not paid by that third party. Similarly, if you are awarded legal fees or costs by a court or other party, you will remain responsible for payment of BCSW's billed fees and other charges even if the award to you is less than amounts

we have billed you. Where we have agreed to represent multiple Clients in a matter, we will understand that each Client has agreed to be jointly and severally responsible for payment of our services and related charges.

D. Questions. If you have any questions about any statement for professional services and related charges that we submit to you, you should contact the lawyer responsible for your engagement as soon as you receive it so that we may understand and address your concerns promptly.

TERMINATION.

A. Your Right to Terminate. You may terminate our engagement on any or all matters at any time, with or without cause.

B. Our Right to Terminate. Subject to any applicable ethical rule or legal requirement, BCSW reserves the right to terminate its representation of you, subject to such permission from any court or tribunal as may be required under the circumstances. In such event, we will provide you with reasonable notice of our decision to terminate and afford you a reasonable opportunity to arrange for successor lawyers, and we will assist you and your successor lawyers in effecting a transition of the engagement. Reasons for BCSW's termination may include your breach of our Engagement Agreement including, without limitation, failure to pay outstanding invoices in a timely fashion as set forth above, the risk that continued representation may result in our violation of applicable rules of professional conduct or legal standards or of our obligations to any tribunal or third parties, your failure to give us clear or proper direction as to how we are to proceed or to cooperate in our representation of your interests, or other good cause.

C. Payment Responsibility. Whether our services are terminated by you or BCSW, termination of our services will not affect your responsibility to pay for billed and unbilled legal services rendered or other charges incurred as of the date of termination and, where appropriate, for such expenses as we may incur in effecting an orderly transition to successor lawyers of your choice.

D. Termination Upon Conclusion. Unless it is previously terminated, our representation of you, and our attorney-client relationship with you, will be deemed to have been terminated upon the expiration of thirty (30) days after the conclusion of our services and our delivery of our final statement for the services described in our Engagement Agreement and any additional matters for which BCSW has expressly agreed to provide representation.

E. Post-Engagement Matters. After the conclusion or termination of our representation of you as described in our Engagement Agreement, changes in relevant laws, regulations, or decisional authorities may affect your rights and obligations. Unless you engage BCSW to provide future services and to advise you with respect to any issues that may arise in the future as a result of such changes, we will have no continuing obligation to advise you with respect to future legal developments.

F. Subsequent Representation. We look forward to representing you. You should, however, understand that after the conclusion or termination of our representation of you as described in our Engagement Agreement, this representation will not preclude our subsequent representation in other matters which may be adverse to you.

OUR COMMUNICATIONS WITH CLIENTS

A. Open Communication. Open communication promotes a better working relationship and quicker completion of the work for which we have been engaged. BCSW's lawyers strive to keep our clients reasonably informed about the status of our engagements and to promptly comply with reasonable requests for information. To enable us to provide effective representation, you agree to be truthful and to cooperate with us in the course of the engagement and to keep us reasonably informed of material developments.

During the term of this engagement, we will attempt to be reasonably available to you. We are handling a number of clients, and because of previous engagements, personal days, and matters unforeseen, we will sometimes not be immediately available to respond to your phone, electronic, or written communication. It is our policy that all client communication be returned as promptly as possible. Our firm has a voice-mail system for each attorney and staff member, and we urge you to leave a detailed message if you cannot reach your desired party directly. This will assist us in more quickly responding to you with an answer to any question you might have. If the desired attorney is unavailable, a staff member may often be of assistance.

B. Disclosures of Types of Communication Used by BCSW. Although the use of communication technology such as cordless phones, cellular phones, e-mails, facsimiles, or communication through our website help us to transmit documents to you and to communicate better and faster with you, there is an increased possibility that information transmitted over these various medium may be intercepted by an unauthorized third party or accidentally disseminated to an unauthorized third party which compromises the attorney-client privilege between you and our firm. By your signature to this Engagement Agreement, you expressly authorize the use of all forms of communication as described above for transmitting documents to you and to otherwise communicate with you. If because of the sensitivity of the information to be communicated to our firm you desire that one or more of the above described means of communication not be utilized by our firm with you, or if there are particular limitations on how you would like us to communicate with you, you agree that you will advise us in writing your specific instructions restricting or specifying

the types of communications to be utilized between you and our firm. We will, of course, abide by your wishes in this regard. Unless you advise us to the contrary, however, we will assume that communication by e-mail and facsimile is acceptable to you. Absent special arrangements, we do not employ encryption technologies in our electronic communications.

CONFIDENTIALITY

A. Confidentiality and Disclosure. We owe a duty of confidentiality to all our clients. Accordingly, you acknowledge that we will not be required to disclose to you, or use on your behalf, any documents or information in our possession with respect to which we owe a duty of confidentiality to another client or former client.

As to our representation of you as described in this Engagement Agreement, the Client under this Engagement Agreement will be the person or persons (including any business entity or enterprise) expressly identified above as Client in this Engagement Agreement. We assume no duty to any other person or enterprise, nor any other member of your family, not identified as a client in the contract. We will not disclose any information to anyone other than to a Client except as specifically permitted by you or as otherwise authorized in order to fulfill our representation. We reserve the right to refuse disclosure of confidential and privileged information under any condition or circumstances. If you become incapacitated, you agree that we may, but are not required to, disclose certain information to your immediate family members or your legal representatives.

B. Disclosure to Certain Third Parties. You agree that we may, when required by our insurers, auditors, or other advisers, provide details to them of any matter or matters on which we have represented you.

C. Data Protection. Any information, including personal data, that BCSW collects in our legal practice may be controlled, stored, and processed in, and transferred among, any of our offices and with such contractors as we engage to assist us in our practice, and may be transferred to and through any country, including countries outside the European Economic Area which may not have privacy (data protection) legislation and regulations comparable to the laws of the country in which you reside, including European law. We understand that, in engaging BCSW, you expressly consent to all such control, storage, processing, and transfers.

D. Attorney-Client Privilege. While federal laws and regulations establish rules and disclosure requirements, they do not limit the attorney-client privilege or the confidentiality rules for information provided to attorneys. The privilege and confidentiality rules are governed by state law, the rules imposed on attorneys under state law and our ethics standards. In circumstances where applicable federal laws might allow disclosure, we will continue to follow the stricter non-disclosure rules of attorney-client privilege and client confidentiality.

FILE MAINTENANCE. During our representation of you, we will be sending you copies of all important contracts, pleadings, letters, notices, and other material which we believe you should review. More often, these copies shall be in digital format for ease of retention and portability. You should have a secure place to keep these documents. If you need additional paper copies at any time, we can make those at your expense for our normal copy fees. Clients may control such costs by keeping digital copies. Should you believe your particular file requires an encryption, you should advise us of the form of such encryption. If our office is required to secure encryption software specifically for your case, the cost of that software shall be included in your bill.

PRIVACY AND CLIENT FILE

Our privacy policy as to social security numbers and other private information is as follows:

- Social Security Numbers and Driver's License Numbers are only used as needed and as required by law.
- These private numbers are used to identify parties, whether for initial service of court documents, for certain court orders, as required for reports filed with the state of Texas, or for other required purposes.
- These private numbers received from a client are confidential and are not released from the firm unless authorized by the client or required by law.
- The employees of the firm have access to this personal information but shall not release it without attorney authorization.
- Every step is taken to protect your privacy. Your information is kept secure within the firm in file folders, file drawers, and computers, until such time that the file information is retired and the filed removed to storage in computer files or a locked storage facility. The client information will eventually be shredded per the Disposition of Client Files provision below, or otherwise deleted.

DISPOSITION OF CLIENT FILES. At the conclusion of this matter, Client is advised that all original business-planning documents, upon execution and after copying, will be delivered to the client, and that all other matters in the Client's file shall be returned to Client upon request. Client is further advised to retain all confidential information or original documents from Attorney's file. Client otherwise authorizes Attorney to destroy in a secure manner the information contained in Attorney's file after five years from the date the legal service is completed. Client agrees to request from the Attorney in writing any documents of which the Client may want copies before the end of the five-year period.

CONFLICTS OF INTEREST. Prior to our engagement by you, we conducted a search of the BCSW's conflicts database and have disclosed to you any ethical conflicts of interest, as defined by the applicable rules of professional conduct that existed at that time.

BCSW's lawyers, acting in a variety of practice areas and in multiple jurisdictions, provide and will provide legal services to thousands of clients and future clients. Those clients may be competitors, customers, suppliers, or have other business dealings and relationships among each other. As a result, those clients may have matters in which their interests are actually or potentially adverse to one another.

In these circumstances, BCSW's ability to represent you in any matter involving, directly or indirectly, another client will be governed by applicable rules of professional conduct, unless otherwise agreed to by and between you and BCSW and, as appropriate, any other BCSW client. To allow BCSW to represent both you and other current and future clients in pending or future matters to the fullest extent consistent with applicable ethical restrictions, BCSW requests our clients to agree to a limited waiver of certain actual or potential conflicts of interest.

Specifically, we request that (1) you agree that, to the extent permitted under applicable ethical standards, BCSW can represent other clients whose interests are actually or potentially adverse to you, provided that: (a) the matter is not substantially related to any current or concluded matter in which BCSW has represented you; (b) in carrying out any such other representation, BCSW shall not violate the duty of confidentiality that we owe to you; and (c) prior to undertaking the adverse representation, BCSW has reasonably concluded, in the existing circumstances, that BCSW can provide competent and diligent representation to you and each other affected client and that the proposed representation complies with applicable ethical standards; and, (2) you agree that you will not seek to disqualify us from representing other clients with respect to any matters where such provisos are satisfied.

With respect to conflicts of interest that may arise in the future during our engagement by you, you agree to a limited, future waiver. This means that, if all the conditions set forth herein are met, BCSW may represent another client in a matter in which its interests are adverse to yours.

You further agree that, if you choose to withdraw your consent to BCSW's representation of another client in any such adverse representation, you will, at our request, engage other counsel, and, after any brief and reasonably necessary transition period for which we will not bill you, you will permit us to terminate our representation of you unless any rule or statute or tribunal with jurisdiction precludes us from doing so.

Finally, you agree that, for the purposes of determining whether any conflict may exist, our identified Client, and not any affiliated entity or person, shall be considered as BCSW's sole client.

A. Disputes Between Parties Involved in Entity.

1. If Entity Is a Corporation. If matters arise that cause any one shareholder, director, or officer to have a claim against another shareholder, director, or officer, we could represent neither shareholder, director, or officer. If matters arise that cause any shareholder, director, or officer to have a claim against the corporation, or that cause the corporation to have a claim against an individual shareholder, director, or officer, we retain the right to require the corporation to engage another attorney for that specific action.

2. If Entity Is a Limited Liability Company. If matters arise that cause any one member, managers, or officer to have a claim against another member, manager, or officer, we could represent neither member, manager, or officer. If matters arise that cause any member, managers, or officer to have a claim against the limited liability company, or that cause the limited liability company to have a claim against an individual member, manager, or officer, we retain the right to require the limited liability company to engage another attorney for that specific action.

3. If Entity is a Partnership. If matters arise that cause any one partner to have a claim against another partner, we could represent neither partner. If matters arise that cause any partner to have a claim against the partnership, or that cause the partnership to have a claim against an individual partner, we retain the right to require the partnership to engage another attorney for that specific action.

4. Disputes Regarding Issues Involved in Organizing the Entity.

a. Types of Issues that May Arise. At this time there does not appear to be any difference of opinion among any of you with regard to the major issues involved in organizing the entity. It may turn out, however, that, upon further consultation, one or more of you may have varying opinions with respect to the entity's capitalization and other organizational matters. Issues that investors may disagree about include the amount and type of ownership interest, terms of any loans or leases of property to the entity by the investors, debt-equity ratio, election of tax status, salaries and fringe benefits, ownership options, management

responsibilities, restraints on the sale or other transfer of the ownership interest, circumstances under which the ownership interest of the entity may or must be purchased by the entity or other owners, and selection of the entity's fiscal year.

b. **If Differences Arise that Cannot be Resolved**. It is our duty to explore each organizational issue with you. If we determine there are material differences on any organizational issue that cannot be resolved to each party's best interest, then we must at that time withdraw from representation. If this occurs, we will, if you wish, assist each of you in obtaining a new attorney. You would, of course, be responsible for payment of all our accrued legal fees and any outstanding expenses we have advanced on your behalf. If we have to withdraw, there may be an added expense caused by the representation by a new law firm.

B. If the Client is More than One Person. If the identified Client is more than one person, including husband and wife, parent and child, business entity and owners, we will assume there are no conflicts of interest between those listed above as the Client, and you affirmatively promise to disclose any conflicts that develop during the course of our representation. Notwithstanding the foregoing:

1. **Multi-Party Representation**. Each is advised, as recommended by the Texas Disciplinary Rules of Professional Conduct, of the hazards of multi-party representation by one attorney. An attorney is required to be impartial, loyal, and to exercise independent judgment with regard to the client group as a whole. An attorney may not promote the interest of any one member of a group to the disadvantage of another in the group of clients. An attorney may act as the common representative for more than one person in a common enterprise for so long as their interests do not differ or potentially differ. If some later dispute arises between you as to the subject of the proposed representation, we would be unable to represent either of you without the permission of the other.

2. **Separate and Independent counsel**. Each separate client is advised to obtain the service of independent legal counsel to insure that the client's interests are best protected. Obtaining independent representation, however, could result in increased attorneys' fees and expenses.

3. **Client's Duty to Report Conflicts**. Each Client has the affirmative duty to the Attorney to report any fact or circumstance which may affect the Attorney's impartial representation of all those identified as Client and any fact or circumstance which indicates that the Client's interest is in conflict with another.

4. **Use Your Own Judgment**. One member of a family or business organization may serve as the spokesman for all. It is not uncommon for those who are passively involved in a planning endeavor to sign documents without thoroughly reading or understanding what they have signed. This cannot be permitted in this engagement. At least one court has held that documents signed by a wife were revocable by the wife because she did not receive effective legal representation. The wife claimed that she did not read or understand the documents and that she relied upon the judgment of her husband alone. In signing this Engagement Agreement, each person identified as Client affirmatively represents and promises to read the documents, to ask questions when in doubt as to the meaning of any document or term, and to not sign the documents until he or she understands the documents and the plan for which our firm is being engaged.

5. **Conduct to Be Fair and Open**. You agree to discuss any issues that may arise with respect to our representation of you. You agree that your conduct at all times will be fair and open with one another and with us.

6. **Complete and Free Disclosure**. You each agree that there will be complete and free disclosure and exchange of all information that we receive from you during our representation. This information will not be confidential as to each of the Clients. With common clients, communications relevant to a matter of common interest between the common clients is not protected by privilege.

7. **Discovery of Confidential Information Not to be Disclosed Among Several Clients**. If we represent multiple clients and we become aware of confidential information that we are asked not disclose to all clients, we will ask that the client who has possession of this confidential information disclose that information to the other clients. If the client who has the confidential information does not disclose that information to the other clients within a reasonable period of time, you agree that we have the discretion to either withdraw representation from all clients or to withdraw representation from the client who will not disclose the confidential information, continue to represent all other clients, and to disclose the confidential information to the other clients. If this occurs, you agree not to have us disqualified from representing the other clients because of a conflict of interest. In either situation, all clients will be jointly and severally liable for payment of all our accrued legal fees and any outstanding expenses we have advanced on your behalf. If we have to withdraw, there may be an added expense caused by the representation by a new law firm.

8. **Disclosure of Confidential Information to Non-Client Family Members or Business Associates**. If you allow non-client family members or business associates to attend client conferences or provide them with copies of information that would otherwise be confidential, the attorney-client privilege may be jeopardized as to any information they may possess. You acknowledge that we have made you aware of this potential loss of confidentiality, and you agree to hold us harmless for any loss

of the attorney-client privilege arising out of non-client attendance at client conferences or the delivery of confidential information to non-clients. We will provide confidential information to non-clients only as you may instruct.

9. **Agreement Not to Disclose Confidential Information**. If we are representing one or more of the Clients on separate matters not related to this engagement, you agree that we are under no obligation to disclose any confidential information we may possess in regard to that separate matter.

10. **Separate But Concurrent Representation**. If you have engaged us to represent each of you in a separate but concurrent representation, you agree that we may represent each of you separately, and we will be under no obligation to discuss with either of you what the other has disclosed to us. Each of you releases us from the obligation to reveal to you any information that may have been disclosed to us by the other unless it is material and adverse to your interests. Furthermore, we will not use any information that we receive from the other of you in preparing the other person's plan, even if the result is that the two plans are incompatible and that one plan may be detrimental to the plan of the other. The representation will be structured in such a way as if each of you had gone to a separate lawyer for assistance with your respective plan.

11. **Jointly and Severally Liable**. You agree to be jointly and severally liable for the payment of the fees set out in this contract and guarantee payment according to the terms of this contract.

12. **Disclosure of Wrongdoing**. If we represent multiple clients and we discover that a client has committed acts of fraud, defalcation, forgery or other criminal or civil liability actions, we will ask that the client who has performed that act notify the other clients of their wrongdoing. If the client who has performed the wrongdoing does not notify the other clients within a reasonable period of time of the wrongdoing, we will have an obligation to notify the other clients of the wrongdoing. If the wrongdoing is not resolved among the several clients within a reasonable period of time, you agree that we will have the right to either withdraw our representation from all clients and provide all confidential information in our possession to each client, or, in the alternative, withdraw from representing the client who has performed the wrongdoing and continue to represent the other clients with no obligation to make full disclosure of any confidential information in our file to the client who has done the wrongdoing even if this is to the detriment of the client who performed the wrongdoing. If this occurs, you agree not to have us disqualified from representing the other clients because of a conflict of interest. In either situation, all clients will be jointly and severally liable for payment of all our accrued legal fees and any outstanding expenses we have advanced on your behalf. If we have to withdraw, there may be an added expense caused by the representation by a new law firm.

13. **Development of Conflicts of Interest**. If we represent multiple clients and a conflict arises, we will provide all confidential information in our possession to each client, and you agree we have the right to withdraw our representation from all clients. All clients will be jointly and severally responsible for payment of all our accrued legal fees and any outstanding expenses we have advanced on your behalf. If we have to withdraw, there may be an added expense caused by the representation by a new law firm.

C. Prior Clients. We may have, in the past, represented one or more of the Clients, the Client's family members, and business entities of which the Client or the Client's family members have an ownership, management, or employment relationship ("Prior Clients"). This representation was for matters unrelated to this engagement. We reserve the right to obtain consents from Prior Clients in connection with us serving as legal counsel to the Client. Consents may be obtained because our undertaking to represent the Client constitutes a potential conflict of interest. At this time, we do not believe that our representation of the Prior Clients will impair the exercise of our independent professional judgment on behalf of the Client. If we determine that because of differences between the Prior Clients and the Client we can no longer represent the Client impartially, or if an actual conflict arises while representing the Client, we will inform you of the matter or actual conflict. We must then withdraw from representation and cease further representation of any party to the conflict. If we determine that we must withdraw from the representation, we will, if you wish, assist the Client in obtaining new counsel. The Client would, of course, be responsible for payment of all accrued legal fees and any outstanding expenses we have incurred on your behalf. We will return any unused portion of any advances that have been made. The need to obtain substitute counsel may, in addition, involve the occurrence of additional legal fees and expense.

D. Current Clients. We may at the time this engagement contract is being executed be representing one or more of the Clients, the Client's family members, and business entities of which the Client or the Client's family members have an ownership, management, or employment relationship ("Current Clients") on separate matters unrelated to this engagement. Current Clients include Beverly Prior Client and related entities and trusts. We reserve the right to obtain consents from Current Clients in connection with us serving as legal counsel to the Client. Consents may be obtained because our undertaking to represent the Client constitutes a potential conflict of interest. At this time, we do not believe that our representation of the Current Clients will impair the exercise of our independent professional judgment on behalf of the Client. If we determine that because of differences between the Current Clients and the Client we can no longer represent the Client impartially, or if an actual conflict arises while representing the Client, we will inform you of the matter or actual conflict. You agree that we may withdraw from representing the Client and to continue to represent the Current Clients even in litigation by the current clients against the Client. If this occurs, you agree not to have us disqualified from representing the Current Clients because of a conflict of interest. If we determine that we must withdraw from the representation, we will, if you wish, assist the Client in obtaining new counsel. The Client would, of course, be

responsible for payment of all accrued legal fees and any outstanding expenses we have incurred on your behalf. We will return any unused portion of any advances that have been made. The need to obtain substitute counsel may, in addition, involve the occurrence of additional legal fees and expense.

E. This Engagement Agreement Controls. If we have represented the Client prior to this engagement, you agree that this Engagement Agreement now redefines our attorney-client relationship and that to the extent this Engagement Agreement may conflict with any earlier engagement agreement, this Engage Agreement supersedes any earlier engagement contractual relationships.

F. Representation of Adverse Clients. You agree that we reserve the right to continue representing existing or new clients in any matter that is not substantially related to our work for you even if the interests of those clients in other matters are adverse to you.

OPPOSING LAWYERS. In addition to our representation of business and not-for-profit entities as well as individuals, we also occasionally serve as legal counsel to lawyers and law firms. As a result, opposing lawyers in a matter may be a lawyer or law firm that we represent now or may represent in the future. Likewise, opposing lawyers in a matter may represent our firm now or in the future. Further, we have professional and personal relationships with many other lawyers, often because of our participation in professional organizations. Collectively, these situations are common in the legal field. We believe that these relationships with other lawyers will not adversely affect our ability to represent you.

CLIENT RESPONSIBILITIES.

A. **Information to be Supplied by Client**. An attorney can operate only upon the information the client elects to provide, and the attorney must assume that the information provided is complete and accurate. Your obligation to us is to provide complete and accurate information, including all information about all the assets to be held by the business, with sufficient description of the property to transfer legal title. We will assume that the information you supply is complete and correct.

B. **You Will Read All Documents**. You promise that you will read or reread all of the documents you have signed within one month after the plan documents have been signed.

C. **Insurance Policies**. It is possible that you may have insurance policies relating to the matter which is the subject of our engagement. You should carefully check all policies you have purchased and, if coverage may be available, you should provide notice to all insurers that may provide such coverage as soon as possible. Although we will be pleased to assist you in assessing the potential for coverage under any policies you may have, our engagement will not embrace advising you with respect to the existence or availability of insurance coverage for matters within the scope of our engagement unless you supply us with copies of your insurance policies and expressly request our advice on the potential coverage available under such policies.

D. **Business-Planning Documents Are Complex**. The business-planning documents will be complex to read and understand.

1. **Client's Duties**. It will be your affirmative duty to do the following:

- to involve your accountant, whose services will be necessary to maintain the plan, in the planning process;
- to give the business-planning documents a comprehensive review both before and after they have been signed and before the engagement ends;
- to submit the documents to your accountant for review before the engagement ends;
- to consult with us as to any document or provision you do not understand; and
- to read and review the documents thoroughly within one month from the date the documents are signed.

2. **Client Must Thoroughly Review All Documents**. No attorney is error-proof. Your thorough review of the business-planning and transfer documents, if any, is important to insure that we have followed your business-planning objectives. Your thorough review will also insure that we have properly recorded the information. Any changes made due to our error will be made without cost to you.

3. **Sensitive Provisions**. Certain sensitive provisions are usually included in the business-planning documents. The business-planning documents may include transfer provisions that determine who an ownership interest may be transferred to and the conditions of that transfer. The final documents will include these provisions unless you specifically require a deletion of any provision. The term of the Engagement Agreement is designed to give you the time you need to review the documents and planning procedures within the term of the contract.

E. Interpretation of the Business Plan.

1. **Business Plan Formed Under State and Federal Law**. The business plan will be formed under state and federal law now existing. There is precedent in the law for every procedure used with regard to each business-planning organization having situs or location in the United States. The interpretation of existing law may vary from lawyer to lawyer and from court to court.

Both federal and state laws are subject to change and subject to new and different interpretations. The "integrated business plan" is a new concept. Its goals are comprehensive and many aspects of the plan are considered to be aggressive or may be considered as aggressive as used by the client or others. For example, the Internal Revenue Service may not contest claiming minority discount which reduces the value of a partnership or other business interest by 15 percent or 30 percent. The Internal Revenue Service may, however, litigate the claim of a discount of 40 percent or more.

2. **Resolution of Factual Issues**. The ultimate resolution of factual issues by a court, jury, or state or federal government agency cannot be known in advance and is beyond the attorney's control. The motivation issue is a difficult one because it involves a state of mind. It may not matter what the client actually intended at the time, but what the Court or a jury perceives the client's intent to have been at the time. No representation, guarantee, or warranty is made, nor can be made, with regard to the ultimate resolution of fact issues. Such issues may include:

- That the only purpose of a partnership or transfer was solely to reduce federal tax. Transactions with no purpose or effect other than to reduce taxes will be disregarded for federal tax purposes.
- That, in the view of a jury or judge, a partnership or transfers were motivated by an intent to hinder or defraud creditors.
- That a client lacked the required mental capacity at the time a business-planning document was executed.
- The ultimate resolution of a transfer or other procedure, despite clear directives prohibiting contests by the instrument.

3. **Out-of-State Representation**. The Attorney may be requested to provide business-planning services to a client who is not a resident of Texas or services involving property not situated in Texas. If so, the client must employ an attorney in the jurisdiction of the client's residence or in which the out-of-state property is located to review all documents pertaining to the business plan and transfers. We will work with, and if necessary, under the supervision of, the attorney employed by the client for work pertaining to a jurisdiction other than Texas.

F. Choice of Management. Your choice of any person (or institution) who is to have a custodial or administrative responsibility will govern our preparation of the documents. The authority vested in the business-planning documents is comprehensive in nature. Select your candidate wisely. A spouse, a child, or another who has your trust may not have the experience or ability to serve in a management capacity. An improper choice can destroy a good plan and substantially damage family and business relationships.

G. Law Changes. Changes will likely occur in tax, property, and other laws that could impact your business plan. We cannot review the file of each client to determine the impact of court cases, rulings, and other changes in the law. Furthermore, changes will likely occur in your own family, in marital status and in your finances, all of which could impact your business plan. You should, therefore, have your plan reviewed regularly. You acknowledge that we have no duty to review your documents or business plan unless you request us to do so and agree to pay a reasonable fee for that review. Many plans such as yours (especially if the plan is built around multi-business organizations) are high-maintenance plans. If you fail to keep up with some of the formalities required by law, there may be adverse business or tax consequences, or results that may not otherwise be anticipated. We do not assume any obligation to regularly contact you to verify that you are complying with any required legal formalities unless you specifically contract with us for this service. If facts and circumstances change in the future or life threatening circumstances occur to you or anyone else associated with your family or business, you have a duty to contact someone in this firm to make sure you are properly maintaining your plan and that no additional action is needed. Failure to do so may be detrimental to you or your business affairs.

1. **Requirement to Pay Attention to Estate Tax Law Over Next Several Years**. You are hereby advised of the uncertainty of the estate tax laws as they currently exist. You should pay particular attention to the estate tax laws over the course of the next several years, amending your documents in the event of substantial changes. Because we expect substantial changes to occur, you should be well aware that the documents that have been prepared for you currently or will be prepared for you may need to be significantly revised from time to time within the near future.

2. **Requirement to Maintain Basis Information**. You are advised to keep detailed records of your basis in order to avoid potential problems if the Economic Growth and Tax Relief Reconciliation Act of 2001 is still in effect upon your death. Rather than have your executor to have to grapple with these problems, you should determine the adjusted basis and the date that each of your assets were acquired.

H. Business Risks. There may be certain risks associated with your business plan. If the law changes or if the court interprets the facts or law differently than what is currently believed, there may be some adverse consequences. You acknowledge that the potential risks concerning your business-plan have been pointed out to you and that you accept those risks. We have discussed numerous different business-planning options. You acknowledge that you have made your choices after those discussions took place even though your choices may not maximize the greatest financial return or the best tax consequence, but were made because they met your individual business objectives or family situation. You understand that whatever decision, methodology, or manner that is chosen to use in preparation of your business plan, that that manner chosen may not be the only option. Another lawyer may approach your situation from a different point of view and have a different approach. You understand and agree that it is not necessary for us to raise every possible option with you in determining your plan.

I. Use of Exculpatory Language. You acknowledge that we have discussed with you different types of exculpatory language that may be included in your documents. Exculpatory language is included in legal documents to provide protection for a person acting in management or place of responsibility. We have made you aware that the choice of any particular exculpatory language may have a significant impact on any liability that a particular manager or person having responsibility may have and may limit the ability of others to recover for damages caused by that person's intentional or unintentional acts. You agree to carefully read all legal documents prepared for you to make sure that the language accurately reflects the duties and obligations of all parties and to insure that the correct exculpatory language is included in the documents. You acknowledge that we have discussed with you the problems that may arise out of your choices for those who are in positions of management or authority, and you agree that you will carefully select those persons to be placed in positions of management or authority. You acknowledge that you understand that if disputes arise and the persons you have chosen remain in those positions of management and authority, there may be adverse consequences that may be detrimental to you and your business interests.

SEVERANCE. If all or any part of our Engagement Agreement or these Terms of Engagement are or become illegal, invalid, or unenforceable in any respect, then the remainder will remain valid and enforceable.

THIRD PARTY RIGHTS. No provision of this Engagement Agreement is intended to be enforceable by any third party. **Accordingly**, no third party shall have any right to enforce or rely on any provision of this Engagement Agreement.

ASSIGNMENT

A. **Permitted Assignment**. We may assign the benefit of this Engagement Agreement to any partnership or corporate entity which carries on the business of BCSW in succession to us. You will accept the performance by such assignee in substitution for our performance. References in this Engagement Agreement (other than in this paragraph) and in any relevant engagement agreement to BCSW shall include any such assignee.

B. **Other Assignment**. Subject to the foregoing paragraph, neither you nor we shall have the right to assign or transfer the benefit or burden of this Engagement Agreement without the written consent of the other party.

DEFINITIONS. In these Terms of Engagement a reference to a “matter” is to a transaction, case, or other matter as to which at any time you have engaged us to advise you; and, any reference to “our services” is to the legal services to be provided by us to you as described in our Engagement Agreement and any other legal services provided by us to you at any time in relation to a matter.

INCONSISTENCIES. In the event of any inconsistency between the Engagement Agreement and these Terms of Engagement, the Terms of Engagement will prevail.

RESOLVING PROBLEMS AND DISPUTES. If you have any complaints or concerns about our work for you, please raise these in the first instance with the lawyer responsible for your engagement. We will investigate your complaint promptly and carefully and do what we reasonably can to resolve the difficulties to your satisfaction.

AMENDMENTS. These Terms of Engagement supersede any earlier terms of business we may have agreed with you and, in the absence of express agreement to the contrary, will apply to the services referred to in any engagement letter accompanying these Terms of Engagement and all subsequent legal services we provide to you. From time to time, it may be necessary to amend or supersede these Terms of Engagement by new terms. Where this is the case, we will notify you of the changes, and, unless we hear from you to the contrary within fourteen (14) days after such notification, the amendments or new terms will come into effect from the end of that period.

REQUIRED NOTICE UNDER THE TEXAS HEALTH AND SAFETY CODE, SEC. 181.154 – HB 300. Because BCSW may gather, store, and electronically transmit medical records (Protected Health Information – PHI), BCSW is required to post a notice to Clients that their protected health information is subject to electronic disclosure.

Texas and Federal Law prohibits any electronic disclosure of a Client’s protected health information to any person without a separate authorization from the Client for each disclosure. This authorization for disclosure may be made in written or electronic form or in oral form if it is documented in writing by BCSW.

The authorization for electronic disclosure of protected health information described above is not required if the disclosure is made: to another covered entity, as that term is defined by Section 181.001, or to a covered entity, as that term is defined by Section 602.001, Insurance Code, for the purpose of: treatment; payment; health care operations; performing an insurance or health maintenance organization function described by Section 602.053, Insurance Code; or as otherwise authorized or required by state or federal law. In other words, no further release is necessary for electronic disclosure to other health care providers, insurance companies, governmental agencies, or defense lawyers representing adverse parties.

APPENDIX Q

Fixed Fee – Estate Planning Representation Agreement (Married Couple)

Clients: ___________________, 20_____

This document is the agreement between you, the clients named above, and us, the law firm of Law Firm, for estate planning legal services.

Ethical matters

You are our clients. As far as your estate planning is concerned, you are our only clients; neither your children, if any, nor any other relatives or associates of yours are our clients for this purpose. As and when you aks us to do so, we may discuss your estate plan with your family members and answer questions they may have, but this will always be in our capacity as your lawyers.

Potential conflicts of interest. By hiring us jointly, instead of each retaining your own independent counsel, you help minimize legal fees and facilitate a well-coordinated estate plan; however, you also forego the benefit of having your own lawyer to advocate your own interests. Most couples have reasonable differences of opinion about some aspect of their estate plan (e.g., with respect to property ownership or the preferred disposition of their property). As attorneys for both of you we cannot take sides with just one of you; instead, we must endeavor to balance both views (sometimes playing "devil's advocate) and help you resolve any disagreements before they rise to a conflict between you; however, if any conflict which could affect your estate planning arises, you have an obligation to let us know promptly. If it cannot be resolved, we may be compelled to withdraw and not serve as attorneys for either of you.

Confidentiality. Generally, all information you provide to us will be kept confidential and will not be disclosed to persons outside our office without your consent. However, you authorize us to discuss your estate planning and share your confidential information: (1) with other professional advisors to either of you (such as CPAs, financial planners, insurance agents, etc.); (2) with persons named as an agent, trustee or other fiduciary in estate planning documents signed by either of you or prepared at the request of either of you; and (3) whenever your mental capacity is in question, with your children and other immediate family members, your health care providers, and other interested persons. As between the two of you, you authorize (but do not require) complete and free disclosure and exchange of all information that we receive from either of you; information we receive from one of you will be shared with the other whenever we feel it is appropriate (and will be kept in confidence when we feel it is appropriate).

Other clients. Under applicable ethics rules, we are permitted to continue to represent existing and new clients regarding their estate planning or other matters even if these other clients are related to you (professionally or personally) and even if the interests of the other clients in those matters may be adverse to you, but only as long as the matter is not substantially related to our work for you. (For example, we might prepare Wills for members of your family or business associates).

Scope of our representation

At this time, we have agreed to prepare the following estate planning documents for you in accordance with out discussion to date (strike those that do not apply):

- Wills for both of you.
- Joint Revocable Trust / Separate Revocable Trusts for both of you.
- Declarations of Guardian for both of you (naming guardians for your children).
- "Impaired-Judgment Documents" for both of you (Directive to Physicians a/k/a/ "Living Will", Medical Power of attorney, and Statutory Durable Power of Attorney).
- Instructions for preparing beneficiary designations for your life insurance, IRAs and retirement plans, and for dealing with joint/survivorship accounts and other "nonprobate" assets (but not actual beneficiary designations or account agreements).

It is very important that you understand the legal effect of the documents we prepare for you. Therefore, you both agree to confer with us as to any document or provision you do not understand. We agree to answer your questions and provide a reasonable amount of consultation and advice regarding your estate planning generally and the documents we prepare specifically.

Our fee

Based on our fee schedule for estate planning services (and the specialized provisions you have requested, if any), we have agreed on a total fixed fee of $_________. You agree to pay 50% of this fee ($__________) up front, and we will begin work on your behalf when we received this payment. The balance will be due when you sign the documents described above, or, if sooner, one month after we first deliver to you proposed drafts of the documents described above.

The fixed fee covers: (1) our initial conference, (2) preparation of first drafts of the estate planning documents indicated above in accordance with our discussions to date and (3) an in-office signing conference (up to one hour). The fixed fee also includes up to ________hour(s) of additional attorney time until the date of three months after we deliver the initial drafts for: (a) any additional conferences and communications relating to your estate planning (in person, by phone, or by e-mail) with you or others on your behalf, (b) any revisions to the initial drafts (e.g., where you change your mind or because information you have given us so far proves to be inaccurate or incomplete), and (c) any other legal services requested by you or related to the above (including research, inter-office conferences, extended signing conferences, etc.). (Please note that we charge our time in minimum units of 1/4 hour–15 minutes).

There will be additional fees for: (1) legal services listed above (in items a, b, and c) that exceed the included additional hours; (2) all legal services that occur more than three months after we deliver the initial drafts (including services listed above in items a, b, and c); and (3) all drafting or reviewing actual beneficiary designations (occurring at any time). Unless we agree to a different amount, the additional fees will be based on our standard “Hourly Fee” provisions (copy attached). There is also an additional fixed fee if you don’t finalize and sign your estate planning documents within six months of the date we deliver the proposed drafts. Finally, our fixed fee includes standard expenses (basic photocopying, postage, etc.) but does not include additional expenses we may incur on your behalf (such as messenger delivery charges, staff overtime when you request rush service, filing and recording fees, long distance charges, extra photocopies, etc.), which we will bill to you.

Future legal services

Changes likely will occur in tax, property, probate, and other laws which could impact your estate plan. We cannot – on our own – economically review the file of each client to determine the impact of court cases, rulings, and other changes in the law. Furthermore, changes likely will occur in your own family, in marital circumstances, and in your finances, all of which could impact your estate plan. Therefore, you should contact us or other competent estate planning advisors to have your plan reviewed regularly. We can frequently answer simple questions you may have for no additional fee; however, we will address significant questions and review your documents or estate plan only on your request and for a reasonable fee.

Termination

You have the right to terminate our employment at any time and we have the right to resign as your attorneys at any time. Our active role as your attorneys will terminate when your documents are signed and we have sent you a confirming letter. However, no termination will waive any of the remaining provisions of this agreement, including: (1) your agreement to pay us for all work performed prior to termination, (2) your consent to complete disclosure of confidential information to either of you and to others (to the extent authorized above), and (3) our ethical duties to you, such as our duty not to disclose your confidential matter to third parties (except as authorized above).

Hourly Fee Provisions

When providing legal services on an “hourly fee” basis, we may provide an estimated fee (either orally or in writing), based on the information provided to us and the specific documents or services we are asked to provide. However, our actual fee is a reasonable fee based primarily upon the hours we expend: drafting instruments, researching legal issues, consulting with you or with others on your behalf--in person or over the phone, etc. (Also, please note that we charge our time in minimum units of ¼ hour--15 minutes.) Currently, hourly rates for our paralegals and lawyers for matters of this type vary from $80 to $320.

In accordance with the criteria for reasonable fees described in the Attorney Code of Professional Responsibility (adopted by the Texas Supreme Court), we also may adjust our fee, up or down, for such factors as the complexity, novelty, and magnitude of the issues involved, the skill required to perform the services, the speed with which you need or desire our services, the value to you of the results achieved, the extent to which you benefit from work we have done for other clients, the extent to which work we do for you may benefit other clients, etc.

In addition to our hourly fees for legal services rendered, we bill for expenses, including postage, photocopying, long distance and other communication charges, filing fees, messenger delivery and transportation charges, staff overtime (where you request rush service) and other miscellaneous out-of-pocket disbursements in accordance with our customary practices.

We bill monthly for fees and expenses and our bill is due upon receipt. In most circumstances we request an up-front retainer of 50% of the estimated fee, and we begin work when we receive the retainer funds. The retainer is held in our trust account and is applied to our last invoice. If our last bill is less than the retainer balance, we will refund the excess. We may also apply all or any part of the retainer to any interim bill; however, we will still deliver the bill to you and you agree to pay us the amount of the bill so that we may restore your retainer balance.

* * *

If the foregoing correctly reflects our agreements, please sign in the space provided below. Thank you for giving us an opportunity to provide these professional services for you. We look forward to working with you.

______________________________	LAW FIRM
Husbands signature	
______________________________	By: ______________________________
Wife's signature	

APPENDIX R

Fixed Fee – Estate Planning Representation Agreement (Single Person)

Client: ___________________, 20___

This document is the agreement between you, the client named above, and us, the law firm of Law Firm, for estate planning legal services.

Ethical matters

You are our client. As far as your estate planning is concerned, you are our only client; neither your spouse or your children, if any, nor any other relatives or associates of yours are our clients for this purpose. As and when you aks us to do so, we may discuss your estate plan with your family members and answer questions they may have, but this will always be in our capacity as *your* lawyers.

Confidentiality. Generally, all information you provide to us will be kept confidential and will not be disclosed to persons outside our office without your consent. However, you authorize us to discuss your estate planning and share your confidential information: (1) with your other professional advisors (such as CPAs, financial planners, insurance agents, etc.); (2) with persons named as an agent, trustee or other fiduciary in estate planning documents signed by you or prepared at your request; and (3) whenever your mental capacity is in question, with your spouse, children and other immediate family members, your health care providers, and other interested persons.

Other clients. Under applicable ethics rules, we are permitted to continue to represent existing and new clients regarding their estate planning or other matters even if these other clients are related to you (professionally or personally) and even if the interests of the other clients in those matters may be adverse to you, but only as long as the matter is not substantially related to our work for you. (For example, we might prepare Wills for members of your family or business associates).

Scope of our representation

At this time, we have agreed to prepare the following estate planning documents for you in accordance with out discussion to date (strike those that do not apply):

- Will.
- Revocable Trust.
- Declaration of Guardian (naming guardians for your children).
- "Impaired-Judgment Documents" (Directive to Physicians a/k/a/ "Living Will", Medical Power of attorney, and Statutory Durable Power of Attorney).
- Instructions for preparing beneficiary designations for your life insurance, IRAs and retirement plans, and for dealing with joint/survivorship accounts and other "nonprobate" assets (but not actual beneficiary designations or account agreements).

It is very important that you understand the legal effect of the documents we prepare for you. Therefore, you agree to confer with us as to any document or provision you do not understand. We agree to answer your questions and provide a reasonable amount of consultation and advice regarding your estate planning generally and the documents we prepare specifically.

Our fee

Based on our fee schedule for estate planning services (and the specialized provisions you have requested, if any), we have agreed on a total fixed fee of $________. You agree to pay 50% of this fee ($_________) up front, and we will begin work on your behalf when we received this payment. The balance will be due when you sign the documents described above, or, if sooner, one month after we first deliver to you proposed drafts of the documents described above.

The fixed fee covers: (1) our initial conference, (2) preparation of first drafts of the estate planning documents indicated above in accordance with our discussions to date and (3) an in-office signing conference (up to one hour). The fixed fee also includes up to ________hour(s) of additional attorney time until the date of three months after we deliver the initial drafts for: (a) any additional conferences and communications relating to your estate planning (in person, by phone, or by e-mail) with you or others on your behalf, (b) any revisions to the initial drafts (e.g., where you change your mind or because information you have given us so far proves to be inaccurate or incomplete), and (c) any other legal services requested by you or related to the above (including research, inter-office conferences, extended signing conferences, etc.). (Please note that we charge our time in minimum units of 1/4 hour–15 minutes).

There will be additional fees for: (1) legal services listed above (in items a, b, and c) that exceed the included additional hours; (2) all legal services that occur more than three months after we deliver the initial drafts (including services listed above in

items a, b, and c); and (3) all drafting or reviewing actual beneficiary designations (occurring at any time). Unless we agree to a different amount, the additional fees will be based on our standard "Hourly Fee" provisions (copy attached). There is also an additional fixed fee if you don't finalize and sign your estate planning documents within six months of the date we deliver the proposed drafts. Finally, our fixed fee includes standard expenses (basic photocopying, postage, etc.) but does not include additional expenses we may incur on your behalf (such as messenger delivery charges, staff overtime when you request rush service, filing and recording fees, long distance charges, extra photocopies, etc.), which we will bill to you.

Future legal services

Changes likely will occur in tax, property, probate, and other laws which could impact your estate plan. We cannot – on our own – economically review the file of each client to determine the impact of court cases, rulings, and other changes in the law. Furthermore, changes likely will occur in your own family, in marital circumstances, and in your finances, all of which could impact your estate plan. Therefore, you should contact us or other competent estate planning advisors to have your plan reviewed regularly. We can frequently answer simple questions you may have for no additional fee; however, we will address significant questions and review your documents or estate plan only on your request and for a reasonable fee.

Termination

You have the right to terminate our employment at any time and we have the right to resign as your attorneys at any time. Our active role as your attorneys will terminate when your documents are signed and we have sent you a confirming letter. However, no termination will waive any of the remaining provisions of this agreement, including: (1) your agreement to pay us for all work performed prior to termination, (2) your consent to complete disclosure of confidential information to others (to the extent authorized above), and (3) our ethical duties to you, such as our duty not to disclose your confidential matter to third parties (except as authorized above).

Hourly Fee Provisions

When providing legal services on an "hourly fee" basis, we may provide an estimated fee (either orally or in writing), based on the information provided to us and the specific documents or services we are asked to provide. However, our actual fee is a reasonable fee based primarily upon the hours we expend: drafting instruments, researching legal issues, consulting with you or with others on your behalf--in person or over the phone, etc. (Also, please note that we charge our time in minimum units of ¼ hour--15 minutes.) Currently, hourly rates for our paralegals and lawyers for matters of this type vary from $80 to $320.

In accordance with the criteria for reasonable fees described in the Attorney Code of Professional Responsibility (adopted by the Texas Supreme Court), we also may adjust our fee, up or down, for such factors as the complexity, novelty, and magnitude of the issues involved, the skill required to perform the services, the speed with which you need or desire our services, the value to you of the results achieved, the extent to which you benefit from work we have done for other clients, the extent to which work we do for you may benefit other clients, etc.

In addition to our hourly fees for legal services rendered, we bill for expenses, including postage, photocopying, long distance and other communication charges, filing fees, messenger delivery and transportation charges, staff overtime (where you request rush service) and other miscellaneous out-of-pocket disbursements in accordance with our customary practices.

We bill monthly for fees and expenses and our bill is due upon receipt. In most circumstances we request an up-front retainer of 50% of the estimated fee[3], and we begin work when we receive the retainer funds. The retainer is held in our trust account and is applied to our last invoice. If our last bill is less than the retainer balance, we will refund the excess. We may also apply all or any part of the retainer to any interim bill; however, we will still deliver the bill to you and you agree to pay us the amount of the bill so that we may restore your retainer balance.

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If the foregoing correctly reflects our agreements, please sign in the space provided below. Thank you for giving us an opportunity to provide these professional services for you. We look forward to working with you.

_______________________________________ LAW FIRM

Client signature

By:_______________________________________

[3] For "rush" projects, the up-front retainer is 100% of the estimated fee.

APPENDIX S

ARCE Waiver/Arbitration Bonus Fee Agreement

Re: Terms of Engagement for ________________Trust Matters

Dear ____________:

1. Introduction.

The purpose of this engagement letter is to establish the terms of our representation in the following matters. We appreciate the selection of our firm, and we look forward to developing a professional relationship in the course of our representation. This Agreement governs our relationship and, as a result, you should read it carefully. We cannot represent you in connection with this agreement and you should feel free to consult a lawyer regarding its terms.

2. Scope of Engagement.

You hereby engage the law firm of _________________, or its successors or assigns (hereinafter "____________"), in connection with any investigation and litigation related to your dispute with the Trustees of various Trusts established for your benefit (the "Case"). _________________undertakes and agrees to assume the following duties in the Case:

1. Investigate the Case and advise you regarding it;
2. File any appropriate lawsuits;
3. Prepare the Case and manage its development;
4. Present and defend against any motions in court;
5. Prepare and review pleadings, arrange for filing and support activities;
6. Participate in discovery and provide research as to Texas law;
7. Try the Case; and
8. Any and all matters that are necessary and proper to the accomplishment of the above tasks.

Our engagement does not involve any appeal of the Case unless we mutually agree to assume that obligation in writing.

3. Attorneys Responsible for Your Matters.

___________________and __________________will serve as the Partners in Charge of your Case and will utilize the services of such other partners or associates at _______________to prosecute the Case as they deem necessary and proper.

4. Payment for Services Rendered by _________________________________.

In exchange for ________ services on the Case, you agree to pay _______ for all time worked on the Case by ___________on the hourly rates specified below ("Hourly Work") plus any bonus in accordance with Section 6 below. You also agree to reimburse ________for all expenses incurred in connection with the Case in accordance with Section 8 below.

_________shall bill for its Hourly Work on a monthly basis. The statements shall reflect the time spent by each attorney on the daily basis and a brief description of the work performed. You agree to pay each monthly bill within thirty days of its receipt.

5. Billing Rates for Hourly Work.

_________________'s current billing rate is $__________per hour and _______________'s rate is $__________. The billing rates for the other associates and partners in the firm range from $_________ to $______ an hour. Billing rates for legal assistants range from $_______to $_______an hour in addition to any overtime. We usually adjust these rates annually and apply updated rates prospectively, in this case we will agree to limit any escalation on a yearly basis to____% applicable to all lawyers and other professionals, except ____________________, whose rate will remain at the above stated rate until trial is completed should trial be required.

We record and bill our time in one-tenth hour (six minute) increments and adjust the bill to reflect the Texas ethical considerations.

6. Bonus Amounts.

In addition to payment for the Hourly Work as specified above in Section 5, and upon the conclusion of the Case (meaning the execution of final settlement documents or the entry of a final judgment and the exhaustion of all appeals), ___________shall be entitled to a "Success Bonus of $_________payable as follows: a) within 30 days from any settlement (regardless of when the settlement occurs); or, b) upon achieving a "successful" completion of the litigation with "Successful" meaning achieving all of the following goals:

HERE LIST GOALS

In addition to the foregoing "Success Bonus", _________shall be entitled to a "Discretionary Bonus" should the Clients, in their sole discretion, be pleased with the services rendered by ________.

All Bonus amounts set forth above are payable within 30 days of the conclusion of the Case.

7. Disclaimer of Any Result or Warranty.

A trial is an unpredictable event, the outcome of which is based upon facts we do not know at this time and on law that may change. There can be no assurances, and we make no representations, guarantees or warranties as to the particular results from our services, the response and timeliness of action by the court, or any party involved in the Case, or the outcome of the Case. **You may win or lose at trial, and any trial decision could be upheld, reversed or modified on appeal.**

8. Expenses.

Our internal charges typically include such items as long distance telephone tolls, facsimile transmissions, messenger services, overnight courier services, charges for terminal time for computer research and complex document production, secretarial and paralegal overtime and charges for photocopying or printing materials sent to the client or third parties or required for our use.

During the course of our representation, it may be appropriate or necessary to engage third parties to provide services on your behalf. These services may include such things as consulting or testifying experts, investigators, providers of computerized litigation support, court reporters, providers of filing services and searches of governmental records, filings, mock trial experts and local counsel. Because of the legal "work product" protection afforded to services that an attorney requests from third parties, our firm may assume responsibility for retaining the appropriate service providers. ________will not incur expenses in excess of $______without first obtaining permission in writing from at least one of you. Such permission may be provided by email or any other means. A ___% per month interest rate will be charged on the outstanding balance advanced for any costs and unpaid and past due legal fees. Legal fees and expenses are due 30 days after receipt of our invoice. Receipt by Client is deemed to be three days after the bill is mailed or otherwise transmitted by ________________. In the case of any bonus due under the terms of this Agreement, the interest will begin and run from the payment date specified in this Agreement.

9. Scope of Engagement.

We will provide services of a strictly legal nature. You should not rely upon us for business, investment, or accounting decisions, or to investigate the character or credit of persons with whom you may be dealing, or to advise you about changes in the law that might affect you in matters unrelated to the Case. We will keep you advised of developments as necessary. You have directed me to communicate with both of you regarding this case.

10. Conflicts.

1. In this Case a number of interests are represented or could be affected that raise the issue of conflicts of interest as between members of the group. The group includes _________and their heirs and assigns (collectively, the "Clients").

2. Included Matters: ________and ________will represent the ownership rights and interests of the Clients as a group in certain trusts and other assets received and to be received from ________, including certain ownership issues and disputes involving the ________(the "Representation").

3. Excluded Matters: Representation of any of the Clients' individual, in contrast to group, interests regarding such ownership rights, except to the extent (i) required in connection with the Included Matters and (ii) consented to in writing by each of the Client Representatives defined below.

4. Conflicts of Interest: ___________ will advise the Client Representatives from time to time during the Representation with respect to any matter that _______believes could create a conflict of interest in _______'s

Representation of the Clients or with respect to the interests of any of the Clients versus the interests of the other Clients. The Clients likewise shall bring to the attention of ________in writing any conflict of interest that each may discover.

5. Conflict Issues and Examples: Each of you may have different interests from the other. These different interests may become a conflict of interest. For example, one may wish to settle, and the other may not. One of you may select one litigation strategy and the other may wish to pursue as different strategy. One may have personal information that you may wish to keep secret that affects the other. These types of situations may present a conflict of interest. By signing this Agreement you hereby waive any such conflicts of interest that may arise in our dual representation of each of you and affirm that to the extent either of you determines you have a conflict of interest and that we are not serving your interest, you will (i) pay all amounts due under this Agreement including in bonus if applicable; and (ii) not move to disqualify or attempt to prevent the representation of the others in the group who may wish ________to continue its preparation.

6. Right to Engage Separate Counsel: Each of the You is entitled to engage separate counsel to represent You individually at any time and any such counsel shall act as co-counsel with ________in representing You.

7. Direct Supervision of Representation: You agree that ___________ will have final control over all decisions regarding strategy and staffing with respect to all aspects of the Representation of the Clients, subject to ________'s agreement to consult with and obtain the approval of the Client Representatives with respect to any such strategy or staffing that could have a material effect on the Representation (including without limitation the decision to commence litigation or to enter into any settlement or similar agreement or to retain any additional legal counsel).

8. Client Representatives: The Clients designate ______________ (the "Client Representatives") to work with, supervise and manage _________'s Representation of the Clients, and the Client Representatives will have authority to advise ________regarding issues that may arise in connection with the Representation of the Clients with respect to the Included Matters, except as otherwise provided in a written notice to ________on behalf of any Client; and the Clients will have the right to change the Client Representatives at any time by written notice to ________from ___________.

11. Termination of Engagement.

You have the right at any time to terminate our services and representation upon written notice to the firm. We reserve the right to withdraw from our representation if any fact or circumstance would, in our view, render our continuing representation a potential loss of money uneconomic, unlawful or unethical. If we elect to withdraw, you will take all steps necessary on behalf of the company to free us of any obligation to perform further, including the execution of any documents necessary to complete our withdrawal. Therefore, if for example, we decide that we cannot afford to go forward with the Case, we can and will withdraw.

Termination of our engagement in no way affects your obligation to pay for services or expenses due or incurred and interest thereon until fully pa*Id*

12. Governing Law.

OUR AGREEMENT SHALL BE GOVERNED BY THE LAWS OF THE STATE OF TEXAS AND ALL DISPUTES RELATED DIRECTLY OR INDIRECTLY TO ANY ASPECT OF OUR REPRESENTATION OR RELATIONSHIP OF ANY OF OUR PARTNERS, THEIR EMPLOYEES OR EMPLOYEES OF THE FIRM WITH YOU SHALL BE ARBITRATED IN DALLAS, TEXAS PURSUANT TO AND BY JAMS ENDISPUTE SIMPLE FORM (HOWEVER DESIGNATED BY JAMS BY WHATEVER TITLE) OR ITS SUCCESSOR. NOTWITHSTANDING THE PROVISIONS SET FORTH ABOVE, ________AND CLIENTS SHALL BE ENTITLED TO DISCOVERY SUFFICIENT TO MAKE THAT DETERMINATION.

13. Waiver of Certain Remedies.

WITH RESPECT TO ___, ITS EMPLOYEES OR THE EMPLOYEES OF THE PARTNERS OF ___________, CLIENT HEREBY WAIVES THE REMEDIES OF PUNITIVE DAMAGES AND THE REMEDY OF DISGORGEMENT OF ANY ATTORNEY'S FEES OR EXPENSES. *WARNING: YOU SHOULD REVIEW THIS LETTER WITH A LAWYER BEFORE YOU EXECUTE THIS ENGAGEMENT LETTER.*

14. Notice of Clients.

THE STATE BAR OF TEXAS INVESTIGATES AND PROSECUTES PROFESSIONAL MISCONDUCT COMMITTED BY TEXAS ATTORNEYS. ALTHOUGH NOT EVERY COMPLAINT AGAINST OR DISPUTE WITH A LAWYER INVOLVES PROFESSIONAL MISCONDUCT, THE STATE BAR'S OFFICE OR GENERAL COUNSEL WILL PROVIDE YOU WITH INFORMATION ABOUT HOW TO FILE A COMPLAINT. PLEASE CALL 1-800-932-1900 TOLL-FREE FOR MORE INFORMATION.

15. **This Agreement can be executed and shall become effective and fully enforceable even if signed by the parties separately and in multiple counterparts.**

I look forward to representing you in this matter and we are pleased that you have chosen us. To signify your agreement to the terms and conditions set forth herein, please execute your signature below and return to me.

Sincerely,

Name of Firm

Date: ________________________ By: ____
(Attorney)

AGREED:

Date: ________________________ By: ____

Date: ________________________ By: ____

Date: ________________________ By: ____
________________________________, Individually

Date: ________________________ By: ____
________________________________, Individually

APPENDIX T

Guardianship Fee Agreement

Date: ____________________, 2005

[Proposed client's name and address]

Re: Engagement of [law firm name] for the rendition of legal services regarding the Guardianship of the Person and Estate of [proposed ward's name]

Dear [proposed client's name]:

This letter sets forth the agreement between [law firm], (the "Firm") and, [proposed client], individually, as Proposed Guardian of the Person and Estate of [proposed ward] with respect to the terms of the engagement of the Firm to represent you in connection with seeking a Guardianship of the Person and Estate of [proposed ward's name] and any contest in connection with the application for appointment of guardian of the person and estate.

Our representation, with respect to this matter, will include advising, counseling, processing, litigating, and assisting you with the guardianship application. Our services may also include advising you regarding the administration of the guardianship so that you may properly carry out your duties and responsibilities as guardian. Our representation will not, however, extend to tax matters or tax compliance matters.

Before we proceed with seeking your appointment as guardian, we want you to be aware of the eligibility requirements and the potential reasons that a person would be found to be "ineligible" to be appointed as a guardian. Specifically, Section 681 of the Texas Probate Code provides that a person may not be appointed guardian if he or she is:

- under the age of eighteen;
- a person whose conduct is notoriously bad (such as being convicted of a felony);
- an incapacitated person;
- a person who is a party or whose parent is a party to a lawsuit concerning or affecting the welfare of the incapacitated person, unless the court (i) determines that the lawsuit of the person who has applied to be appointed guardian is not in conflict with the lawsuit of the incapacitated person; or (ii) appoints a guardian ad litem to represent the interests of the incapacitated person throughout the limitation of the lawsuit;
- a person indebted to the incapacitated person unless the person pays the debt before appointment;
- a person asserting a claim adverse to the incapacitated person or his or her property;
- a person who, because of inexperience, lack of education, or any other good reason, is incapable of properly and prudently managing and controlling the incapacitated person or his or her estate;
- a person, institution, or corporation found unsuitable by the Court;
- a person disqualified by the incapacitated person in a declaration which is signed by the incapacitated person, prior to his or her incapacity.
- a non-resident of the state of Texas who has not filed with the Court the name of a resident agent to accept service of process in all actions or proceedings relating to the guardianship.

Please advise us immediately if any of these disqualifications apply to you.

Based on our understanding that you are qualified to serve, we will prepare an Application for Appointment of Guardian of the Person and Estate upon receipt of the signed agreement and retainer. In short, the application for guardianship will ask the ________County Probate Court to appoint you as the guardian of your [father's/mother's] person and estate. Note that, the court cannot act on a permanent application, and, thus, appoint a guardian, for a minimum of ten (10) days after the filing of the application.

We also want to alert you to the possibility that a third party could "contest" your application to be appointed as guardian. The general rule is that anyone has standing to initiate or complain about actions relating to a guardianship of an incapacitated person. For example, [her/his] [husband/wife] could intervene and contest your appointment.

In order to enable us to render effective legal services, you agree to keep us apprised of all facts and developments relating to your application for guardianship and the estate. This is very important as any advice we give must be based on accurate and

complete facts and information. Of course, we shall also keep you informed as to the progress of your case, and every effort will be made to expedite this matter promptly and efficiently according to the highest legal and ethical standards.

In consideration of the Firm's representation, you agree to pay the attorneys' fees charged by the Firm, generally based on the standard hourly rates of the attorneys of the Firm working on such matter from time to time, as such hourly rates may be adjusted from time to time. My hourly rate is $__________. A schedule showing hourly rates is attached to this letter. In some situations, the standard hourly rates referred to above may be adjusted either upward or downward based upon several factors which are prescribed by the rules promulgated under the Texas Disciplinary Rules of Professional Conduct, including the novelty and difficulty of the questions involved, the skill requisite to perform the legal service properly, the amount involved and the results obtained in the representation, the time limitations imposed by you or by the circumstances, and the nature and length of the professional relationship with you.

In addition, you agree to pay for reasonable expenses incurred by the Firm in the performance of the Firm's work, such as travel expenses, delivery expenses, long-distance telephone charges, deposition costs, filing fees, printing and reproduction costs, and other similar expenditures (collectively, the "Related Expenses").

It is difficult to predict exactly how much time will be required to complete our legal work regarding the matter. The Firm will devote, however, the time that we deem necessary to carry out the representation.

From time to time, the Firm will bill you for legal services rendered pertaining to the matter and Related Expenses incurred by the Firm in handling the matter during the period covered by the invoice. These invoices are generally sent monthly, but may be forwarded more or less frequently. You agree to pay all invoices on a current basis within ten (10) days following the mailing of each invoice by the Firm. We will, however, seek reimbursement of your fees and expenses related to seeking guardianship from your [father's/mother's] estate. The Court may authorize reimbursement if it determines you sought this application in good faith and with just cause.

A failure by you to pay sums due to the Firm will, at the option of the Firm, result in a cessation of work then in progress until the invoice is pa*Id* In this regard, you agree to permit the Firm to withdraw from any representation of you by the Firm (including withdrawal from any court proceeding in which the Firm is representing you) if you do not pay any sums due under this letter or for any other reason desired by the Firm. Any time spent by the Firm and any Related Expenses incurred by the Firm in the collection of outstanding invoices issued by the Firm to you under this agreement shall also be billed to you at the Firm's standard hourly rates.

In order for the Firm to commence representation under this letter, it will require the payment of a $__________retainer, which will be held in a trust account. The retainer is to be held by the Firm (without interest) until the conclusion of the case (or other termination of the Firm's representation under this letter) and is to be applied to the final bill; it is not to be applied to any earlier invoice unless the Firm so elects. The deposit of the retainer will not eliminate or modify your obligation to pay promptly, as provided above, invoices, which the Firm hereafter periodically renders. Upon conclusion of the work or other termination of the Firm's representation under this letter, any excess funds in the trust account remaining from the retainer (after application to all charges by the Firm provided for in this letter) will be refunded to you.

The Firm has the exclusive right to determine what procedures to follow in connection with the representation as well as what strategies and actions to take in connection with such representation. The Firm does not guarantee any results from the actions taken by the Firm on your behalf. We assure you, however, that we will take appropriate professional action to represent your interests, and we look forward to doing so.

You have the right to terminate the Firm's representation of you at any time by written notice to the Firm in which case you will be liable for the following, whether invoiced before or after such termination: (1) the Firm's charges for legal services rendered to you and Related Expenses incurred by the Firm incurred up to the time of such termination; plus (2) the Firm's charges and Related Expenses incurred after such termination which relate to the Firm's withdrawal from the representation, such as, by way of example but not limited to withdrawal as counsel or substitution of new counsel in court proceedings, transfer of file papers to appropriate parties and related communications (oral or written) with various parties pertaining to the subject matter of this engagement.

Any dispute that may arise with respect to any aspect of this fee agreement shall, on the written request of either of us, be submitted to arbitration in accordance with appropriate statutes of the state of Texas and the Commercial Arbitration Rules of the American Arbitration Association; and, judgment upon the award rendered by the arbitrators may be entered in any court having appropriate jurisdiction. Each party shall appoint one person as arbitrator, and a third arbitrator shall be chosen by the two arbitrators previously selected by the parties; provided however, if there is no agreement as to the third arbitrator within 60 days after the notice of arbitration is served, then the third arbitrator shall be selected by a district or probate judge in _____County, Texas, having subject matter jurisdiction over the dispute. We further agree that the expenses of arbitration shall be paid in such proportions as the arbitrators decide, except that the successful party in any such proceeding seeking enforcement of the provisions

of this agreement shall be entitled to receive from the party not prevailing reasonable and necessary attorney's fees and expenses, in addition to any other sums to which such successful party may be entitled. The arbitrators shall decide the identity of the successful party for purposes of the preceding sentence. We also agree that each of the arbitrators shall be either (i) Board Certified as an Estate Planning and Probate Law specialist by the State Bar of Texas, or (ii) a Fellow of the American College of Trust and Estate Counsel. **ARBITRATION IS FINAL AND BINDING ON THE PARTIES. THE PARTIES ARE WAIVING THEIR RIGHT TO SEEK REMEDIES IN COURT, INCLUDING THE RIGHT TO JURY TRIAL. PRE-ARBITRATION DISCOVERY IS GENERALLY MORE LIMITED THAN AND DIFFERENT FROM COURT PROCEEDINGS. THE ARBITRATORS' AWARD IS NOT REQUIRED TO INCLUDE FACTUAL FINDINGS OR LEGAL REASONING AND ANY PARTY'S RIGHT TO APPEAL OR TO SEEK MODIFICATION OF RULINGS BY THE ARBITRATORS IS STRICTLY LIMITED.**

As suggested by the Code of Professional Responsibility for Attorneys, we are enclosing a brochure from the State Bar of Texas, which advises you of your more significant rights with respect to our attorney/client relationship. We advise you to read it at your convenience, and let us know if you have any questions.

If the foregoing accurately sets forth our mutual agreement, please sign one copy of this letter in the space below and return that signed copy to us.

Very truly yours,

[LAW FIRM]

BY:____

[ATTORNEY]
For the Firm

Enclosure

AGREED AND ACCEPTED:

I, [proposed client's signature], hereby agree to the engagement of [attorney] and the law firm of [law firm name], [city], [state], as my attorneys with respect to the above-referenced matters, and I agree to the conditions and terms of the foregoing letter pertaining to the representation by [attorney] and the law firm of [law firm], including the payment of fees and expenses charged by such firm.

BY: ____

[PROPOSED CLIENT'S SIGNATURE]

NAME OF LAW FIRM

Attorneys	Rate Per Hour
Shareholders	$.00 - $.00
Members	$.00 - $.00
Associates	$.00 - $.00
Paralegals	$.00 - $.00

APPENDIX U

Engagement Letter

NOTE: This is preceded by an explanation of the various options the client has chosen, and an explanation of the estate tax and the GST tax which the author asked me not to disclose.

ENGAGEMENT

As I had not earlier sent a formal engagement letter, the remainder of this letter will answer questions about our billing procedures and spell out the terms of my engagement. I would appreciate your reviewing this letter and returning it for my records. Hopefully, it will answer any questions you may have about the work we have done. This confirms that you hired me to represent you in connection with preparing your Wills, trusts for your children, and collateral personal management documents. After that is completed, I understand that you might also want to talk about setting up a partnership.

Legal fees ultimately depend on the nature of what I may be asked to handle for you and the time I spend. I estimate the fee for preparation of the Wills and collateral personal management documents to be in the range of $__________. Estimates are neither a minimum nor maximum fee because the total fees will include not only the drafting and signing of your documents, but also the amount of time that I spend meeting with you regarding these matters. In arriving at this estimate for preparation of your Wills and collateral documents, I have included our initial conference and an estimate of conference time to answer questions and to sign those documents, if you want to sign them here. However, some clients wish for an extended opportunity to review and discuss the documents.

PROFESSIONAL FEES

My fees will be dependent on the complexity of the work, the specific situations that we may encounter, and the amount of time that I spend working on your file and meeting with you in person or by phone or other means of communication regarding your work.

Many factors are taken into account before a statement is rendered. However, in determining my fees, and those of my legal assistant, the principal factor is the amount of professional time spent on the matter and our regular hourly rates for such services. My hourly rate is $_____________ an hour. My associate attorney's and my legal assistant's time is charged at $____________per hour. These rates are reviewed periodically and are adjusted from time to time, generally on an annual basis. Other factors taken into account include the results obtained, the novelty and difficulty on the questions involved, the time constraints imposed by your work, and the circumstances and likelihood that the engagement will preclude my engagement by other clients.

We will be keeping tract of our time by quarter hour segments. By doing so, we do not intend to charge you every time we communicate, but rather only when our contacts by phone or other means result in some substantive action or response. This will avoid accounting for and your being billed for communications of short duration.

OPTION NO RETAINER: I have not asked for a deposit or retainer, knowing that you will take care of your statement promptly. However, I reserve the right to ask for a payment in the nature of a deposit to be held as security against the cost of future legal services as a condition to continued representation, especially if a statement is not paid in a timely manner. If a deposit is requested, it will be held to be applied against a final statement or applied to an interim statement in my discretion.

OPTION FOR RETAINER: I have asked for a deposit in the amount of $______________/ OR: This will acknowledge receipt of your retainer in the amount of $_____________. The deposit will be held and may be applied against a final statement or applied to an interim statement in my discretion.

EXPENSES

Rather than to bill you for out-of-pocket costs and routine expenses incurred in performing your work, I propose to charge an initial file set up and maintenance fee of $___________. Absent extraordinary expenses, that charge will be in lieu of billing you for routine long distance, fax and in-house copying charges. However, court costs and filing fees, or certain projects handled by outside service suppliers (an example is the filing fee for the powers of attorney, which is $__________) will be accounted for and billed to your account. If such customary charges incident to my work should prove to exceed my estimate or become non-routine, I reserve the ability to include those on a future statement for your review and payment.

STATEMENTS

All statements will be reviewed by me personally to ensure that the charges are appropriate. Likewise, I ask that you review the statements carefully as well. If there is anything on a statement that you do not understand, or question, I will consider it a favor for you to call me within a week of your receipt of the statement. By doing so, I believe that we can handle your questions promptly while the matter is still fresh on our minds. If you do not have any questions, or if I do not hear from you within that time, I will consider that you have approved my statement and that you will put it in line for payment.

I will generally bill on a monthly basis. Statements are due upon receipt, and are payable at my office in NO TOWN, NO County, Texas. Also, if you have any balance in your account, such balance may be credited against any outstanding statement. If a statement is not paid within thirty (30) days of the statement date, I reserve the right to charge interest on the unpaid balance at 10% per annum or, if less, at the highest nonusurious rate of interest permitted by applicable law.

You will have the right to terminate my services at any time. I may also do so, with or without cause, subject to my obligation to give reasonable notice so that you can arrange for alternative legal representation.

USE OF ELECTRONIC MAIL

While we encourage the use of electronic mail ("e-mail") to communicate information between us, I think it appropriate that we have a clear understanding of the limitation on it s use. I, like you, may receive hundreds of e-mails on a daily basis, but some of my e-mails never come to me because they may contain catch words that are screened out by security software. I want to make our relationship as easy as possible on you but, I must insist that communications by e-mail will not be regarded as reflecting an intention by you to conduct a transaction or make an agreement by electronic means. What this means is that if you are requesting action from this office by e-mail, please know that our policy is that e-mail communications are not deemed to be actionable until your request has been acknowledged by us in writing, by voice confirmation, or by a return electronic mail communication.

TAX ADVICE

From time to time, you may ask our advice regarding federal tax issues. Please be aware that the Internal Revenue Service does not allow you to rely on informal tax advice rendered before you file your tax return to avoid tax penalties. If you want to rely on our federal tax advice to avoid federal tax penalties, the Internal Revenue Service requires us to issue formal written tax opinions regarding the tax issue(s). Such formal written tax opinions are not within the scope of this engagement. The Internal Revenue Service rules also prohibit someone else from using the advice we provide to you. Accordingly, you should consider that all communications from us are intended for your use only and include, and are intended to reflect, in substance, the following notice:

> **Treasury Circular 230 Disclosure**: to the extent this communication contains any statement of tax advice, such statement is not intended or written to be used, and cannot be used, by any person for the purpose of, or as the basis for, avoiding tax penalties that may be imposed on that person. This communication is not intended to be used, and cannot be used for the purpose of promoting, marketing, or recommending to another party any matter addressed in this communication. This legend is attached pursuant to U.S. Treasury Regulations governing tax practice, to comply with requirements imposed by the Internal Revenue Service.

If you desire a formal, legal opinion regarding tax issues, please advise us. We can discuss with you the cost of such communications, which likely are to be substantial, given the scope of what the Internal Revenue Service requires to be included in such a communication.

OFFICE POLICIES

I will ask you to use my fax and call note services at any time. Both will be checked every business day. It will be my goal to return your inquiry within one business day. If that were not to occur, you have my assurance that it is only because I am, at that time, giving my full focus and attention to another matter and that I will return to your work with the same focus. I ask you to make full use of my staff. They are here to expedite your legal work, is knowledgeable about most everything that I do and can generally receive your questions and organize the documents that I need to see in order to given you an answer. Also, feel free to leave direct and specific messages on my call notes. That will also help us know what you want before we return your call.

After your consideration of this letter, if it is your wish that I represent you, and if you agree that this letter accurately reflects your understanding and agreement concerning my fees, I will ask that you sign and return the attachment to this letter. This sets out our engagement agreement. If this engagement agreement contains anything with which you disagree, please contact me so that we can discuss what changes you deem necessary.

I will look forward to talking to you. Thank you for the opportunity to be of service.

APPENDIX V

Pre-Engagement Letter

_________________________, 20____

____

____

____

Dear **Person Who Is Not My Client**:

Thank you for calling my office today. You and I discussed the possibility of my representing you. I told you that before I would be able to represent you, you would need to come in the office, sign an engagement letter, and pay a deposit. Until that time, I am not your lawyer.

I am writing this letter to make our relationship clear and to avoid any future misunderstandings. The law prescribes certain time limits within which you must take certain action or be forever precluded from doing so. It is important that you hire a lawyer to represent and advise you regarding this matter as soon as possible.

Sincerely yours,

LAWYER

APPENDIX W

Legal Services Employment Contract

THIS LEGAL SERVICES EMPLOYMENT CONTRACT IS A LEGAL CONTRACT BETWEEN YOU AND THE LAW FIRM. YOU ARE ADVISED TO HAVE INDEPENDENT LEGAL COUNSEL REVIEW THIS CONTRACT ON YOUR BEHALF. THE LAW FIRM CANNOT REPRESENT YOU IN CONNECTION WITH THE NEGOTIATION, PREPARATION, OR EXECUTION OF THIS ENGAGEMENT LETTER.

Services. I employ the firm of ____________________________(hereinafter called "Attorney"), to represent me as follows:

.

Fees. In consideration of this representation, I agree to pay at the offices of MOORMAN TATE, LLP, in Brenham, Texas, the hourly rates as shown in the attached schedule. Each portion of a quarter hour is billed as a full quarter hour. All work is done and all fees are payable in Brenham, Texas. I also agree to pay for all expenses as provided in the attached schedule.

Our hourly rates usually increase at the beginning of each calendar year to take into account current levels of legal experience, changes in overhead costs and other factors. This increase will most likely be in the range of $10 to $30 per hour.

Occasionally, when a bill for a specific matter is rendered near the conclusion of the matter, posting of some time and charges (such as telephone, copying, or similar items) may be delayed, or there may be an invoice which is not delivered to the Attorney until after the legal matter has been finalized. In such cases, I agree to pay the "after closing" expenses even though I may have previously received what was designated as a "final" bill. I will be responsible for paying these "after closing" expenses.

Deposit. IT IS OUR USUAL PRACTICE TO REQUIRE PAYMENT OF A DEPOSIT BEFORE WE BEGIN WORK FOR A CLIENT. WE HAVE ASKED THAT YOU REMIT AND MAINTAIN WITH US, DURING THE ENTIRE COURSE OF OUR REPRESENTATION OF YOU IN THIS MATTER, AN INITIAL DEPOSIT IN THE SUM OF $____________________ (THE "DEPOSIT"). WE WILL PLACE THE DEPOSIT INTO OUR TRUST ACCOUNT. IN OTHER WORDS, THE DEPOSIT REMAINS IN OUR TRUST ACCOUNT DURING THE TIME WE REPRESENT YOU AND WE WILL ASK YOU TO PAY OUR BILL ON A MONTHLY BASIS. THE DEPOSIT WILL BE APPLIED TO OUR FINAL BILLING STATEMENT FOR FEES AND EXPENSES, OR, IN OUR DISCRETION, TO ANY PAST DUE MONTHLY STATEMENT. UPON THE TERMINATION OF OUR SERVICES, WE WILL PROMPTLY REFUND THE DEPOSIT TO YOU, LESS ANY BALANCE FOR FEES AND EXPENSES UNPAID AS OF THE DATE OF OUR FINAL BILL.

WE RETAIN THE RIGHT AND DISCRETION TO REQUEST A SUPPLEMENTAL COST DEPOSIT, OVER AND ABOVE THE INITIAL DEPOSIT, IN THE EVENT OF AN INCREASE IN OUR ANTICIPATED FEES AND EXPENSES DURING THE COURSE OF REPRESENTING YOU. IF WE MAKE SUCH A REQUEST, YOU WILL AGREE TO PROMPTLY DELIVER THE ADDITIONAL DEPOSIT TO US.

Permission to Investigate Credit and Background. I agree that the Attorney may investigate my personal and professional background and may check my credit history in deciding whether or not to represent me.

Citizenship and Document Review. I agree to read the documents thoroughly and notify the Attorney of any misspelled names or other errors obvious to me. Unless otherwise indicated on the contract, I am a United States citizen.

Payment Terms. The fees are due and payable on the 21st day of each month. If the Attorney does not hear from me regarding the bill sent to me, the Attorney can presume I have understood and approve of the charges.

Witness. I understand that if the Attorney is called as a witness or asked to assist others acting on my or my estate's behalf in a later proceeding, I bind myself and my estate to compensate the Attorney at the Attorney's then-prevailing hourly rates.

Mediation. In the unlikely event I have a disagreement with the Attorney, before resorting to litigation or arbitration, any disputes arising out of or connected with this engagement agreement (including but not limited to the services performed by Attorney under this agreement) will be submitted to mediation in Washington County, Texas, in accordance with the rules for alternative dispute resolution set forth under Texas law. I and Attorney will mutually cooperate to select the mediator to be used. Any and all information, negotiation, and results of the mediation will remain confidential.

Confidentiality. I understand that, generally, all information I provide to the Attorney will be kept confidential and will not be disclosed to persons outside the Attorney's office without my consent. However, I authorize the Attorney to discuss my estate planning and share my confidential information: (1) with other of my professional advisors (such as CPAs, financial planners, insurance agents, etc.); (2) with persons named as an agent, trustee or other fiduciary in estate planning documents signed by me

or prepared at my request; and (3) whenever my mental capacity is in question, with my children and other immediate family members, my health care providers, and other interested persons.

Other clients. I agree that under the rules that govern the practice of law, the Attorney can continue to represent existing and new clients regarding their estate planning or other matters even if these other clients are related to me (professionally or personally). I understand that, without prior permission, the Attorney will not reveal any confidential information of mine to these other clients and the Attorney will not relate any of the confidential information of the other clients to me. Regarding other immediate family members (immediate family members means parents and children), if they call the Attorney, the Attorney will first seek my permission to represent the other immediate family members. I will let the Attorney know if there is a conflict between my desires and the desires of these other immediate family members to the extent I am aware of any conflict. I also understand that if the Attorney becomes aware of a conflict, the Attorney will withdraw from representation of the last immediate family member who has hired the Attorney and will continue to represent the other immediate family member that the Attorney represented first.

Future legal services. I understand that changes likely will occur in tax and other laws which could impact the legal work the Attorney is doing for me. The Attorney cannot economically review my file to determine the impact of changes in the law. Changes likely will occur in my own family, in marital circumstances, and in my finances, all of which could impact the legal work the Attorney is doing for me. I understand I should contact the Attorney to have the work reviewed regularly. I will be charged by the Attorney to answer questions and review the legal work on my request.

Termination. I have the right to terminate the employment of the Attorney at any time and the Attorney has the right to resign as my Attorney at any time. The Attorney's active role, as my attorney, will terminate when my documents are signed. However, no termination will waive any of the remaining provisions of this agreement, including: (1) my agreement to pay the Attorney for all work performed prior to termination, (2) my consent to complete disclosure of confidential information to me and to others (to the extent authorized above), (3) the Attorney's ethical duties to me, such as the Attorney's duty not to disclose my confidential matters to third parties (except as authorized above), and (4) the obligation of my estate to compensate the Attorney if called as a witness in a later proceeding. I understand the Attorney has the right to terminate the Attorney's representation of me if I do not pay in a timely manner, fail to cooperate with the Attorney, or under any other ethical rule regarding the Attorney's conduct.

INTEREST ON PAST DUE ACCOUNTS. UNPAID FEES AND EXPENSES WILL BE CONSIDERED PAST DUE IF NOT PAID WITHIN THIRTY (30) DAYS OF THE BILLING DATE. I AGREE TO PAY INTEREST ON PAST DUE AMOUNTS AT THE RATE OF 1.5 % PER MONTH (18% ANNUAL PERCENTAGE RATE), OR THE MAXIMUM RATE ALLOWED BY LAW, UNTIL PAID. INTEREST CHARGES WILL BE CALCULATED ON ALL PAST DUE AMOUNTS AND ADDED TO THE NEXT MONTH'S BILLING STATEMENT.

Full Family and Financial Information. I have provided or have had others provide full family and financial information to the Attorney. I realize the documents prepared are based on this information I have supplied and are only as good as the information provided.

Place for Performance. I understand that the place for performance of the majority of the work covered by this Agreement is in Washington County, Texas.

Document Retention. I agree the Attorney is not responsible to keep copies of my documents. I agree to keep all originals and copies that I desire among my own files for future reference.

Circular 230. I may ask the Attorney's advice regarding federal tax issues. The Internal Revenue Service (IRS) does not allow me to rely on informal tax advice rendered before I file my tax return to avoid tax penalties. If I want to rely on the Attorney's federal tax advice to avoid federal tax penalties, the IRS requires the Attorney to issue formal written tax opinions regarding the tax issue(s). Formal written tax opinions are not within the scope of this engagement. The IRS rules also prohibit someone else from using the advice the Attorney provides to me. All communications from the Attorney are intended for my use only and include, and are intended to reflect, in substance, the following notice:

> Treasury Circular 230 Disclosure: to the extent this communication contains any statement of tax advice, such statement is not intended or written to be used, and cannot be used, by any person for the purpose of, or as the basis for, avoiding tax penalties that may be imposed on that person. This communication is not intended to be used, and cannot be used for the purpose of promoting, marketing, or recommending to another party any matter addressed in this communication. This legend is attached pursuant to U.S. Treasury Regulations governing tax practice, to comply with requirements imposed by the Internal Revenue Service.

I will let the Attorney know if I want a formal, legal opinion regarding tax issues. I agree to sign a separate engagement letter with the Attorney to show I want such an opinion. I understand that the cost of such an opinion will be substantial given the IRS requirements.

Complaints and Grievances. All lawyers in Texas have an obligation to maintain a high standard of ethical conduct toward their clients and others. To enforce this standard, the State Bar of Texas investigates and prosecutes complaints of professional misconduct against attorneys licensed in Texas. Although not every complaint against or dispute with a lawyer involves professional misconduct, the State Bar office of General Counsel will provide you with information about how to file a complaint. If I feel that misconduct may have occurred, or if I have questions regarding the disciplinary process, I may call or write the State Bar of Texas, P.O. Box 12487, Austin, Texas 78711, (512) 463-1381 or 1-800-932-1900 (toll free). By my signature below, I acknowledge a receipt of the Texas Lawyer's Creed, which is attached to this agreement.

Electronic Mail and Voice Mail. We use electronic mail ("email") and voice mail. Email is not a secure communication. If you use a work computer to send emails, your employer may have access to those emails. It is possible for third parties to illegally obtain information from emails. Please indicate below if we have your permission to communicate with you by email.

You should not consider that any communication by you to us by email or voice mail is received until it is acknowledged by a return email or telephone call by us. If your email or voice mail is not acknowledged in what you consider a reasonable amount of time, please follow up with a telephone call directly to us at the office. To effectively follow up on an unacknowledged email or voice mail to us at the office, you need to make sure you are speaking live to a person at the office (rather than by leaving a voice mail).

Attorney Privacy and File Maintenance Policy. PRIVACY POLICY AS TO SOCIAL SECURITY NUMBERS AND OTHER PRIVATE INFORMATION:

a. SOCIAL SECURITY NUMBERS AND DRIVER'S LICENSE NUMBERS ARE ONLY USED AS NEEDED AND AS REQUIRED BY LAW.

b. THESE PRIVATE NUMBERS ARE USED TO IDENTIFY PARTIES WHETHER FOR INITIAL SERVICE OF COURT DOCUMENTS, FOR CERTAIN COURT ORDERS, IN REQUIRED REPORTS FILED WITH THE STATE OF TEXAS, OR FOR OTHER REQUIRED PURPOSES.

c. THESE PRIVATE NUMBERS RECEIVED FROM A CLIENT ARE CONFIDENTIAL AND ARE NOT RELEASED FROM THE FIRM UNLESS AUTHORIZED BY THE CLIENT OR REQUIRED BY LAW.

d. THE EMPLOYEES OF THE FIRM HAVE ACCESS TO THIS PERSONAL INFORMATION BUT SHALL NOT RELEASE IT WITHOUT ATTORNEY APPROVAL.

e. YOUR INFORMATION IS KEPT SECURE WITHIN THE FIRM IN FILE FOLDERS, FILE DRAWERS, AND COMPUTERS, UNTIL SUCH TIME THAT THE FILE INFORMATION IS RETIRED AND THE FILE REMOVED TO STORAGE IN COMPUTER FILES OR A LOCKED STORAGE FACILITY. THE CLIENT INFORMATION WILL EVENTUALLY BE DELETED.

File Information. During our representation of you, we will be sending you copies of all important contracts, pleadings, letters, notices and other material which we believe you should review. Our office strives to maintain these documents in digital (paperless) format, so more often these copies shall be in digital format, for ease of retention and portability. You should have a secure place to keep these documents. If you need additional paper copies at any time, we can make those at your expense for our copy fees. Clients may control such costs by keeping digital copies. Should you believe your particular file requires an encryption, you should advise us of the form of such encryption. If our office is required to secure encryption software specifically for your case, the cost of that software shall be included in your bill.

Document Retention. You agree that we are not responsible for keeping copies of your documents. You agree to keep all originals and copies that you desire among your own files for future reference. You are advised to retain all confidential information or original documents from our file as received. You otherwise authorize us to destroy in a secure manner the information contained in our file when the legal service is complete.

HIPAA Provisions. Under Texas Health and Safety Code, Sec. 181.154 – HB 300, effective September 1, 2012, because we gather, store, and electronically transmit medical records (Protected Health Information – PHI) in the course of our representation of our clients, we are required to post a notice to clients that their protected health information is subject to electronic disclosure. Texas and federal law prohibits any electronic disclosure of a client's protected health information to any person without a separate authorization from the client or the client's legally authorized representative for each disclosure. This authorization for disclosure may be made in written or electronic form or in oral form if it is documented in writing by Attorney.

The authorization for electronic disclosure of protected health information described above is not required if the disclosure is made to another covered entity, as that term is defined by Section 181.001, Texas Health & Safety Code, or to a covered entity, as that term is defined by Section 602.001, Texas Insurance Code, for the purpose of treatment; payment; health care operations;

performing an insurance or health maintenance organization function described by Section 602.053, Texas Insurance Code, or as otherwise authorized or required by state or federal law. In other words, no further release is necessary for electronic disclosure to other health care providers, insurance companies, governmental agencies, or defense lawyers representing adverse parties.

Optional Provisions Regarding Authorized Agents. You agree that ____is/are authorized by you to receive confidential information from us, but it is not intended by you to have that information disclosed to third persons.

I designate ____________________________________as my agent(s) to obtain legal services from or to act on advice rendered by the Law Firm on my behalf and to have all Claims & Litigation powers under Section 752.110, Texas Estates Code. This is intended to be a power of attorney. This power of attorney is not affected by the subsequent disability or incapacity of the principal.

ALL CLIENTS SHOULD ALSO READ THE DOCUMENT ENTITLED "WARNING TO CLIENTS REGARDING JOINT TENANTS, SURVIVORSHIP, POD AND TRUSTEE ACCOUNTS".

****

I have read and understand the terms of this document.

SIGNED on ________________________.

____
CLIENT

_______ Yes. I understand email is not a secure communication. You may communicate with me via email.
Initial Preferred email address ____

_______ No. Please do not communicate with me via email.
Initial

STATE OF TEXAS §
§
COUNTY OF WASHINGTON §

The foregoing instrument was acknowledged before me on the _____day of _______________________, 2019 by ________________________________(client).

____
Notary Public, State of Texas

STATE OF TEXAS §
§
COUNTY OF WASHINGTON §

The foregoing instrument was acknowledged before me on the _____day of _______________________, 2019 by ________________________________(client).

____
Notary Public, State of Texas

Received the sum of $__________in the form of check/cash on _________________________, 20____.

____
ATTORNEY

Fee and Expense Schedule – 20_

Attorney 1	XXX per hour
Attorney 2	XXX per hour
Support Staff	XXX - XXX per hour
Law Clerks	XXX per hour
Clerks	XXX per hour

Expenses

Copying	15 ¢ per page in firm or actual cost of copy service
Incoming Fax	15 ¢ per page
Outgoing Fax	Long distance call expense plus ten percent
Long Distance Calls	Cost to firm plus ten percent
Other Expenses	Actual cost to firm

APPENDIX X

Fee Proposal

LAW FIRM 777

123 Anywhere Street
Anytown, Texas

Date ___________________________

Re: **Fee Proposal for ***

Dear *:

Thank you for the opportunity to represent * ("*") in ad valorem property tax work. Our normal process is to file the lawsuit with the court, send out written discovery requests to the Defendant (i.e., ask for documents from their file, ask questions as to how they arrived at the value, etc.) because we find that the discovery process expedites settlement of the lawsuit, and then try to arrange either an informal meeting with the appraisal district or court-ordered mediation in an attempt to settle the case. (We find that if we wait until late December or January to arrange such a meeting, we are usually able to get a two-year settlement.) Typically, we are able to resolve these types of disputes by no later than January 31; however, this will be impacted to some extent by which law firm the district uses. Each law firm has its own style and peculiar way of handling these types of lawsuits, ranging from nonchalant to combative. If we are unsuccessful in getting the case settled informally, we will then proceed with preparing the case for trial by taking depositions and reviewing discovery responses.

Listed below are *three options you may choose from for the billing of our representation of * in this case. Please mark the option you prefer, sign this letter and return it to me.

________ **Option 1. Hourly Rate.**

Our initial fee, which includes preparation of the petition, letter to the clerk, filing fees, issuance of citation and service of process, is $*Beyond that point, my hourly rate for this type of work is $* per hour. We estimate the fee for preparation of discovery to be approximately $*. The normal cost for my handling of a property tax case, on an hourly basis, ranges from $* to $* when the case is resolved either at an informal settlement conference with the appraisal district or at a formal mediation. We bill for out-of-pocket expenses including airfare, hotel, rental car, postage, printer/photocopier charges at $* per page, and ingoing and outgoing telecopies at $* per page. This fee does not envision court reporter expenses attendant to the taking of depositions, nor does it envision my retaining or paying for the costs of expert witnesses, if that becomes necessary. These would be borne by you. Statements are sent monthly and are due within 30 days of invoicing.

In the event that we have to prepare this case for trial, Law Firm 777("777") has the option to require you to provide a replenishable retainer from which 777 will draw for its fees and any expenses in preparation of this matter for trial. Prior to requiring the retainer, 777 will provide you with an estimate of expenses through trial. You agree to either pay the retainer in the amount requested, allow 777 to dismiss the suit, or allow 777 to withdraw.

As is standard in the industry, should any of our fees not be paid within 30 days of invoicing, we reserve the right to withdraw from representing the taxpayer in the suit. Invoices not paid within 30 days of invoicing will accrue interest at the rate of 1½% per month or 18% per annum.

`________ **Option 2. Contingent Fee.**

We will perform all legal services necessary to handle this matter and advance all expenses including the cost of an independent appraisal if one proves necessary and the value of the case justifies the expense for 25% of all tax savings for all years if the case is settled before preparation for trial; 33-1/3% of all tax savings for all years (plus any additional monies recovered from the appraisal district, and agrees to reimburse all out-of-pocket costs) if the case is settled after preparation for trial commences and before an appeal to the Court of Appeals is commenced after trial; 40% of the total tax savings for all years if the case is appealed to the Court of Appeals; and 50% of all tax savings for all years if the case is appealed to the Texas Supreme Court. All out-of-pocket expenses (including appraisals, airfare, hotel, rental car, postage, photocopying at $* per page, and ingoing and outgoing telecopies at $* per page) advanced on your behalf will be reimbursed first from the total tax savings and then the applicable percentages will be applied. We will also receive the above-referenced contingent fee if

in subsequent years the lawsuit is still ongoing and the appraisal review board reduces the assessed value. * agrees to reimburse 777 $* for initial out-of-pocket expenses associated with the prosecution of this suit. * agrees that any refund check will include the name of Law Firm 777 as well as the property owner and that we are authorized to pick the refund check up from the taxing entity.

If the fees owed 777 are not paid within thirty (30) days of settlement or entry of judgment, interest on the amount owed to 777 will run at the rate of 1 ½ percent per month until pa*Id* Interest will begin running thirty (30) days from the date of entry of judgment or settlement.

________ **Option 3. Flat Fee.**

We will perform all legal services necessary to handle this matter at a fixed fee of $*, provided that the fixed fee is paid in full up front prior to the filing of the suit. If this flat fee is not paid within ten business days after the suit is filed, then our fee will increase to $*. If the suit should spill into another year, it will necessarily involve an increase in the fixed fee to accommodate the amendment of the lawsuit. This fee includes filing the petition, engaging in preliminary discovery, preparing for and attending settlement conference (no more than two settlement conferences) and finalizing judgment. It does not envision preparing for or taking this case to trial, attending mediation, court reporter expenses attendant to the taking of depositions, nor does it envision my retaining or paying for the costs of expert witnesses, if that becomes necessary. These would be borne by you. If this case does not settle within these parameters, then we will enter into a new fee agreement. If we cannot come to an agreement, we will dismiss the suit.

In the event the fixed fee is not paid in full prior to filing the suit, we will notify you. If you do not pay the flat fee in full at that time, we reserve the right to withdraw from representing you in this matter.

The Client understands that any refunds, if any, are made by governmental entities other than the appraisal district. It is not the responsibility of the Attorney and is not within the scope of representation as contemplated by this agreement to track, obtain or ensure the payment of any refunds by any governmental entity. In the event that the Client wishes the Attorney to do, the Client understands that this would represent a separate matter and require a separate agreement.

If we have to go to court and try the case, the Property Tax Code allows you to recover your attorney's fees at the discretion of the court. In this case, we could recover reasonable attorney's fees of the greater amount of $15,000 or 20% of the taxes in dispute. In no event will the court award more in attorney's fees than the amount of the tax reduction. The Appraisal District will not reimburse attorney's fees or costs as a part of any settlement.

This agreement encompasses representation for the tax year and property in this lawsuit only. Subsequent tax years for this property which can be added by amendment to this lawsuit are encompassed within the scope of this agreement. If you should desire us to represent other properties or this same property for subsequent years in administrative proceedings, a new and separate fee agreement will be required.

At either party's request, any and all disputes arising under or relating to this contract or the engagement and legal services to be rendered, including but not limited to fee disputes, legal malpractice claims and claims of fraud, constructive fraud, breach of fiduciary duties, breach of contract or any others, will be submitted to Judicial Arbitration and Mediation Services ("JAMS") for prompt resolution. Both attorney and client agree to be bound by this provision and the results of such arbitration. Client understands and agrees that it has the right to consult independent counsel regarding this provision and that if accepted, this provision will eliminate client's right to a jury trial in any and all disputes against attorney. Client understands and agrees that pre-arbitration discovery is generally more limited than and different from court proceedings. The arbitrator's award shall rely on evidence admissible in a district court and the substantive law of the jurisdiction. Further, any party's right to appeal the arbitrator's final ruling is strictly limited.

Please let me know which option you choose. I look forward to working with you on this case. If at any time you have any questions, please give me a call.

Very truly yours,

Joe Lawyer

AGREED:

____

CLIENT

APPENDIX Y

Policy Statement Regarding Billing and Payment Procedures

LAW FIRM, L.L.P.
POLICY STATEMENT REGARDING
BILLING AND PAYMENT PROCEDURES

Date

1. Introduction.

It is the policy of our firm to endeavor to assure that our clients clearly understand the manner in which we bill for our legal services and for disbursements advanced by the firm on their behalf. Our experience shows that the manner in which fees and expenses are computed and charged and procedures for billing and payment vary from law firm to law fir. This statement is intended to set forth our standard policies and procedures concerning the manner in which statements for services rendered and expenses incurred by us on behalf of our clients will be prepared and pa*Id* We believe that a prior understanding of such matters is essential to a harmonious professional relationship. Consequently, we encourage our clients to pursue with us at the outset of our professional relationships any questions necessary to obtain such a full understanding which are not clearly resolved by this statement.

2. Terms of Engagements.

In consideration of the services we are to provide, unless other arrangements are made in specific instances, it is understood that clients engaging our firm to perform legal services have agreed to pay legal fees based on our standard hourly rates, as in effect from time to time during the course of the engagement, for the attorneys and para-professional personnel of this firm who perform such services.

Copies of this policy statement will be provided to existing and prospective clients of our firm. In addition, pursuant to the rules of professional conduct applicable to our firm, existing and new clients of the firm will be requested to execute engagement letters acknowledging the contents of this policy statement, setting forth the terms of our engagement in particular instances and describing the manner, if applicable, in which such terms may differ from the standard policies and procedures set forth in this statement. In any event, however, unless indicated to the contrary in writing, it will be understood that services which we are asked to perform on behalf of our clients will be rendered pursuant to the terms and conditions of this statement.

3. Performance of Services.

Most services required by our firm's clients will be performed by lawyers, legal assistants and administrative personnel who are employed by the firm on a full-time basis. The firm is currently comprised of XXX lawyers, XXX legal assistant, XXX administrative assistants and a firm administrator on a full-time basis. All individual client matters are assigned to specific firm partners who are responsible for assuring that the matters are addressed in a timely and professional manner.

The firm also has of counsel, referral and working relationships with other attorneys, briefing clerks and legal assistants who are occasionally requested to assist the firm's personnel in serving firm clients. The determination of the appropriate strategy to utilize in staffing individual situations from sources both within and outside the firm is based generally on considerations of experience, expertise, time availability and billing efficiency. The overall goal in such situations is to utilize the resources available to the firm in a manner which provides our clients with high quality, timely and cost-effective services which are commensurate with the client's objectives in particular instances.

In cases where the services obtained from such sources outside the firm are anticipated to involve significant costs or essential contributions to the particular matter in question, the client's approval will ordinarily be sought in advance. Generally, fees and expenses of such referral sources will be included in the firm's bills to its clients, but statements may be rendered directly to the clients by the individual referral sources in particular situations. Ultimately, however, our firm will be responsible for assuring that services are being performed to the client's satisfaction and for addressing any questions which may arise in that regard.

4. Methods of Computing Fees.

Our firm is subject to canons of professional conduct regarding the reasonableness of fees charged to our clients. Under these rules, the factors to be taken into account in determining the reasonableness of fees in particular instances include the following: (a) the time and labor required, the difficulty of the task and the skill requisite to perform it; (b) the likelihood that the employment in question will preclude other employment of the lawyer; (c) fees for similar services in the local area; (d) the amount

of money involved in the matter and the results obtained; (e) the time limitations imposed by the client or by circumstances; (f) the nature and length of the lawyer's professional relationship with the client; (g) the experience and ability of the lawyer; and (h) whether the fee is fixed or contingent. Our firm has assigned standard hourly rates to time-keeping personnel employed by or associated with the firm which have been determined by taking the foregoing factors into account.

Several methods are available to our clients for determining the fees to be charged for our services in particular instances. Generally, our fees will be calculated on the basis of the time expended on the client's matter in accordance with our standard hourly rates as described below. In other instances, our fees are also determined on the basis of the time expended on the client's matter, but an agreement is made in advance to employ applicable hourly rates which are higher or lower than our standard rates in order to more closely conform to the criteria described above in those particular instances. In certain hourly rate billing arrangements, agreements may be made in advance that our fees will be subject to maximum and/or minimum amounts.

5. Hourly Rate Billing Procedures.

The standard method of computing fees for legal services rendered by our firm with respect to particular client matters is to record in quarter-hour increments on a daily basis the time spent by each person performing services in connection with such matters (whether such services be telephone consultations, office consultations, research, drafting documents, travel or the like), and to total the time expended at the end of each billing month. There is then applied to the time so computed the applicable hourly rate for the respective individuals who performed service on such matters. Unless otherwise agreed in particular instances, our standard hourly rates are utilized for such purposes.

Our standard hourly rates change from time to time as warranted, but the current standard rates for the personnel employed by or associated with our firm are as set forth on the Rate Schedule attached as Attachment A to this policy statement.

We occasionally adjust our standard hourly rates for some personnel at other times to reflect particular circumstances, but our general practice is to evaluate our standard hourly rates for individual time-keeping personnel annually in January of each year to determine whether adjustments are appropriate to reflect additional knowledge and experience acquired during the preceding year or to reflect changing market conditions. Any such adjustments in our standard hourly rates are applied to services rendered during the month in which such adjustments become effective and thereafter. Unless otherwise agreed in specific instances, any such adjustments in our standard hourly rates will not be subject to prior client approval. Notice of any such adjustments in our standard hourly rates will be provided, however, to those clients with whom we have engagement relationships utilizing such rates.

Because our hourly rate fees are based on the time expended, it is beneficial for our clients to make efficient use of our time, to be conscious of the time which may be required for particular tasks we are requested to perform and to define clearly for us the scope of the work which we are to perform at the outset of each project where our clients have preconceived budgetary notions. Where no budgetary limitations are discussed and set in advance, we will use our best judgment as to what efforts are necessary to achieve the desired result.

Since for the most part we base our fees on personnel time expended, our production capacity is limited by the time available to perform legal services, so it is our practice to apply the applicable hourly rates, plus travel expenses, for any time we are required to travel out of the office. This practice is based on the assumption that most companies, firms or individuals are not compensated on an hourly basis (since they are not personal service businesses) and that it is more economical for them to attend meetings at our offices. Nevertheless, if it is desirable for us to attend meetings out of our offices, we are always willing to do so and frequently do so.

We retain detailed records of time spent on any matter or transaction, which are the basis on which our hourly rate statements are computed. If, at any time, a client has questions about the basis of compilation of any such statement, we will be happy to meet with the client to make those records available to assist the client in understanding the fee computation. We urge our clients to raise questions as statements are rendered in order for us to be able to gain a mutually satisfactory feeling for our financial relationship as well as our professional relationship.

6. Reimbursement of Expenses.

Amounts advanced or expended by us on behalf of our clients for expenditures such as long distance telephone charges, photocopying and telecopying charges, postage charges, shipping and delivery charges, courier expenses, travel expenses, printing costs, filing fees, computer research costs, court reporter fees, expert witness fees, employee overtime and expense reimbursement costs and the like are considered to be reimbursable by our clients unless otherwise agreed in particular instances and are generally included in the statement rendered to the client for the month in which such amounts are advanced or incurred. Certain costs which are incurred internally for items such as photocopying, telecopying and long distance telephone costs are billed to our clients at rates comparable to third-party charges, which do not necessarily reflect the firm's direct out-of-pocket expenses and may include amounts which represent recovery of the administrative costs and investment expenses which the firm has incurred in making such services available and accounting for such expenses.

Unless otherwise agreed in connection with specific engagements, it is understood that our firm has no obligation to advance any of the foregoing costs on behalf of our clients. We may require that the clients make arrangements in advance to fund such expenses either by means of an escrow deposit with our firm or by means of direct arrangements with third-party vendors or a combination of such arrangements.

7. Supplemental Services.

Our standard policy is that any involvements which our firm may have with regard to subsequent disputes between our clients and third parties involving matters with respect to which we have provided legal services, including our providing documents or testimony and responding to interrogatories or other discovery, are a part of the engagement, and that we are entitled to be paid for our time, services and expenses attributable to such activities. Unless otherwise specified by the terms of our original engagement in particular instances or subsequently agreed in connection with the performance of such supplemental services, it is understood that our fees for any such supplemental services will be determined on the basis of our standard hourly rates which are in effect at the time such supplemental services are rendered regardless of the billing arrangement which was applicable in connection with the original engagement.

In recent years, some litigation attorneys have employed the tactic of including in lawsuits the attorneys and law firms that represented the clients that are being sued. The intent is to either disqualify the attorney(s) or law firm from defending their clients or increasing the financial burden associated with the client's defense. If our firm or any of our lawyers are included in litigation instituted by third parties by reason of their services and activities in representing our clients, we will be entitled to be paid by our clients at the rates then applicable for the time expended by our attorneys and staff in connection with the defense of the attorney(s) or firm included in the litigation, as well as reimbursement of expenses paid or incurred by the firm with respect to such matters.

Unless otherwise agreed in specific circumstances, we do not have any obligation to inform persons for whom we have previously performed services of subsequent statutory or judicial developments which may affect the documents prepared or advice rendered pursuant to such earlier engagement. We will be pleased, of course, to make appropriate financial arrangements for providing updating services in particular instances, and we certainly endeavor to make our regular, ongoing clients aware of new developments which we perceive as having an effect on their current and prior business affairs and transactions.

8. Payment Terms.

As to the method of billing and payment, our practice is to bill monthly where our fees are based on hourly rate billing. We have found this procedure is desired by clients so that they will know on a regular monthly basis what their current total legal fees are and so that they will not receive any accumulated surprises. We normally close our books on or about the last day of each calendar month and render statements on or before the 10th day of the next calendar month. Unless other arrangements are mutually agreed upon in writing in specific instances, we request that payment of statements be made within twenty (20) days after the date the statement is received.

Although our standard practice is to bill and collect monthly, on occasion a transaction may arise in which it is agreed that it would be more appropriate to defer the billing until a later date. In such instances, we reserve the right to add interest at a rate of one percent (1%) per month (or the maximum rate permitted by applicable law, if lower), compounded monthly, to all accrued and unbilled balances, beginning the first month following the month in which such charges are actually incurred.

It is also understood that we reserve the right to add interest at the rate of one percent (1%) per month (or the maximum rate permitted by applicable law, if lower), compounded monthly, to all billed and unpaid balances beginning thirty (30) days following the date upon which such charges are actually billed.

It is also understood that this firm shall be entitled to recover reasonable attorneys' fees and expenses and court costs in connection with any efforts necessary to collect amounts due and unpaid pursuant to any engagement between a particular client and our firm.

9. Retainer Deposits.

We frequently will ask that new clients deposit a cash retainer with us in advance as security for payment of our fees and expenses. In addition, when representing new or existing clients on large projects which will require substantial personnel and equipment involvement over a long period of time, such as significant litigation, major real estate acquisitions and complex loan workout negotiations, we frequently will request a project retainer in advance. Our practice is to deposit retainers in a trust account and to transfer "progress payments" from our trust account to our operating account as segments of the work are completed or other appropriate billing stages are attained. A detailed accounting will be provided of the application of all funds so transferred. If the work for a particular client or project continues over an extended period of time, we will generally require and bill additional retainers monthly until the work is completed.

10. Termination of Engagement.

We reserve the right to suspend or terminate any work in progress, including withdrawal from pending litigation, in the event of non-payment of our statements within twenty (20) days after a statement is due. In the event that we exercise such right to suspend or terminate work in progress or withdraw from pending litigation, we will be entitled to receive from the client a written acknowledgment that we are permitted to exercise such suspension, termination or withdrawal right under the terms and conditions of our engagement with the client.

In addition to our right to withdraw from a representation engagement at any time if the payment terms described above are not satisfied, it is understood that, subject to certain exceptions with respect to contingent fee matters, our clients reserve the right to terminate their engagement of our firm at any time, upon payment in full of fees and expenses accrued up to that time.

11. Ownership of Files.

We consider the files which are generated and maintained by us in connection with services for our clients to be the property of our firm and not the property of our clients, except for documents and materials ("*Client Papers*") which fall within the following categories: (i) original documents and materials which are furnished to us by our clients; (ii) original documents and materials, such as executed contracts and corporate records, which are prepared by us for our clients; and (iii) other documents and materials which may affect our clients' rights or the exercise of such rights. We will assert and maintain a possessory retaining lien on all such Client Papers as security for the payment of our fees and expenses, except to the extent that retention of such Client Papers would prejudice the rights of our clients. In the event of a termination of our engagement, except as stated above, we will release such Client Papers and copies of the materials in our files to our clients only upon (i) written request and instructions from the client; (ii) payment in full of all of our unpaid fees and expenses; and (iii) payment in advance of all reasonable copying costs which will be incurred in making copies of the Client Papers for our permanent files and in making copies of the other materials in our files for the client.

12. Services for Related Entities.

It is contemplated that we may be requested on occasion to render services for individuals, partnerships, corporations and other entities which are affiliated with our principal client in a particular engagement. In such instances, unless otherwise agreed in advance, we will consider all participants in the transaction to be jointly and severally liable for the payment of our fees and expenses as outlined in this statement and the relevant engagement letter. Unless other arrangements are made in advance, however, we will render our statements to, and will expect full payment from, our principal client and will not be responsible for honoring any internal cost-sharing arrangements which may be in effect between the participants in the transactions.

13. Personal Guaranties.

We understand that individuals whom we consider to be our clients may sometimes request statements for our services to be rendered to entities which they control and/or through which their business activities are conducted. In order to avoid any confusion in this regard, however, and in recognition of the fact that our services will be primarily for the benefit of the individual client, we may ask that our engagement be executed by both the entity and the individual in order to acknowledge that both the individual and the entity will be responsible for payment of our fees and expenses in connection with the engagement.

14. Texas Lawyer's Creed.

We are required to advise our clients of the existence of and our obligations under the Texas Lawyer's Creed. A copy of the complete Creed is attached as Attachment B. Pursuant to the Creed, our clients are advised as follows, which advice is acknowledged by the execution of engagement letters contemplated in this policy statement:

1. Proper and expected behavior of counsel are described in the Creed.

2. Civility and courtesy are expected from lawyers and are not a sign of weakness.

3. We will not pursue conduct which is intended primarily to harass or drain the financial resources of the other party.

4. We will not pursue tactics which are intended primarily for delay.

5. We will not pursue any course of action which is without merit.

6. We reserve the right to determine whether to grant accommodations to opposing counsel in all matters that do not adversely affect your lawful objectives.

7. You are advised that mediation, arbitration and other alternative methods of resolving and settling disputes are available to you to resolve disputes with opposing parties.

15. Notice to Clients.

We are required to provide our clients with a notice that the State Bar of Texas investigates and prosecutes professional misconduct committed by Texas attorneys. This notice is required of all lawyers in Texas. A copy of the required notice is attached to this policy statement as Attachment C and is incorporated herein by reference.

16. Privacy Policies.

Our firm has adopted privacy policies in accordance with federal requirements governing providers of financial services. Our policies are described in the "Notice of Our Firm's Privacy Policies" which is attached to this Policy Statement as Attachment D.

17. Conclusion.

It is hoped that the foregoing discussion will anticipate most, if not all, of the issues which will arise in connection with billing and payment procedures of our firm. Clients having general or specific questions regarding the policies and procedures set forth above are encouraged, however, to raise those issues with the firm at an early date in order to resolve any such questions as soon as practicable.

ATTACHMENT A

LAW FIRM, L.L.P.

Hourly Rate Schedule – June 1, 2008

Personnel Category	Rate Per Hour
Partners	$XXX-XXX
Associates	$XXX-XXX
Legal Assistants	$ XX- XX
Administrative Assistants	$ XX

ATTACHMENT B

THE TEXAS LAWYER'S CREED--A MANDATE FOR PROFESSIONALISM

I am a lawyer. I am entrusted by the People of Texas to preserve and improve our legal system. I am licensed by the Supreme Court of Texas. I must therefore abide by the Texas Disciplinary Rules of Professional Conduct, but I know that professionalism requires more than merely avoiding the violation of laws and rules. I am committed to this creed for no other reason than it is right.

I. OUR LEGAL SYSTEM

A lawyer owes to the administration of justice personal dignity, integrity, and independence. A lawyer should always adhere to the highest principles of professionalism.

1. I am passionately proud of my profession. Therefore, "My word is my bond."
2. I am responsible to assure that all persons have access to competent representation regardless of wealth or position in life.
3. I commit myself to an adequate and effective pro bono program.
4. I am obligated to educate my clients, the public, and other lawyers regarding the spirit and letter of this Creed.
5. I will always be conscious of my duty to the judicial system.

II. LAWYER TO CLIENT

A lawyer owes to a client allegiance, learning, skill, and industry. A lawyer shall employ all appropriate means to protect and advance the client's legitimate rights, claims, and objectives. A lawyer shall not be deterred by any real or imagined fear of judicial disfavor or public unpopularity, nor be influenced by mere self-interest.

1. I will advise my client of the contents of this creed when undertaking representation.
2. I will endeavor to achieve my client's lawful objectives in legal transactions and in litigation as quickly and economically as possible.
3. I will be loyal and committed to my client's lawful objectives, but I will not permit that loyalty and commitment to interfere with my duty to provide objective and independent advice.
4. I will advise my client that civility and courtesy are expected and are not a sign of weakness.
5. I will advise my client of proper and expected behavior.
6. I will treat adverse parties and witnesses with fairness and due consideration. A client has no right to demand that I abuse anyone or indulge in any offensive conduct.
7. I will advise my client that we will not pursue conduct which is intended primarily to harass or drain the financial resources of the opposing party.
8. I will advise my client that we will not pursue tactics which are intended primarily for delay.
9. I will advise my client that we will not pursue any course of action which is without merit.
10. I will advise my client that I reserve the right to determine whether to grant accommodations to opposing counsel in all matters that do not adversely affect my client's lawful objectives. A client has no right to instruct me to refuse reasonable requests made by other counsel.
11. I will advise my client regarding the availability of mediation, arbitration, and other alternative methods of resolving and settling disputes.

III. LAWYER TO LAWYER

A lawyer owes to opposing counsel, in the conduct of legal transactions and the pursuit of litigation, courtesy, candor, cooperation, and scrupulous observance of all agreements and mutual understandings. Ill feelings between clients shall not influence a lawyer's conduct, attitude, or demeanor toward opposing counsel. A lawyer shall not engage in unprofessional conduct in retaliation against other unprofessional conduct.

1. I will be courteous, civil, and prompt in oral and written communications.
2. I will not quarrel over matters of form or style, but I will concentrate on matters of substance.
3. I will identify for other counsel or parties all changes I have made in documents submitted for review.
4. I will attempt to prepare documents which correctly reflect the agreement of the parties. I will not include provisions which have not been agreed upon or omit provisions which are necessary to reflect the agreement of the parties.
5. I will notify opposing counsel, and, if appropriate, the Court or other persons, as soon as practicable, when hearings, depositions, meetings, conferences or closings are cancelled.

6 I will agree to reasonable requests for extensions of time and for waiver of procedural formalities.

NOTICE TO CLIENTS

The State Bar of Texas investigates and prosecutes
professional misconduct committed by Texas attorneys.

Although not every complaint against or dispute with a lawyer involves
professional misconduct, the State Bar Office of General Counsel
will provide you with information about how to file a complaint.

For more information, please call 1/800/932/1900. This is a toll free call.

ATTACHMENT D

NOTICE OF OUR FIRM'S PRIVACY POLICIES

We, as lawyers, together with all other providers of personal financial services, are now required by law to inform our clients of our policies regarding privacy of client information. For us, this is nothing new. The sanctity of the lawyer-client privilege is at the heart of our profession. The Model Rules of Professional Conduct provide that we as lawyers may not reveal information relating to our representation unless our client consents after consultation. Nevertheless, to assure compliance with both the letter and spirit of the rules and applicable federal law, we are providing this notice of our policy. We have in the past and will always continue to protect your right of privacy.

Information We Collect About You

We collect nonpublic personal information about you only in connection with providing you with the legal services that you request. The types of nonpublic personal information that we collect vary according to the services that we perform for you, and may include:

- Information that we receive from you (such as your name, address, income, assets, social security information, and other financial or household information);
- Information about your relationship and past history with us and others (such as the types of legal services we provide to you, your invoice balances and payment history);
- Information that we receive, with your authorization, from third parties such as accountants, financial advisors, insurance agents, banking institutions and others.

How We Handle Your Information

We do not disclose to anyone outside our firm any public or nonpublic personal information about you that we have collected, except as authorized by you or required by law. For example, with your consent, we may disclose personal information to a third-party contractor, such as an appraiser or accountant, who is assisting us in providing services to you. In addition, we will release information to the extent required by law or regulation.

We do not sell client information to anyone or disclose client information to marketing companies.

We may disclose information regarding the type of legal services we have provided to you, your invoice balance, and your payment history as necessary to terminate our relationship or collect unpaid sums due to us.

How We Protect Your Information

We restrict access to nonpublic personal information about you that we have collected to attorneys and staff members in our firm. All of our attorneys and employees are required to maintain the confidentiality of all nonpublic personal information about you. We maintain physical and procedural safeguards to protect the nonpublic personal information that we collect about you.

While the federal laws and regulations establish rules and disclosure requirements, they do not limit the attorney-client privilege or the confidentiality rules for information provided to attorneys. In circumstances where applicable federal laws may allow disclosure, we will continue to follow the stricter non-disclosure rules of attorney-client privilege and client confidentiality.

Please call if you have any questions, because your privacy, our professional ethics and the ability to provide you with quality legal services are very important to us.

APPENDIX Z

Billing Terms

Unless the Client has a written, fully executed Retainer Agreement to the contrary, the following terms and conditions apply to all attorney-client relationships:

ARTICLE 1
RETENTION BY THE CLIENT

Section 1.1. Retention of the Firm by the Client. The Client hereby engages and retains the Firm to provide the services represented on each monthly invoice sent to the Client. If the Client is of the opinion that the Client retained the Firm to represent the Client on matters not shown on an applicable invoice, the Client must immediately notify the Firm of such opinion.

Section 1.2. Representations and Warranties of the Client. In connection with this retention, and for any and all subsequent matters, the Client (each individually, respectively, if more than one) represents and warrants to the Firm that:

(A) the Client will accurately and completely inform the Firm of all facts related to each matter in which the Firm performs services for the Client pursuant to this Agreement; and

(B) the Client will read correspondence, any transactional documentation, and all other communications from the Firm, will ask questions when in doubt as to the meaning of any communication, document or term, and will not sign any documentation until the Client understands the documents;

(C) the Client does not purpose, intend or plan to use the services of the Firm, either directly or indirectly, to engage in or further any unlawful activity.

ARTICLE 2
REPRESENTATION BY THE FIRM

Section 2.1. Services Provided; Additional Representation. The terms of this Agreement will apply to all representation(s); provided that the Firm is not obligated to represent the Client in any other matter in addition to the initial matter for which the Client represented the Firm unless the Firm agrees to do so in writing.

Section 2.2. Limitations of Scope.

(A) The Firm's representation does not include rendering any income tax advice or the preparation of any income tax return, federal or state estate tax return, or, state franchise tax return. The Client acknowledges that the Client must seek such advice from their accountant or other financial advisor. The Firm may, however, provide information on the federal estate tax and/or state franchise tax; however, legal information is not legal advice. Only a qualified accountant or other financial professional can render legal advice regarding tax matters.

(B) The Firm's representation does not include valuation of any assets, nor does the Firm claim to have expertise in this area. The Firm will advise the Client as necessary or desirable to retain appropriate experts, such as accountants, financial advisors, or real estate or business appraisers, to assist in this regard. The Firm does not automatically search titles, determine the validity of income and expense figures supplied by others or attempt to verify other underlying data, unless that is relevant to the issues involved in the representation. If there are questions in the Client's mind concerning any of these issues, you the Client should discuss them with the Firm and authorize the Firm to retain appropriate experts to provide assistance on your behalf.

(C) The attorney(s) of the Firm are licensed to practice law in the State of Texas, and in no other state. Work involving any jurisdiction other than Texas will require at the very least a review of the documentation involving the laws of that jurisdiction by an attorney licensed in that jurisdiction. The Client further acknowledges that J. Mark McPherson is not board certified by the Texas Board of Legal Specialization.

(D) Changes likely will occur in tax, property, probate, and other laws which could impact an estate plan and/or business structure. The Firm cannot--on our own--economically review the file of each client to determine the impact of court cases, rulings, and other changes in the law. Furthermore, changes likely will occur in each client's family, in marital circumstances, and in a Client's finances, all of which could impact estate planning and/or business structuring advice. Therefore, you should contact us or other competent estate planning advisors regularly to have your plan reviewed. The Firm may frequently answer simple questions of yours for no additional fee; however, the Firm will address significant questions and review your documents or estate plan only on your request and for a reasonable fee.

Section 2.3. NO GUARANTEES OR REPRESENTATIONS AS TO RESULTS. THE CLIENT ACKNOWLEDGES THAT THE FIRM HAS MADE NO GUARANTEES OF RESULTS TO BE ACHIEVED IN ANY PHASE OF THE FIRM'S LEGAL REPRESENTATION OF THE CLIENT; THE FIRM CANNOT GUARANTEE A SPECIFIC RESULT. All expressions relative to the Client's legal matters are only the opinion of the Firm.

Section 2.4. Contact. Client agrees to advise the Firm of all points of contact and to also advise the Firm of any changes of any points of contact on or prior to the effectiveness of the change. If the Firm is unable to reach the Client using the most current contact information provided by the Client, the Client authorizes the Firm to withdraw from representing the Client immediately with notice only to the Client's last known address.

Section 2.5. File Maintenance. Any papers, documents, instruments, records, and other writings that the Client furnishes or causes to be furnished to the Firm and/or which the Firm may prepare for the Client will remain the property of the Client and will be relinquished to the Client upon request, subject to any lien which the Firm may properly assert. If the Client does not ask the Firm to release such written materials to the Client within six (6) months after completion of the project or transaction to which they pertain or after the termination of the Firm's services for any reason, then they may be destroyed when the Firm disposes of its file regarding such. Periodically, the Firm purges its files; and it is possible for both the Client's property and the Firm's to be disposed of as waste, including (without limitation) such important documents as Wills, Powers of Attorney, Promissory Notes, Deeds, Minutes of Corporate Meetings or similar records, Shares of Stock and the like, and Business Purchase and Sale Agreements.

ARTICLE 3
MATTERS OF PROFESSIONAL ETHICS

Section 3.1. Reporting Potential Conflicts. By agreeing to retain the Firm, the Client has the affirmative duty to the Firm to report to the Firm any fact or circumstance which may affect the Firm's impartial representation of all those identified in any communication as the "client", and any fact or circumstance which indicates that the Client's interest is in conflict with another client of this Firm, to the extent known.

Section 3.2. Potential Spousal Conflicts of Interest. If the Client includes persons who are related to each other as husband and wife, the Firm is sensitive to issues which occasionally arise in joint representation of clients related by marriage. For example, husband and wife may have different views on how property could pass after the death of one or both of them. Different individuals may have different goals in planning their respective estates or different community and separate property interests. In some situations, the Firm may recommend that holdings be restructured to take advantage of available tax benefits, which may affect different spouses differently due to their community and separate property interests. To give another example, a conflict may exist or may arise in the determination of what is community property and what is separate property. That determination may be more beneficial for husband than wife, or vise versa. For example, if community property is partitioned or given to the other spouse as part of the estate plan, the possibility of a divorce, however remote, must be recognized. Consequently, the Firm's present recommendations could affect the income, property, and support provisions in any such divorce or after the death of one or both spouses. These are just a few general examples. Each couple's situation is unique. If the Firm acts in a capacity as attorney for both spouses, the Firm cannot be an advocate for either spouse against the other spouse.

In assisting with an estate plan and business structure, the Firm must necessarily obtain confidential information from the Client. During the course of representation, the Firm often meets or speaks with only one of the spouses, and this may occur in your case. When the Firm represents both of you, the Firm cannot keep information received from either of you confidential from your spouse. Confidential information will be shared with both of you, even if received by the Firm in private conference with only one of you, but such information will be kept confidential from outside parties, except with your consent. For example, pursuant to your instructions, the Firm may discuss certain aspects of your estate plan and business structure with your other advisors.

Either of you may have your own independent counsel for any part or all of the matters within the scope of the Firm's representation. If a conflict arises that makes it improper or impractical for the Firm to continue representing both of you, the Firm will withdraw from further dual representation and advise that one or both of you obtain separate independent counsel.

If the Firm represents both married spouses in a matter, then as a prerequisite to such representation each of you are representing to the Firm that: (1) you have read this Article and understand that conflicts of interest may exist or may arise between you and your spouse in the matters within the scope of the Firm's representation; (2) you each consent to have the Firm represent both of you in your estate planning until the Firm is notified otherwise in writing; (3) each of you realize that there are areas where your individual interests and objectives may differ, and areas of potential or actual conflict of interest may exist in connection with your estate planning and related matters; (4) each of you understand that either of you may retain separate, independent counsel in connection with these matters at any time. After careful consideration, each of you request the Firm to represent you jointly in connection with your estate planning, business structuring and related matters, and each of you consent to that dual representation. Each of you also understand and agree that no confidential communications are possible as between the Firm and either of you separately, because communications and information the Firm receives from either of you relating to these matters will be shared

with the other. If either of you wish to have separate counsel or desires that the Firm not be involved in any aspect of estate planning on our behalf, respectively, you each agree to notify the Firm of this change in your decision in writing.

Section 3.2. Firm Conflict of Interest; Recommended Review of this Agreement. The Firm notifies you that any question or doubt you may have about this Agreement should be resolved before you retain this Firm. This Agreement is one of the few times when the interest of the Firm may be in conflict with your own as Client. It is always a prudent practice to seek the advice and counsel of another attorney as to your rights under this Agreement. You will never offend the Firm, or jeopardize our relationship, in seeking a review of our work and a second opinion from qualified legal counsel for bona fide reasons. As a general rule, any attorney's service to a client should be structured so that the attorney has no interest, other than the client's interest, in the outcome of any procedure or recommendation. However, this Agreement is an exception to that rule. This Agreement is technical; it will govern our relationship. It is important that you resolve any question you may have before you sign this Agreement. If in doubt, the Firm recommends that you seek the opinion of a qualified attorney or other trusted advisor.

Section 3.3. Privacy Notice. Professionals who advise on personal financial matters, such as attorneys, are required by a relatively new federal law to notify their clients about their policies on privacy. The Firm understand our clients' concern for privacy. The Firm has been and will continue to be bound by professional standards of confidentiality that are even more stringent than those required by the new law. During the Firm's representation of you, the Firm may receive non-public personal information about you. The Firm does not disclose any non-public personal information about its current or former clients, except as expressly or impliedly authorized by its clients to enable us to represent them, or as required or authorized by law or other applicable rules governing the Firm's professional and ethical conduct as attorneys. Because the Firm retains records relating to the professional services provided so that the Firm is better able to assist its clients with their professional needs and to comply with professional guidelines or requirements of law, the Firm maintain physical, electronic, and procedural safeguards that comply with our professional standards in order to guard our clients' nonpublic personal information.

Section 3.4. Disciplinary Notice. Complaint brochures prepared by the State Bar of Texas are available at the Firm's place of business.

ARTICLE 4
FINANCIAL TERMS

Section 4.1. Attorneys' Fees. The Client agrees to pay to the Firm reasonable and necessary attorneys' fees incurred in the Client's various legal matters handled by the Firm. The Firm bills its time in units of one-tenth hour each, with minimum units of 1/4 hour (15 minutes), at the applicable hourly rate. Because legal matters sometime continue over a long period of time, this hourly rate may increase after the Client has retained the Firm but before the Firm's representation of the Client is completed. The Firm will provide the Client with prior written notice of any increase in any applicable hourly rate.

Section 4.2. Expenses. The Client also agrees to pay reasonable and necessary expenses incurred by the Firm in connection with the Client's various legal matters handled by the Firm. Expenses may include such items as filing and service fees, travel expenses, depositions, transcripts, delivery fees, and fees of other professionals. Expenses are in addition to attorneys' fees and will be itemized on each monthly invoice.

Section 4.3. Invoices. The Firm will send invoices for payment on a per month basis, and will send final invoices at the conclusion of representation in any matter, whether concluded by withdrawal, termination, completion of the project, or otherwise. These invoices will show the amount of time expended by an attorney, paralegal or clerk on the legal matter, the applicable billing rate, and a brief description of the services performed.

Section 4.4. Agreement to Pay Invoices. The Client agrees to pay invoices immediately upon receipt and in no event later than fifteen (15) days after the date of the invoice. If the monthly invoice is not paid within fifteen (15) days, the Client hereby agrees that the Firm may, in its sole discretion, cease performing any further work for the Client, and if the Firm does cease to perform work for the Client, the Firm will have no further obligation under this Agreement. The Client will be responsible for any fees and costs incurred prior to the Firm's withdrawal or discharge, including time and costs expended to turn over the Client's file(s) and other information to the Client or substitute counsel.

Section 4.5. Other Fees and Expenses. In the unlikely event that a member or employee of the Firm is ever called upon to defend or give testimony about any aspect of its representation of the Client in any matter other than a dispute by the Client about the Firm's fees or by the Client about the Firm's services, (such as, for example, by reason of the fact that the Firm took action in accordance with this Agreement), whether in deposition, hearing or trial, it is further agreed that the Client will pay the Firm legal fees at the Firm's then-prevailing hourly rates for the time the Firm dedicates to the preparation and participation in any such deposition, hearing or trial, and will indemnify and hold the Firm harmless from any expense (including attorneys' fees), judgments, fines and amounts paid in settlement, actually and reasonably incurred by the Firm in connection with such action, suit or proceeding. The Client further acknowledges that if a member or employee of the Firm is called as a witness in a later proceeding,

the Client binds the Client and the Client's estate to compensate the Firm as otherwise provided in this Section, at the Firm's then-prevailing hourly rates.

Section 4.6. Interest on Non-Payment. Unless the Firm otherwise agrees in writing, unpaid fees and expenses will be considered past due if not paid within thirty (30) days of the billing date. All past due amounts shall bear interest at the rate of 1.5 % per month (18% annual Percentage rate), or the maximum rate allowed by law, until pa*Id* Interest charges will be calculated on all past due amounts and added to the next month's billing statement.

Section 4.7. Retainers. From time to time the Firm may require an initial retainer from the Client. In such circumstance, the Firm will not be obligated to take any action on behalf of the Client until the Client has deposited the required retainer with the Firm. If at any time the Client pays to the Firm a retainer, the Firm will credit the retainer against all fees and expenses expended by the Firm for the Client, including any legal services which the Firm has done for the Client prior to the deposit of the retainer. All unused amounts will be refunded to the Client upon the Firm's completion of, withdrawal from or discharge from, representation of the Client.

Section 4.8. Guaranty by Principals. All obligations, financial and otherwise, arising under this Agreement or related to this Agreement are personally guaranteed, jointly and severally, by the individual owners of any client entity/entities.

ARTICLE 5
TERMINATION

Section 5.1. Withdrawal of the Firm. The Firm reserves the right to withdraw from representation of the Client, and the Client hereby agrees to allow the Firm to withdraw from any and all representation pursuant to this Agreement, if the Client does any one of the following:

(A) the Client misrepresents or fails to accurately and fully disclose material facts; or

(B) the conduct of the Client makes continued representation unreasonable or unworkable; or

(C) the Client fails to follow advice given by the Firm; or

(D) the Client does not make payments required by this Agreement; or

(E) the Client fails to maintain current contact information pursuant to Section 2.12 of these Terms; or

(F) as otherwise allowed by the Texas Disciplinary Rules of Professional Conduct, as amended from time to time, governing the conduct of attorneys in Texas.

Section 5.2. Discharge of the Firm. The Client may discharge the Firm at any time for any reason but agrees to do so in writing. A discharge will not be effective until the Firm receives the written notice of discharge.

Section 5.3. Effect of Termination. No termination will waive any of the remaining provisions of these terms of representation, each of which will survive termination, including: (A) the Client's agreement to pay for all work performed prior to termination, (B) the Client's consent to complete disclosure of confidential information to either individual Client, and (C) the Firm's ethical duties, including but not limited to the Firm's duty not to disclose a client's confidential matters to third parties (other than the client's other professional advisors).

Section 5.4. Fees and Expenses Associated with Termination. The Client will be liable for timely payment of the following, whether invoiced before or after such termination: (1) the Firm's charges for legal services rendered to the Clients and Related Expenses incurred by the Firm incurred up to the time of such termination; plus (2) the Firm's charges and related expenses incurred after such termination which relate to the Firm's withdrawal from the representation, such as, by way of example but not limitation, withdrawal as counsel or substitution of new counsel in court proceedings, transfer of file papers to appropriate parties and related communications (oral or written) with various parties pertaining to the subject matter of this engagement.

ARTICLE 6
DISPUTE RESOLUTION

Section 6.1. Written Notice of Questions or Disputes. The Client agrees to send the Firm written notice within twenty (20) days after the Firm's invoice if the Client disagrees with the amount of the fees and expenses reflected in that invoice. The Client agrees to specify the error or overcharge in the notice. The Firm is happy to review the professional services it has performed. If no such written notice of a dispute is given within this time frame, all parties agree that the fee is reasonable and accurate and the Client waives any and all objections about the fee shown on that invoice.

Please review each invoice carefully; it is the Firm's desire to timely and satisfactorily address all reasonable concerns. The Firm strives to provide quality legal services for a fair fee and the Firm urges the Client to conduct open discussions with the Firm throughout the course of the Firm's representation pursuant to this Agreement. Many unsatisfactory and unpleasant experiences between an attorney and client are the result of poor communication and honest misunderstandings. Please help the Firm keep the lines of communication open by offering input whenever it might be helpful. Any issue of importance should be communicated immediately and in writing so as to avoid misunderstandings and to document the files of both the Client and the Firm.

Section 6.2. Mediation. Before resorting to litigation, any disputes arising out of or connected with this Agreement (including but not limited to the services performed by any attorney under this agreement) will be submitted to mediation in Dallas County, Texas, in accordance with the rules for alternative dispute resolution set forth under Texas law. The Client and the Firm will mutually cooperate to select the mediator to be used. Any and all information, negotiation, and results of the mediation will remain confidential. The expenses to retain a mediator shall be borne equally by the Client and the Firm.

ARTICLE 7
MISCELLANEOUS

Section 7.1. Supersedes Prior Agreements. This Agreement supersedes any prior Agreement(s) entered into by any of the parties hereto relating to this matter.

Section 7.2. No Oral Modification. No modification or amendment of this Agreement will be of any force or effect unless made in writing and executed by all parties to this Agreement.

Section 7.3. Paragraph Headings. The headings of the various paragraphs in this Agreement are for the convenience of the parties and will not alter or modify the terms and provisions of this Agreement.

Section 7.4. Enforceability. This Agreement shall be interpreted, construed and enforced in such a manner to be effective and valid under applicable law. If any provision of this Agreement is held to be illegal, invalid or unenforceable under present or future laws, all other clauses and provisions of this Agreement shall remain in full force and effect and the clause or provision determined to be void or illegal or unenforceable shall be so limited that it shall remain in effect to the fullest extent permitted by law without fully invalidating such clause or provision or the remaining clauses and provisions of this Agreement.

Section 7.5. CHOICE OF LAW; VENUE. THE PARTIES HERETO ACKNOWLEDGE THAT THIS AGREEMENT IS DELIVERED AND FULLY PERFORMABLE IN DALLAS COUNTY, TEXAS; ANY LAWSUIT FILED THAT CONCERNS THIS AGREEMENT SHALL BE FILED IN DALLAS COUNTY, TEXAS, AND THE PARTIES WAIVE ANY RIGHTS THEY MAY HAVE TO SUE OR BE SUED ELSEWHERE WITH RESPECT TO THIS AGREEMENT. THIS AGREEMENT SHALL BE INTERPRETED, CONSTRUED AND ENFORCED IN ACCORDANCE WITH THE LAWS OF THE STATE OF TEXAS.

Section 7.6. ENTIRE FINAL AGREEMENT. THIS WRITTEN AGREEMENT REPRESENTS THE FINAL AND COMPLETE AGREEMENT BETWEEN THE PARTIES AND MAY NOT BE CONTRADICTED BY EVIDENCE OF PRIOR, CONTEMPORANEOUS, OR SUBSEQUENT ORAL AGREEMENTS OF THE PARTIES. THERE ARE NO UNWRITTEN, ORAL AGREEMENTS BETWEEN THE PARTIES.

APPENDIX AA

Invoice for Professional Services Rendered

Accounting

Our Federal EIN: 75-2951641

Date

Client:
Name
Address
Address

Re: **Invoice for Professional Services Rendered**
through Date
Applicable Hourly Rates: J. Mark McPherson $XXX

Services Rendered	***Time***	***Value***
TOTAL:		***$***

Thank you for choosing McPherson & Associates, PC (the "Firm"), for your legal needs. The individuals and entities named on this invoice are the "Client" for purposes of the Firm's representation. All legal services provided by the Firm, including those shown on this invoice, are subject to the terms and conditions stated at www.mctexlaw.com/billingterms.asp, unless the Firm and Client have executed a written Retainer Agreement stating the different terms and conditions. Note that if the Client desires or intended to retain the Firm for matters during this billing period that are not reflected on this invoice, the Client must immediately notify the Firm.

TERMS: DUE AND PAYABLE UPON RECEIPT

Please send your payment of this invoice to the address above. If you have any questions or comments about this or any other matter, please do not hesitate to contact us. With best regards, we remain,

Very truly yours,

McPherson & Associates, P.C.

APPENDIX BB

New Engagement and Assignment Acceptance – Dispute with Co, LLP

A LAW FIRM

PRIVILEGED AND CONFIDENTIAL

Date

Client
Street
City, State Zip

Re: **New Engagement and Assignment Acceptance - Dispute with Co, LLP**

Dear Ms. Client:

This letter confirms our agreement that this Firm will represent you in connection with the possible disputes stemming from your former employment with Co, LLP ("Co"), especially insofar as your right to any additional compensation, or your right to payments are concerned.

As a preliminary matter, you understand that the Firm is representing Joe Bob and Joe Bob Company ("JCO") in various litigation stemming from the deal executed on or about June 1, 2008. As such, we are currently adverse to Co, as well as other entities and individuals. At this time, the tenor of your potential claims against Co, and the limited nature of our representation, are not perceived to be adverse in any manner to Joe Bob or JCO. To the extent adversity may develop between your interests, and those of Joe Bob and/or JCO, in any manner, but in particular, with respect to the pending litigation, you expressly agree to waive any such conflict. You further commit not to use any conflict, if any arises, as an excuse to disqualify A Law Firm from further representation of the Joe Bob, JCO or related entities. That said, if a conflict should arise, or you perceive that it is likely to do so, you clearly reserve the right at all times to terminate our representation and replace A Law Firm with counsel of your choice. Of course, if you have any questions or concerns regarding the nature of this waiver, we will be happy to address them. Otherwise, the terms and conditions of our engagement are detailed as follows.

Unless we agree otherwise, our fees for services will be based on the time spent on the matter, computed at our hourly rates for the persons performing the services. You agree to pay the reasonable fees and other charges billed by us in connection with this representation. I will have primary responsibility for the representation and my hourly rate on this file will be $450. As necessary, we will use other Firm lawyers and paralegals as we believe appropriate in the circumstances. At present, the usual rates for Houston office lawyers range from $200 to $750 per hour for partners, $300 to $395 for associates, and $150 to $225 for paralegals, clerks, and other staff personnel.

Other charges for which we will bill you are described in the enclosed schedule of charges. In addition to the charges shown on the enclosed schedule, we will also include a charge for any local value added or similar taxes (including, for example, goods and services tax, business tax or services tax) due in respect of legal services performed in certain jurisdictions. Our rates and charges are subject to change.

If you have any questions, please call me. Otherwise, please sign and return the enclosed copy of this letter. Unless we agree otherwise in writing, the terms of this letter and our Standard Terms of Engagement for Legal Services will govern this engagement and any future assignments we accept from you.

Very truly yours,

Mr. Lawyer

Agreed to on Behalf of Client

By: ____

Date: ____

Enclosures: A Law Firm Standard Terms of Engagement for Legal Services
A Law Firm Client Cost Recovery Policy

A LAW FIRM

STANDARD TERMS OF ENGAGEMENT FOR LEGAL SERVICES

Governing Terms. This statement contains the standard terms for our engagement as your lawyers. Unless modified in writing by mutual agreement, these terms will be an integral part of any agreement we may have with you. Please review this statement carefully and contact us promptly if you have any questions. We suggest that you retain this statement in your file.

Application and Interpretation. Your engagement is with A Law Firm. In accordance with the common terminology used in professional service organizations, reference in these Standard Terms, or otherwise in the course of your dealings with us, to a "partner" means a partner, or equivalent, in this or another such law firm. Similarly, references to an "office" means an office of any such law firm.

Client Service Lawyer. One lawyer will generally be assigned primary responsibility for seeing that your requests for legal services are met. Additional lawyers and paralegals from other Firm offices may assist in rendering the most appropriate and efficient legal services, and we will share confidential information with them regarding your matters for the purpose of better serving you.

Scope of Our Engagement and Fees. The scope of any engagement will be set out in a separate letter that will be sent to you each time we agree to represent you on an individual matter (Assignment Letter). Our fee arrangement will be set out in that letter.

Conflicts. We will always honor our duty of confidentiality to you and protect your information. Without detracting from our duty of confidentiality to you, this letter confirms our mutual agreement that, so long as we act in accordance with ethical requirements, we and other Firm offices may without your consent act for other persons or entities whose interests are adverse to you or your affiliates in matters not substantially related to our engagement by you. The adversity may be in litigation, legislative or regulatory matters, or in transactions or otherwise, all regardless of type, importance or severity of the matter.

We agree, however, that we will not act adversely to you in any instance where, as the result of our representation of you, we have obtained sensitive, proprietary or other confidential information of a nonpublic nature that, if known to any such other client of ours, could be used in a matter in which we are retained by our other client to your or your affiliates' material disadvantage, unless we screen our lawyers and paralegals who have such information from any involvement in the adverse representation.

You also understand that we and other Firm offices may obtain confidential information from other clients that might be of interest to you, but which we cannot share with you.

Conflicts With Affiliates. For purposes of our engagement, our client is only the entity designated in our Assignment Letter, and not its affiliates (the stockholders, parent, subsidiaries, directors, officers, or related companies of any entity, or the individual members of a trade association, or the partners of a partnership or joint venture). Accordingly, for conflict of interest purposes, we and other Firm offices may represent another client with interests adverse to your affiliates without obtaining your or their consent. We will expect you to inform us immediately if the designated client does business under any other name.

Third Parties. Our engagement for you does not create any rights in or liabilities to any third party.

Termination of Services. We are subject to the rules of professional responsibility for the jurisdictions in which we practice, which list types of conduct or circumstances that require or allow us to withdraw from representing a client. We may terminate our representation for any reason consistent with the applicable rules of professional responsibility. We try to identify in advance and discuss with out client any situation that may lead to our withdrawal, and if withdrawal ever becomes necessary, we give the client written notice of our withdrawal.

You may terminate our representation at any time by notifying us. Termination of our services will not affect your responsibility for payment for legal services rendered and additional charges incurred before termination and in connection with an orderly transition of your matters.

Our attorney-client relationship will be considered terminated upon our completion of the specific services that you have retained us to perform, or if open-ended services are agreed upon, when more than six months have elapsed from the last time you requested and we furnished any billable services to you. If you later retain us to perform further or additional services, our attorney-client relationship will be revived, subject to these and any subsequent written terms in the Assignment Letter. The fact that we may inform you from time to time of developments in the law which may be of interest to you, by newsletter or otherwise, should not be understood as a revival of an attorney-client relationship. Moreover, we have no obligation to inform you of such developments in the law unless we are engaged in writing to do so.

Your Papers. When termination occurs, papers and property that you have provided to us will, at your request, be returned to you promptly. Copies of papers we have created for you, which you may need but no longer have, will be made available to you. Our drafts and work product will belong to us. We reserve the right, subject to any applicable laws or rules of professional responsibility to the contrary, to destroy within a reasonable time any items described in this paragraph that are retained by us.

E-Mail. Documents sent to you by e-mail (whether or not containing confidential information) will not be encrypted unless you request us, in writing, to encrypt outgoing e-mail and we are able to agree with you and implement mutually acceptable encryption standards and protocols.

We make reasonable attempts to exclude from our e-mails and any attachments any virus or other defect that might affect any computer or IT system. However, it is your responsibility to put in place measures to protect your computer or IT system against any such virus or defect, and we do not accept any liability for any loss or damage that may arise from the receipt or use of electronic communications from us.

Questions. One of our goals is to ensure that legal services are delivered effective and efficiently, and that all billings are accurate and understandable. Please direct any questions about services or billing practices to your client service lawyer.

Agreement. These Standard Terms shall be incorporated into any specific engagement and will be part of each Assignment Letter. Except for pending uncompleted assignments, these Standard Terms supersede all prior understandings or agreements between you and us and they shall prevail over any contrary or alternative terms of yours or any third party. Any change to these terms must be made or confirmed in writing in the Assignment Letter and be signed by the Managing Partner of one of our Firm offices.

A LAW FIRM

SCHEDULE OF CLIENT COSTS

It is our policy to recover only our cost of providing certain goods and services, which are auxiliary to practicing law. Following are statements of how we charge for the provision of the most frequently used goods and services:

Reprographics and Printing. We charge $0.19 per page for black and white copies and $0.75 for color copies when materials are produced in our offices. Outsourced printing, copying and assembly/finishing is charged to our clients at actual cost.

Facsimiles. We charge $1.00 per page for outgoing facsimiles, no charge is made for incoming facsimile transmissions.

Telephone. A Law Firm's discounted Service Provider actual costs are passed through to our clients on all long distance and international calls. No charge is generated to clients for local telephone calls.

Postage, Messenger and Courier Services. Costs for envelopes and packages mailed, or delivered, on a client's behalf are billed at cost. When the time sensitivity of a delivery requires, we use internal staff to insure proper handling. We charge a flat fee of $9.50 plus any additional costs incurred.

Document Production and Support Services. No charge is made for secretarial services and word processing during the regular work day. When overtime is required to complete a client project, we charge the marginal costs incurred. Other support services such as translation, notary, file retrieval and duplication are billed at cost.

Electronic databases. For electronic databases such as Lexis and Westlaw, we charge the discounted rate that we are charged by these companies.

Travel, Transportation and Meals. When a A Law Firm employee travels on behalf of a client, we charge the costs that the employee actually incurs. We strive to use discounted rates for airline travel and hotels.

APPENDIX CC

Warning to Clients Regarding Joint Tenants, Survivorship, POD, and Trustee Accounts

Holding accounts in the following account designations can ruin your estate plan.

These are:

1. Joint Tenancy With Right of Survivorship.
2. P.O.D. (Payable on Death) Account.
3. Trust Account where you hold something as "Trustee" for someone or someone holds something as "Trustee" for you.
4. Community Property With Right of Survivorship.
5. Joint Tenants.

All of these accounts, whether in a bank, brokerage firm or other financial institutions or as a designation for the ownership of stock, land, or other assets, can ruin a good estate plan. If you have provided for a trust that utilizes estate tax or Medicaid planning (a bypass trust, A/B trust, unified credit trust, applicable credit amount or special needs trust) or if you plan on giving your property in equal shares to more than one person, the survivorship account designation will cause the account to be paid directly to the survivor and not to the trust or as provided in your will. *It is important that none of your accounts (except for small amounts held in a checking account) be established in this manner.* Designations of this type do allow the account to escape probate, but they can cause big problems with estate taxes and can create gift tax liability. *These account designations prevail over the terms of a written will and any prenuptial or postnuptial agreement.*

Real property should be held in one or both spouses' names but without any designation of rights of survivorship. Deeds should be prepared to correct this error. Stock certificates and brokerage accounts should be retitled so that you are "tenants in common" rather than joint tenants with rights of survivorship.

If an account is a spouse's separate property, the account should only be in that spouse's name with the words "Separate Property" after the name.

If the asset is separate property, it should be in that spouse's name with the words "Separate Property" after the name.

The best way to have your bank accounts is in both names as "Tenants in Common", "Multiple Party Account <u>Without</u> Rights of Survivorship" or "Convenience Account." You will find that financial institutions will argue with you about these designations. If they do, ask them to have their attorney give you a legal opinion that the way the bank has set up the account will cause no estate tax or Medicaid qualification problems for you and that they are not survivorship or payable on death accounts. Have the attorney bind his law firm and the bank to indemnify you from any adverse liability as a result of the financial institution's account designations. No one will do this and that is because these accounts do cause problems.

I suggest that you send each financial institution or other entity a letter similar to the one below by certified mail, return receipt requested, keeping a copy of the letter and the return receipt with your important papers. Section 113.157 of the TEXAS ESTATES CODE provides that if a letter like this is signed by the party and received by the financial institution during the party's lifetime, it must be honored. Financial institutions do not understand this but their attorneys should. Get them to call <u>their</u> attorneys to explain it to them rather than spending your money to have me explain it to them. If I have to explain this to them, I will have to charge you for doing so.

There is an issue as to whether Section 113.157 affects stock and bond accounts. Just make sure the brokerage firm has changed the account designations.

After you change the account designations, it is important to be sure your account is still insured by the FDIC. This may require you to move your assets to other financial institutions to keep your deposit insurance.

If you want the firm to prepare the notices, we will be happy to do so. We will have to charge you for the preparation of these notices and any follow up with the financial institutions at our normal hourly rates.

LAW FIRM

By: ______________________________
Lawyer

NOTICE PURSUANT TO SECTION 113.157 OF THE TEXAS ESTATES CODE AND ANY OTHER APPLICABLE LAW

[to be sent by certified mail, return receipt requested]

To: [Name of Financial Institution or brokerage concern]
[P.O. Box]
[City and State]
CMRRR No.

This notice is given pursuant to Section 113.157 of the TEXAS ESTATES CODE and any other applicable law. The undersigned do not want any of their accounts in the form of joint tenancy, joint tenancy with right of survivorship, community property with right of survivorship, P.O.D. or as "Trustee" for anyone. This applies to all accounts established now and in the future. Please change all account designations, immediately, so that no accounts are joint tenants, survivorship, P.O.D. or Trustee accounts and all accounts are in the undersigned's name, only, with the words "Separate Property" after the undersigned's name.

Do not revoke the account. Please make sure that the accounts remain insured. Please advise us if there is a problem with FDIC insurance.

If you do not understand this letter, please consult your attorney regarding the legal effect of this letter.

Sincerely yours,

______________________________	______________________________
(signature of party)	(signature of party)
______________________________	______________________________
(typed name of party)	(typed name of party)

(FOR SEPARATE PROPERTY)

NOTICE PURSUANT TO SECTION 113.157 OF THE TEXAS ESTATES CODE AND ANY OTHER APPLICABLE LAW

[to be sent by certified mail, return receipt requested]

To: ______________________________________[Name of Financial Institution or brokerage concern]
______________________________________[P.O. Box]
______________________________________[City and State]
CMRRR No. ____

This notice is given pursuant to Section 113.157 of the TEXAS ESTATES CODE and any other applicable law. The undersigned does not want any of his or her accounts in the form of joint tenancy, joint tenancy with right of survivorship, community property with right of survivorship, P.O.D. or as "Trustee" for anyone. This applies to all accounts established now and in the future. Please change all account designations, immediately, so that no accounts are joint tenants, survivorship, P.O.D. or Trustee accounts and all accounts are in the undersigned's name, only, with the words "Separate Property" after the undersigned's name.

Do not revoke the account. Please make sure that the accounts remain insured. Please advise us if there is a problem with FDIC insurance.

If you do not understand this letter, please consult your attorney regarding the legal effect of this letter.

Sincerely yours,

____
(Signature of Party)

____
(Typed/Printed Name of Party)

APPENDIX DD

Sample Letter Regarding Portability and Filing a Federal Estate Tax Return

Ms. Mary Doe
12 Johnson Street
Anywhere, Texas

Re: *Estate of John Doe, Deceased, No. 2011, In County Court at Law of Washington County, Texas*

Dear Mary:

As you know and we have discussed, the law regarding the federal estate tax for individuals dying after 2010 is that a single individual has a $5,340,000 ($5,430,000 in 2015 and more in 2016) exclusion from the estate tax. A married couple can exclude $10,680,000 ($10,860,000 in 2015 and more in 2016) from the estate tax even if everything is left outright to the surviving spouse. This concept is called portability.

There are some problems with portability. Portability is based on whoever was your last surviving spouse. So, for example, the husband dies in 2014 and leaves everything to his wife. She now has a $10,680,000 exclusion, $5,340,000 of hers and $5,340,000 of her husband's. She remarries someone who has used up all of his $5,340,000 tax exclusion by making gifts to his children. Her second husband dies before her. At her death, she only has a $5,340,000 exclusion because her second husband was her last deceased spouse before she died and he had used up all of his exclusion. Her first husband's exclusion does not count because she remarried and her second husband predeceased her.

The exclusion is also available for gifts made during your lifetime. Please let me know if you want to discuss this further.

There are several issues regarding portability. One is that, under current law, portability only covers whatever the estate tax exclusion is at the death of the second spouse. For example, a husband dies and leaves his wife everything. The wife has a $10,680,000 exclusion after her husband dies leaving her everything. If the government takes the estate tax exclusions back to a lower amount (say $3 million per person), however, at the wife's death, she would only have a $6 million exclusion, $3 million for her and $3 million for her husband. There are no proposals to reduce the exclusion at this point.

Another issue is inflation. Portability does not have an inflation adjustment. For the deceased spouse's portion, it will be whatever it was at the first spouse's death. Creditor protection is also an issue. If the surviving spouse owns all the assets outright, there is no creditor protection that would be available in a trust.

There is also no portability for the generation-skipping tax exemption. If the assets are in a credit trust and generation-skipping tax exemption is assigned to the trust, they can escape federal estate taxation for several generations. That is not the case when you rely strictly on portability

The way to avoid the downside of portability is by setting up what are called bypass trusts or credit trusts in a will or revocable trust. The credit trust will take maximum advantage of the tax free exclusion available at the death of the first spouse to die and will preserve it for the surviving spouse. The trust can take advantage of the generation-skipping tax exemption available to the first spouse. Also, once the assets are in a properly drafted credit trust, they escape estate taxation no matter what they are worth at the death of the surviving spouse.

Option 1. No Credit Trust

In your situation, however, John's Will had no credit trust. In order to take advantage of your deceased spouse's exclusion through portability, we have to file a federal estate tax return even though federal estate tax is not due.

Option 2. Credit Trust

John’s will contained a credit trust. The portion of his estate that passed to the credit trust is fully sheltered from future estate taxation because of the credit trust. If you file a federal estate tax return, however, you can take advantage of an additional $XXXXXXX of exclusion from the estate tax from John. If you do not file the return, you cannot take advantage of this additional exclusion from the estate tax.

Based on the size of your estate now and assuming no appreciation or depreciation in value, under current law, you would have a total estate at your death of approximately $XXXXXX that would be subject to an estate tax. This is below the federal estate tax exclusion just for you of the $5,340,000 amount.

The problem is we don’t know what the future holds. None of us know what the tax laws will be and whether your property will appreciate or depreciate in value. To preserve your spouse’s full exclusion of approximately $5,340,000, we will have to timely file a federal estate tax return (IRS Form 706). The return is due nine months from the date of John’s death. The due date can be extended an additional six months. A return that is not timely filed will not preserve portability.

The decision about whether or not to do this is, of course, up to you. There is an expense involved of preparing the estate tax return and filling it out although much of the work has been done because we have values and descriptions of the assets.

When you have a chance, please give me a call or make an appointment to come in to discuss this. Because of the deadline for filing the estate tax return is ___________________, I need to know something before _____________, 20___.

APPENDIX EE

Getting Started with Your Estate Planning

MOORMAN TATE, LLP
207 East Main Street
P.O. Box 1808
Brenham, Texas 77834-1808
(979) 836-5664
Fax (979) 830-0913
www.moormantate.com

FREQUENTLY ASKED QUESTIONS
About

Getting Started With Your Estate Planning

What is the first step in the estate planning process?

The first step in the estate planning process is to schedule an appointment with an estate planning attorney to discuss your particular situation. The initial estate planning conference provides an opportunity for your attorney to obtain information about you, your family, your assets and your goals and to make some recommendations to you regarding an appropriate estate plan. It is a "no obligation" meeting that lasts approximately one-half hour. At the conclusion of the meeting, the attorney will make recommendations about which estate planning techniques best suit your needs, and will advise you of the fees for implementing these techniques. You can decide how you wish to proceed.

What is the most important thing for me to do?

The most important thing for you to do in order to start your estate planning process is to make an appointment with your lawyer and get started. If you wait to make an appointment until you have everything completed, you may never come in. Make the appointment first, and then start completing the forms.

What should I bring with me to the initial conference?

You should bring a financial statement with you to your initial estate planning conference. It does not have to be professionally prepared. A list of your major assets and liabilities (debts), with approximate values, helps your lawyer assess whether any tax planning should be recommended for your situation. Also, be sure to indicate separately "pre-tax" assets (like IRAs and qualified retirement plans) versus "after-tax" assets (like regular investment accounts, money market accounts, etc.). Some people use a computer program or other form for creating a financial statement. Others simply sketch out their information on the form similar to the one attached as Exhibit A. A list of what you own and what it is worth on a piece of notebook paper is a fine start. Bringing along your address book or completing the information on Exhibit B is also helpful (see below). Also, if available, bring copies of your current estate planning documents (although, if you know they need to be completely redone, your attorney will probably not spend too much time reviewing them). They can be helpful.

Is there anything else that I should bring to my initial conference?

Other documents that should be brought, if applicable, would be copies of documentation relating to any business you own, such as the articles of incorporation and bylaws for your corporation, the partnership agreement for your business partnership and any buy-sell agreement. If you are the beneficiary under someone else's Will or trust, you should bring a copy of that document. In addition, if you have ever been divorced and you believe the divorce decree might impose certain requirements with respect to various assets that you own (such as life insurance), please bring a copy of the divorce decree or property settlement agreement. If you have signed a premarital agreement or other marital property contract, that document should be brought along as well. If these documents are not readily available, they can be provided after the initial conference.

What should I think about before meeting with my estate planning attorney?

The two most basic questions are:

(i) to whom do you want to leave your assets; and
(ii) who do you want to name in various positions of responsibility?

With respect to the bulk of your estate, the answer to the first question is often very standard. Most married couples wish to provide first for their spouse and then for their children. Single people with children usually leave the bulk of their estate to their children in equal shares.

Unmarried individuals without children should make a list of persons (or charities) they wish to benefit and the percentage share to each.

The answer to the second question can sometimes be more difficult. Usually, spouses name each other first in all positions of responsibility (except as guardian for minor children, which is automatic in most cases). The executors, trustees, agents and guardians that you name in your estate planning documents should be trustworthy, responsible people (collectively called "fiduciaries"). These individuals will be dealing with your assets with virtually no court supervision unless someone sues them. In some cases, a professional (such as a bank having trust powers or a private trust company) can be named as a fiduciary. You do not need to know exactly who you will name in every position before meeting with your attorney. Your attorney will help advise you in regard to these matters. Preparation of your documents, however, will be advanced if you at least bring with you to the meeting the names, addresses and phone numbers of all persons who *might* be involved in your estate plan (see Exhibit B and further discussion below).

What else should I think about in preparation for the meeting?

If you have any particular issues or concerns, such as disposition of your business in the event of your death, or providing for an adult disabled child who is receiving government benefits, you should make a list of those issues and concerns prior to meeting with your attorney. You should discuss whether you are concerned with paying for the cost of a nursing home if one is needed. You should also advise your attorney whether you and your spouse are both U.S. citizens and how long you have lived in Texas during the period of your marriage. If you or your spouse has inherited any assets from someone, you should advise your attorney of that fact and identify the inherited assets in your financial statement. Further, it is also helpful if you can determine the current beneficiaries that you have named for your life insurance policies, IRAs and qualified retirement plans. If you are thinking of making relatively large cash gifts or gifts of other assets (*excluding* items that come within the general phrase "household furnishings and personal effects"), you might begin making a list of those persons and the amount or items that you are considering leaving to them.

Is there any other information that would be helpful to bring with me to the initial conference?

It would be helpful if you were to bring a prepared list of family and personal information, including all of the basic information relating to you, your spouse, your children, and any other persons who might be involved in your estate plan. A form that can be used to compile this information is attached to this memorandum as Exhibit B. Please make sure you name all children born to or adopted by you.

EXHIBIT A
FINANCIAL STATEMENT

Assets	**Designated Beneficiary (if any)**	**How Titled**	**Approximate Value**
Your home			
Other real estate			
Oil, gas and other mineral interests			
Stocks, bonds, mutual funds and other investments ("after-tax")			
Cash, CDs, money market accounts			
Automobiles and other vehicles			
Valuable collections/collectibles/heirlooms			
Other household furnishings and personal effects			
Retirement assets, such as 401(k) plans, profit sharing plans, pension plans, IRAs, etc. ("pre-tax")			
Life insurance (identify insured and show both death benefit and cash value, if any)			
Closely held business interests (describe)			
Other miscellaneous assets (describe)			
Digital Assets – passwords, etc.	Discuss		
Patents, Copyrights, Trademarks			
Total Assets			

Liabilities (Debts)	**Current Balance**
Mortgage on home	
Other real estate mortgages	
Personal debt (credit cards, car notes, etc.)	
Accrued taxes	
Other debts	
Total Liabilities	
Net worth for estate planning purposes (Total Assets minus Total Liabilities)	

EXHIBIT B
FAMILY AND PERSONAL INFORMATION

General Personal Information.

	Husband	Wife
Full legal name:	______________________	______________________
Alias names, if any:	______________________	______________________
Name usually used to sign documents:	______________________	______________________

Home Address: Street: ______________________

City: ______________________

County: ______________________

State, Zip Code: ______________________

Phone: (   )   -

Home FAX: (   )   -

Home e-mail address: ______________________

	Husband	Wife
Birth date (& age):	______________	______________
Soc. Sec. No.:	______________	______________
Citizenship:	______________	______________
Date of marriage:		
How long have you lived in Texas?	______________	______________
Occupation:	______________	______________
Employer:	______________	______________
Bus. address:	______________	______________
		______________
	Bus. Phone: ( ) ________	Bus. Phone: ( ) ________
	Bus. Fax: ( ) ________	Bus. Fax: ( ) ________
	Bus. e-mail address: ________	Bus. e-mail address: ________

Children, Grandchildren.

Please list all children of either of you below. For each child, please indicate: (i) the child's name (if the child has a preferred name, please put it in parenthesis after the legal name) and occupation; (ii) Gender (male or female); (iii) date of birth; (iv) whether the child is the husband's only (H), the wife's only (W), or a child of both (B); and (v) the child=s approximate net worth. If any child is adopted by either of you, please indicate. If any child is deceased, please include him or her and indicate the date of death.

Name & occupation	m/f	Birth date	h/w/b	net worth

[*] Note: For each child who does *not* live at home with you, please mark an "X" or make a check mark in front of that child's name and list that child's name on the back of this page (or on a separate page), along with his or her complete address (including street, city, *county,* state, and ZIP code if possible), and phone number.

Are additional children in the future (including adopted children) even *remotely* possible? ___(Y/N)

Other Family Members and Friends Involved in Your Estate Plan.

If either of your parents is living *and if they might be involved in your estate plan,* please list them below. Additionally, please list any brothers, sisters, or other relatives or friends who might be involved in your estate plan (as executor or trustee, as guardian for your minor children, as a recipient of any specific gift, as a beneficiary of a trust, etc.). Be sure to include each person's complete name, age and occupation. When listing addresses, include city, *county,* state, and ZIP code if possible.

Name/Age/Occupation	Relationship*	Address and phone no.

*For "Relationship", specify, e.g., "husband's mother", "wife's brother", "wife's friend", "our friend", etc.

Executors, Trustees, and Other Agents

You may already know who you want to name as your Executor, Trustee, Guardian of your children, or Guardian of you. If you do, please specify that information below. If you are uncertain about what this means or if you wish to discuss it, then there is no need to complete the section below. The purpose of this is to start you thinking about who you may nominate. In all of these cases, it should be individuals who are completely trustworthy and who will carry out the tasks that you ask them to complete.

HUSBAND	WIFE
Executor: 1st	Executor: 1st
2nd	2nd
3rd	3rd
4th	4th
Trustee: 1st	Trustee: 1st
2nd	2nd
3rd	3rd
4th	4th
Guardian/Custodian: 1st	Guardian/Custodian: 1st
2nd	2nd
3rd	3rd
Notes/Special Provisions:	
Directive to Physician	**Directive to Physician**

Durable Power of Attorney	**Durable Power of Attorney**
1st	1st
2nd	2nd
3rd	3rd
4th	4th
Designation of Guardian	**Designation of Guardian**
Person	*Person*
1st	1st
2nd	2nd
3rd	3rd
Estate	*Estate*
1st	1st
2nd	2nd
3rd	3rd
Exclusions	*Exclusions*
Medical Power of Attorney	**Medical Power of Attorney**
1st	1st
2nd	2nd
3rd	3rd
4th	4th
Burial Agent	**Burial Agent**
1st	1st
2nd	2nd
3rd	3rd
Special Provisions:	
ADDRESS AND PHONE FOR AGENTS	
Name:	**Name:**
Address:	Address:
Phone	Phone
Name:	**Name:**
Address:	Address:
Phone	Phone
Name:	**Name:**
Address:	Address:
Phone	Phone
Name:	**Name:**
Address:	Address:
Phone	Phone
Name:	**Name:**
Address:	Address:
Phone	Phone

Other Advisors.

If you have another attorney, or a CPA, insurance agent, financial planner, stock broker, or other professional advisor, *and if they might be involved in your estate plan, or if you think we may need to discuss aspects of your estate plan with them,* please list them below.

Name/Company	Profession	Address and phone no.

APPENDIX FF

Family Conflict Disclosure and Waiver
New Family Member

THIS IS A LEGAL CONTRACT BETWEEN YOU AND THE LAW FIRM. YOU ARE ADVISED TO HAVE INDEPENDENT LEGAL COUNSEL REVIEW THIS CONTRACT ON YOUR BEHALF. THE LAW FIRM CANNOT REPRESENT YOU IN CONNECTION WITH THE NEGOTIATION, PREPARATION, OR EXECUTION OF THIS FAMILY CONFLICT DISCLOSURE AND WAIVER.

In an Estate Planning Engagement Letter with the Law Firm whose letterhead is shown above, the Law Firm (called "Attorney" in the Engagement Letter) agreed to seek the permission of my [position of family member, i.e., mother] [name of family member] "Family Member" to represent another member of Family Member's family and to withdraw from representing the last immediately family member who hired the Law Firm if a conflict of interest became apparent between Family Member and any other members of Family Member's family.

I want the Law Firm to represent me understanding the conflict of interest and my waiver of the conflict of interest between me and Family Member.

I have been told that there is a potential conflict of interest when one lawyer represents different family members. If I become Law Firm's client, if my Family Member decides to omit me from Family Member's will, Law Firm would be preparing something that would harm me. This is an example of a conflict of interest between family members.

I realize that the Law Firm may prepare wills, trusts, powers of attorney, business organizations, and other documents ("estate planning documents") for Family Member that are contrary to my interests and desires and that may omit me from any bequests under those estate planning documents made for Family Member. I realize that Law Firm in preparing estate planning documents for Family Member may create trusts that may or may not benefit me but which I do not control and which may not benefit my spouse or another member of my family. These are examples of conflicts of interest between my interests and those of Family Member. I realize that Law Firm will not disclose what Family Member is doing in Family Member's estate planning documents to me and Law Firm will not disclose what I am doing in my estate planning documents to Family Member without the written consent of the party involved.

Waiver of Conflict of Interest

Realizing all of these things, I waive any conflict of interest between me and Law Firm and Family Member in preparing estate planning documents for me or for Family Member. Law Firm may keep all matters revealed to Law Firm from Family Member confidential from me. Law Firm may represent Family Member regardless of any conflict of interest between me and Family Member.

I also agree that Law Firm may withdraw at any time from representing me and may still represent Family Member.

Signed on _____________, 2019

____
Client

____
Client

Family Conflict Disclosure and Waiver
Existing Client

THIS IS A LEGAL CONTRACT BETWEEN YOU AND THE LAW FIRM. YOU ARE ADVISED TO HAVE INDEPENDENT LEGAL COUNSEL REVIEW THIS CONTRACT ON YOUR BEHALF. THE LAW FIRM CANNOT REPRESENT YOU IN CONNECTION WITH THE NEGOTIATION, PREPARATION, OR EXECUTION OF THIS FAMILY CONFLICT DISCLOSURE AND WAIVER.

In an Estate Planning Engagement Letter with the Law Firm whose letterhead is shown above, the Law Firm (called "Attorney" in the Engagement Letter) agreed to seek my permission to represent another immediate family member and to withdraw from representing the last immediately family member who hired the Law Firm if a conflict of interest became apparent between me and any other members of my family.

I want the Law Firm to represent my [position of family member, i.e., son] [name of family member] "Family Member" understanding the conflict of interest and my waiver of the conflict of interest between me and Family Member.

I have been told that there is a potential conflict of interest when one lawyer represents different family members. If my Family Member becomes Law Firm's client, if my Family Member decides to omit me from Family Member's will, Law Firm would be preparing something that would harm me. This is an example of a conflict of interest between family members.

I realize that the Law Firm may prepare wills, trusts, powers of attorney, business organizations, and other documents ("estate planning documents") for Family Member that are contrary to my interests and desires and that may omit me from any bequests under those estate planning documents made for Family Member. I realize that Law Firm in preparing estate planning documents for Family Member may create trusts that may or may not benefit me but which I do not control and which may not benefit my spouse or another member of my family. These are examples of conflicts of interest between my interests and those of Family Member. I realize that Law Firm will not disclose what Family Member is doing in Family Member's estate planning documents to me and Law Firm will not disclose what I am doing in my estate planning documents to Family Member without the written consent of the party involved.

<u>Waiver of Conflict of Interest</u>

Realizing all of these things, I waive any conflict of interest between me and Law Firm and Family Member in preparing estate planning documents for me or for Family Member. Law Firm may keep all matters revealed to Law Firm from Family Member confidential from me. Law Firm may represent Family Member regardless of any conflict of interest between me and Family Member.

Signed on _____________, 2019

____
Client

____
Client

APPENDIX GG

Probate Information Sheet

APPENDIX HH

Case Control Record

Originating Atty: ____ **Billing Atty:**_______ **Date Opened:**________ **Tabs3 No.**__________

File No.____________

File Name:____

Matter Name:____

Client Contact:____

Address:____

Street or P.O. Box City/State Zip Code

Contact: Home ____________________ Work ____________________

Cell ____________________ Cell ____________________

E-Mail ____________________ Other ____________________

SS# Husband: ____________________ Wife: ____________________

Matter Description: ______________________________________

Billing Agreement: (check one) □ Standard □ Contingent □ Flat Fee □ Manual Bill □ No Charge

Practice Code: (circle one) CO EP OG GE FL LI RE CR PR PI GD RA

Work Code: (circle one)

Civil Litigation – All Others	CLO	General	GE
Civil Litigation – Collections	CLC	Guardianship	GS
Civil Litigation – Personal Injury – Defendant	CLPID	Oil and Gas	OG
Civil Litigation – Personal Injury – Plaintiff	CLPIP	Probate	PR
Civil Litigation – Will Contest	CLWC	Real Estate – Commercial	REC
Civil Litigation – Fiduciary/Trust/Probate	CLFTP	Real Estate – Farm and Ranch	REFR
Corporate	CO	Real Estate – Lots, Vacant Land	REL
Criminal	CR	Real Estate – Residential	RER
Estate Planning	EP	Referring Attorneys	RA
Family Law	FL		

Funds Received or Pending/Billing Information

$____________Retainer in Escrow □ Apply to Monthly Bill OR □ Apply to Final Bill □ Pending

$____________Receipt to General Fund □ Pending

□ ½ Paid Now,

□ FLAT FEE, Total Fee $_____________ ½ Bill Later □Paid in Full □ OTHER ________________

RateCode:____________________ Attorney: _________ Support Staff:______________

Tabs3

Bill Format: (check one)

□ MT01 - Total Fees only – no timekeeper recap

□ MR3 - Date/Description/Hours - with Timekeeper Recap

□ ST1 - Initials/Time/Rate/Hours/Amount - with Timekeeper Recap

□ NoHRA - Total Fees – Flat Fee Cases

□ HrsTkFee - Initial/Hours/Fee – No timekeeper recap

Special Remarks:____

____

Adverse Party:____
Address:____

Opposing Counsel:____
Address:______________________________________ Telephone:______________

______________________________________ Fax:______________

Referral:____

Copies of Statement to: Name:______________________________
Address:______________________________

Entered into Tabs3/Database Date ______________ Initials __________
Added to MTMUH Contacts Date ______________ Initials __________

APPENDIX II

Local Counsel Legal Services Employment Agreement

THIS LEGAL SERVICES EMPLOYMENT CONTRACT IS A LEGAL CONTRACT BETWEEN YOU AND THE LAW FIRM. YOU ARE ADVISED TO HAVE INDEPENDENT LEGAL COUNSEL REVIEW THIS CONTRACT ON YOUR BEHALF. THE LAW FIRM CANNOT REPRESENT YOU IN CONNECTION WITH THE NEGOTIATION, PREPARATION, OR EXECUTION OF THIS ENGAGEMENT LETTER.

Services. You employ the firm of LAW FIRM (hereinafter sometimes referred to as "Local Counsel" or "we"), to represent you as follows: Serving as local counsel in ____________________________________. You will remain the lead attorney and will bear the primary responsibility in and for this matter. You will give Local Counsel precise instructions as to what you would like Local Counsel to do in this matter by email or other writing. (all referred to in this agreement as the "Legal Matter").

Fees. In consideration of this representation, you agree to pay at the offices of MOORMAN TATE, LLP, in Brenham, Texas, the hourly rates as shown in the attached schedule. Each portion of a quarter hour is billed as a full quarter hour. All work is done and all fees are payable in Brenham, Texas. You also agree to pay for all expenses as provided in the attached schedule.

You understand that the hourly rates usually increase at the beginning of each calendar year to take into account current levels of legal experience, changes in overhead costs and other factors. This increase will most likely be in the range of $10 to $30 per hour.

Occasionally, when a bill for a specific matter is rendered near the conclusion of the matter, posting of some time and charges (such as telephone, copying, or similar items) may be delayed, or there may be an invoice which is not delivered to Local Counsel until after the legal matter has been finalized. In such cases, you agree to pay the "after closing" expenses even though you may have previously received what was designated as a "final" bill. You will be responsible for paying these "after closing" expenses.

Deposit. IT IS OUR USUAL PRACTICE TO REQUIRE PAYMENT OF A DEPOSIT BEFORE WE BEGIN WORK FOR A CLIENT. WE HAVE ASKED THAT YOU REMIT AND MAINTAIN WITH US, DURING THE ENTIRE COURSE OF OUR REPRESENTATION OF YOU IN THIS MATTER, AN INITIAL DEPOSIT IN THE SUM OF $2,500.00 (THE "DEPOSIT"). WE WILL PLACE THE DEPOSIT INTO OUR TRUST ACCOUNT. IN OTHER WORDS, THE DEPOSIT REMAINS IN OUR TRUST ACCOUNT DURING THE TIME WE REPRESENT YOU AND WE WILL ASK YOU TO PAY OUR BILL ON A MONTHLY BASIS. THE DEPOSIT WILL BE APPLIED TO OUR FINAL BILLING STATEMENT FOR FEES AND EXPENSES, OR, IN OUR DISCRETION, TO ANY PAST DUE MONTHLY STATEMENT. UPON THE TERMINATION OF OUR SERVICES, WE WILL PROMPTLY REFUND THE DEPOSIT TO YOU, LESS ANY BALANCE FOR FEES AND EXPENSES UNPAID AS OF THE DATE OF OUR FINAL BILL.

WE RETAIN THE RIGHT AND DISCRETION TO REQUEST A SUPPLEMENTAL COST DEPOSIT, OVER AND ABOVE THE INITIAL DEPOSIT, IN THE EVENT OF AN INCREASE IN OUR ANTICIPATED FEES AND EXPENSES DURING THE COURSE OF REPRESENTING YOU. IF WE MAKE SUCH A REQUEST, YOU WILL AGREE TO PROMPTLY DELIVER THE ADDITIONAL DEPOSIT TO US.

Payment Terms. The fees are due and payable when billed. If Local Counsel does not hear from you regarding the bill sent to you, you agree that Local Counsel can presume that you understand and approve of the charges.

Conflicts of Interest. One of the most important considerations which we must have in accepting an engagement is whether the engagement will put us in conflict with any existing client interest. If we discover such a conflict after beginning work for you, we may be disqualified from continuing our representation of you. You acknowledge that it is, therefore, very important for you to consider all the interests which are involved in the Legal Matter, to be certain that you have advised us fully in that regard. If we, in our judgment and discretion, determine that a conflict of interest does exist, we will notify you and all other affected clients, and will proceed in a manner consistent with the ethical standards contained in the Texas Disciplinary Rules of Professional Conduct (the "Disciplinary Rules").

Mediation. In the unlikely event you have a disagreement with Local Counsel, before resorting to litigation or arbitration, any disputes arising out of or connected with this engagement agreement (including but not limited to the services performed by Local Counsel under this agreement) will be submitted to mediation in Washington County, Texas, in accordance with the rules for alternative dispute resolution set forth under Texas law. You and Local Counsel will mutually cooperate to select the mediator to be used. Any and all information, negotiation, and results of the mediation will remain confidential.

Withdrawal of Firm. You have requested our advice and counsel as a part of our services to you. In order for our representation of you to be successful, it is important that you follow our advice, reasonably cooperate with us, and abide by the terms and conditions of this agreement. If any of the following events occur, we reserve the right to withdraw from representing you in this matter at any time:

(a) You insist that we present a claim or defense that is not warranted under existing law and cannot be supported by a good-faith argument for an extension, modification, or reversal of existing law;

(b) You seek to pursue an illegal course of action;

(c) You fail to follow our advice or to reasonably cooperate with us, or, by your conduct, you render it unreasonably difficult for us to represent you;

(d) You insist that we engage in a course of conduct that is illegal or that is prohibited under the lawyers' Disciplinary Rules;

(e) You insist that we engage in conduct that is contrary to our judgment and advice, but not prohibited under the Disciplinary Rules;

(f) You fail to timely pay statements for our fees, expenses or costs, or you otherwise fail to fulfill or abide by the terms and conditions of this agreement;

(g) We determine, in our sole judgment and discretion, after further investigation, that the facts related to the Legal Matter are materially different from those you represented to us and upon which our agreement to represent you was based; or

(h) We are required to withdraw due to a conflict in interest, because an attorney with the firm becomes a witness in the case, or for any other reason required under the Disciplinary Rules.

In any of these events, you agree that we may move to withdraw as your counsel in any suit in which we have made an appearance on your behalf or from any matter in which we are representing you, and that you will promptly execute any documents required to accomplish this.

If we withdraw for any reason, we will take reasonable steps to avoid foreseeable prejudice to your rights, including giving proper notice, allowing reasonable time for your to employ other counsel, delivering to you all papers and property to which you are entitled, and complying with applicable laws and rules.

Withdrawal by You. It is our desire and goal that you be satisfied with our legal services at all times. At any time you wish, however, you may cease to use our services by notifying us in writing. You will be still responsible for payment of any and all fees, expenses, and costs that have been incurred in connection with our representation of you prior to the date that we receive your written notice as well as the obligation to pay our then current hourly rates if we are called to testify or assist in another matter.

Document Retention. You agree that Local Counsel is not responsible to keep copies of my documents. You agree to keep all originals and copies that you desire among your own files for future reference.

INTEREST ON PAST DUE ACCOUNTS. UNPAID FEES AND EXPENSES WILL BE CONSIDERED PAST DUE IF NOT PAID WITHIN THIRTY (30) DAYS OF THE BILLING DATE. YOU AGREE TO PAY INTEREST ON PAST DUE AMOUNTS AT THE RATE OF 1.5 % PER MONTH (18% ANNUAL PERCENTAGE RATE), OR

THE MAXIMUM RATE ALLOWED BY LAW, UNTIL PAID. INTEREST CHARGES WILL BE CALCULATED ON ALL PAST DUE AMOUNTS AND ADDED TO THE NEXT MONTH'S BILLING STATEMENT.

Place for Performance. You understand that the place for performance of the majority of the work covered by this Agreement is in _________________County, Texas.

Electronic Mail and Voice Mail. We use electronic mail ("email") and voice mail. Email may not be a secure communication. If you use a work computer to send emails, your employer may have access to those emails. Please indicate below if we have your permission to communicate with you by email.

You should not consider that any communication by you to us by email or voice mail is received until it is acknowledged by a return email or telephone call by us. If your email or voice mail is not acknowledged in what you consider a reasonable amount of time, please follow up with a telephone call directly to us at the office. To effectively follow up on an unacknowledged email or voice mail to us at the office, you need to make sure you are speaking live to a person at the office (rather than by leaving a voice mail).

****

I have read and understand the terms of this document.

SIGNED on ______________________________, 2019

____
CLIENT

____ ____
Client Client

_______ Yes. You may communicate with me via email.
Initial Preferred email address ____

_______ No. Please do not communicate with me via email.
Initial

Received the sum of $__________in the form of check/cash on _________________________, 2019.

20XX FEE AND EXPENSE SCHEDULE
FEES – HOURLY RATES - STANDARD

FEES

R. Hal Moorman	$XXX
Andrew J. Hefferly	$XXX
Christopher S. Hardy	$XXX
Emily G. De Young	$XXX
Support Staff	$XXX
Probate	$XX/$XX/$XXX
Law Clerks	$XX
Clerks	$XX

EXPENSES

Photocopies	XX¢ per page in firm, or cost of copy service
Color Photocopies	$X.00 per copy, or cost of copy service
Incoming Fax; Local Outgoing Fax	XX¢ per page
Outgoing Long Distance Fax	Long distance call expense + 10%
Long Distance Calls	Cost to firm + 10%
Other Expenses	Cost to firm
Costs Advanced	Cost to firm
Mileage	.535 per mile

APPENDIX JJ

Contingent Fee Attorney Employment Contract

THIS DOCUMENT IS A LEGAL CONTRACT BETWEEN YOU AND THE LAW FIRM. YOU ARE ADVISED TO HAVE INDEPENDENT LEGAL COUNSEL REVIEW THIS CONTRACT ON YOUR BEHALF. <u>THE LAW FIRM HAS A CONFLICT OF INTEREST THAT PREVENTS IT FROM REPRESENTING YOU IN CONNECTION WITH THE NEGOTIATION, PREPARATION, OR EXECUTION OF THIS ENGAGEMENT LETTER</u>.

That, whereas, ____________________________ (hereinafter called Clients) desire to retain the services of LAW FIRM (hereinafter called Attorney) to represent them for damages arising out of injuries and damages to ______________________________which occurred in _______________County, Texas, on or about the _______day of _________________, 20___, as follows:

1. Attorney agrees to represent Clients in their cause of action for personal injuries and/or property damages and/or to settlement or final judgment of Clients' claims against any and all parties responsible for such damages.

2. Clients acknowledge and understand that the contingent fee is negotiable and not set by law, however, once Clients sign this Agreement, Clients agree they are bound by the fee provided for in this Agreement.

3. The Attorney's fee shall be as follows:

(a) As to any claim against a third party, Clients agree to pay and do hereby assign to Attorneys as compensation for their services 33-1/3% of any and all recovery obtained in behalf of Clients which is obtained by settlement and/or compromise of the claim before the case is set for trial or 40% of all recovery obtained for the client after the case has been set for trial, provided that such final conclusion is made prior to any appeal of the case; provided further, that in the event any appeal of the case is made, by either party, Attorney shall receive an additional 10% of the recovery for their services in handling such appeal.

(b) If a personal injury case is settled by means of a payment method in which payment is made in two or more installments, the Attorney's fee percentage shall be calculated on the present value of the settlement. Present value is the current value of all payments to be made calculated by adding up all payments to be made and applying an appropriate interest factor to that sum to reflect the time value of money.

(c) The Attorney's fee will be paid from all amounts collected by the Attorney for the Client including, but not limited to, any third party insurance, personal funds of any third party, and Client's or other person's or company's underinsured/uninsured motorist coverage and personal injury protection.

(d) <u>Calculation of Attorney's Fee on Assets other than Cash Payments or Marketable Securities</u>. If the recovery consists partially or completely of assets other than cash or marketable securities ("Other Assets"), the following shall apply. The Other Assets shall be appraised by a qualified appraiser or appraisers. The Other Assets shall be appraised by qualified appraisers if the valuation requires the use of different appraisers for different assets. The Attorney shall have the privilege of selecting such appraiser(s). The appraisal fees shall be considered an expense of the litigation the same as expert fees, court costs and other items ("Expenses"). The Attorney's fee shall be calculated on the total value of the recovery including the value of the Other Assets as calculated by the appraiser or appraisers (the "Attorney's Fee"). Once the Attorney's Fee is determined, Clients agree to pay the Attorney the Attorney's Fee and Expenses with all cash and marketable securities received in the recovery. If cash and marketable securities are insufficient to completely pay the Attorney's Fee and Expenses, the Clients agree to immediately sell Other Assets with sufficient value to pay the remainder of the Attorney's Fee and Expenses, and, once they are sold, the remainder of the Attorney's Fee and Expenses shall be paid with the sales proceeds of the Other Assets. Attorney has the option of taking Attorney's share of mineral and royalty interests and water rights in kind. The value of those interests will be deducted from the Attorney's Fees due Attorney once transferred to the Attorney.

Once the Attorney's Fee and Expenses are determined in a writing submitted by Attorney to Clients and there is a settlement agreement or final judgment, then, beginning thirty calendar days after such

determination letter and the date of the settlement agreement or final judgment, whichever is last (the "Determination Date"), the Attorney's Fee and Expenses shall bear interest as follows:

UNPAID ATTORNEY'S FEES AND EXPENSES WILL BE CONSIDERED PAST DUE IF NOT PAID WITHIN THIRTY (30) DAYS OF SUCH DETERMINATION DATE. CLIENTS AGREE TO PAY INTEREST ON PAST DUE AMOUNTS AT THE RATE OF 1.5% PER MONTH (18% ANNUAL PERCENTAGE RATE), OR THE MAXIMUM RATE ALLOWED BY LAW, UNTIL PAID. INTEREST CHAGRES WILL BE CALCULATED ON ALL PAST DUE AMOUNTS.

4. Clients promise to reimburse and indemnify Attorney for and against all sums that they may spend in the prosecution of the claim by the reason of court costs, taking of deposition, gathering and adducing evidence, expert or otherwise, photographs and X-ray pictures, medical reports and examinations and treatment, long distance telephone calls, certified mailing expense, mileage, costs, etc., if recovery shall be had. Example: NOTE: the figures used in the example are to illustrate how the fee is calculated and how expenses will be deducted from the matter. It is not intended to be an estimate of the recovery in this particular case or of the amount of the expenses in this case. It is only an example to show how expenses and fees will be calculated. Expenses and fees can vary dramatically from what is shown in this example. To understand how fees and expenses will be calculated, if the recovery in a case is $100,000, and the expenses are $10,000, and if the case is settled prior to being set for trial, the attorney's fee will be 33 1/3 percent of the total recovery or $33,333.33. Expenses of $10,000 will also be subtracted before determining the amount due to the client in this example. The net recovery in this example for this client will be $100,000 less the attorney's fee of $33,333.33, less the expenses of $10,000, netting the client in this example, $56,666.67. If there is no recovery, Client does not owe the Attorney any money for these costs and expenses. If any costs and expenses are unpaid at the time of settlement or judgment, costs will be deducted from the amount remaining after Attorney's fees are computed. In-house costs are listed on the attached schedule.

5. It shall be the exclusive privilege of Attorney to determine when and where suit shall be filed and whether or not an appeal should be perfected from any judgment rendered. No settlement shall be made without consent of Clients.

6. Attorney is hereby granted full authority to sign all legal instruments, pleadings, drafts, authorizations, and papers as shall be reasonably necessary to conclude settlement and/or reduce to possession any and all monies or other things of value due to Clients under this claim as fully as Clients could do so in person.

7. It shall be the privilege of Attorney to associate other attorneys, but in such event, the fee of such associate attorney shall be paid by Attorney herein employed.

8. All sums due and to become due are payable at Attorney's office in ____________________County, Texas. Venue (the place where the lawsuit is filed) for any disputes between the Attorney and Client shall be in ___________________County, Texas.

9. At any time after this contract is executed, Attorney may return the file to Clients, thus terminating Attorney's obligations to the client.

10. **Withdrawal from Representation**.

10.1. **Withdrawal of Firm**. You have requested our advice and counsel as a part of our services to you. In order for our representation of you to be successful, it is important that you follow our advice, reasonably cooperate with us, and abide by the terms and conditions of this agreement. If any of the following events occur, we reserve the right to withdraw from representing you in this matter at any time:

(a) You insist that we present a claim or defense that is not warranted under existing law and cannot be supported by a good-faith argument for an extension, modification, or reversal of existing law;

(b) You seek to pursue an illegal course of action;

(c) You fail to follow our advice or to reasonably cooperate with us, or, by your conduct, you render it unreasonably difficult for us to represent you;

(d) You insist that we engage in a course of conduct that is illegal or that is prohibited under the lawyers' Disciplinary Rules;

(e) You insist that we engage in conduct that is contrary to our judgment and advice, but not prohibited under the Disciplinary Rules;

(f) You fail to fulfill or abide by the terms and conditions of this agreement;

(g) We determine, in our sole judgment and discretion, after further investigation, that the facts related to the Legal Matter are materially different from those you represented to us and upon which our agreement to represent you was based;

(h) We are required to withdraw due to a conflict in interest, because an attorney with the firm becomes a witness in the case, or for any other reason required under the Disciplinary Rules; or

(i) This case, in our opinion is not economic to pursue.

In any of these events, you agree that we may move to withdraw as your counsel in any suit in which we have made an appearance on your behalf or from any matter in which we are representing you, and that you will promptly execute any documents required to accomplish this.

If we withdraw for any reason, we will take reasonable steps to avoid foreseeable prejudice to your rights, including giving proper notice, allowing reasonable time for your to employ other counsel, delivering to you all papers and property to which you are entitled, and complying with applicable laws and rules.

11. **FAVORABLE OUTCOME NOT GUARANTEED**. ALTHOUGH WE WILL USE OUR BEST REASONABLE, ETHICAL AND PROFESSIONAL EFFORTS IN REPRESENTING YOU, WE CANNOT PREDICT OR GUARANTEE THE RESULTS OF OUR EFFORTS OR THE OUTCOME OF THE LEGAL MATTER. YOU UNDERSTAND THAT WE HAVE MADE NO REPRESENTATION CONCERNING THE SUCCESSFUL DETERMINATION OR RESOLUTION OF THE LEGAL MATTER OR RELATED CLAIMS OR THE FAVORABLE OUTCOME OR ANY LEGAL ACTION THAT IS OR MAY BE FILED, AND WE HAVE NOT GUARANTEED THAT WE WILL OBTAIN REIMBURSEMENT TO YOU OF ANY OF THE FEES, COSTS, AND/OR EXPENSES INCURRED BY YOU IN THE PROSECUTION OR DEFENSE OF THE LEGAL MATTER. YOU FURTHER EXPRESSLY ACKNOWLEDGE THAT ALL STATEMENTS FROM US ON THESE MATTERS ARE STATEMENTS OF OPINION ONLY.

12. **Complaints and Grievances**. All lawyers in Texas have an obligation to maintain a high standard of ethical conduct toward their clients and others. To enforce this standard, the State Bar of Texas investigates and prosecutes complaints of professional misconduct against attorneys licensed in Texas. Although not every complaint against or dispute with a lawyer involves professional misconduct, the State Bar office of General Counsel will provide you with information about how to file a complaint. If you feel that misconduct may have occurred, or if you have questions regarding the disciplinary process, you may call or write the State Bar of Texas, P.O. Box 12487, Austin, Texas 78711, (512) 463-1381 or 1-800-932-1900 (toll free). By your signature below, you acknowledge a receipt of the Texas Lawyer's Creed, which is attached to this agreement.

13. **Electronic Mail and Voice Mail**. Attorneys use electronic mail ("email") and voice mail. Email is not a secure communication. If Clients use a work computer to send emails, Client's employer may have access to those emails. It is possible for third parties to illegally obtain information from emails.

Clients should not consider that any communication by Clients to Attorneys by email or voice mail is received until it is acknowledged by a return email or telephone call by Attorneys. If Client's email or voice mail is not acknowledged in what Clients consider a reasonable amount of time, please follow up with a telephone call directly to Attorneys at the office. To effectively follow up on an unacknowledged email or voice mail to Attorneys at the office, Clients need to make sure Clients are speaking live to a person at the office (rather than leaving a voice mail).

14. Attorney Privacy and File Maintenance Policy.

14.1 ATTORNEY PRIVACY POLICY AS TO SOCIAL SECURITY NUMBERS AND OTHER PRIVATE INFORMATION:

a. SOCIAL SECURITY NUMBERS AND DRIVER'S LICENSE NUMBERS ARE ONLY USED AS NEEDED AND AS REQUIRED BY LAW.

b. THESE PRIVATE NUMBERS ARE USED TO IDENTIFY PARTIES WHETHER FOR INITIAL SERVICE OF COURT DOCUMENTS, FOR CERTAIN COURT ORDERS, IN REQUIRED REPORTS FILED WITH THE STATE OF TEXAS, OR FOR OTHER REQUIRED PURPOSES.

c. THESE PRIVATE NUMBERS RECEIVED FROM A CLIENT ARE CONFIDENTIAL AND ARE NOT RELEASED FROM THE FIRM UNLESS AUTHORIZED BY THE CLIENT OR REQUIRED BY LAW.

d. THE EMPLOYEES OF THE FIRM HAVE ACCESS TO THIS PERSONAL INFORMATION BUT SHALL NOT RELEASE IT WITHOUT ATTORNEY APPROVAL.

e. CLIENT'S INFORMATION IS KEPT SECURE WITHIN THE FIRM IN FILE FOLDERS, FILE DRAWERS, AND COMPUTERS, UNTIL SUCH TIME THAT THE FILE INFORMATION IS RETIRED AND THE FILE REMOVED TO STORAGE IN COMPUTER FILES OR A LOCKED STORAGE FACILITY. THE CLIENT INFORMATION WILL EVENTUALLY BE DELETED.

14.2. **File Information**. During our representation of clients, we will be sending clients copies of all important contracts, pleadings, letters, notices and other material which we believe clients should review. Our office strives to maintain these documents in digital (paperless) format, so more often these copies shall be in digital format, for ease of retention and portability. Clients should have a secure place to keep these documents. If clients need additional paper copies at any time, we can make those at Client's expense for our copy fees. Clients may control such costs by keeping digital copies. Should clients believe Client's particular file requires an encryption, clients should advise us of the form of such encryption. If our office is required to secure encryption software specifically for Client's case, the cost of that software shall be included in Client's bill.

14.3. **Disposition of Client Files**. We are not responsible for keeping copies (electronic or otherwise) of Client's information. Client is advised to retain all confidential information or original documents from Attorney's file as received. Client otherwise authorizes Attorney to destroy in a secure manner the information contained in Attorney's file when the legal service is complete.

14.4. **HIPAA Provisions**. Under Texas Health and Safety Code, Sec. 181.154 – HB 300, effective September 1, 2012, because we gather, store, and electronically transmit medical records (Protected Health Information – PHI) in the course of our representation of our clients, we are required to post a notice to clients that their protected health information is subject to electronic disclosure. Texas and federal law prohibits any electronic disclosure of a client's protected health information to any person without a separate authorization from the client or the client's legally authorized representative for each disclosure. This authorization for disclosure may be made in written or electronic form or in oral form if it is documented in writing by Attorney.

The authorization for electronic disclosure of protected health information described above is not required if the disclosure is made to another covered entity, as that term is defined by Section 181.001, Texas Health & Safety Code, or to a covered entity, as that term is defined by Section 602.001, Texas Insurance Code, for the purpose of treatment; payment; health care operations; performing an insurance or health maintenance organization function described by Section 602.053, Texas Insurance Code, or as otherwise authorized or required by state or federal law. In other words, no further release is necessary for electronic disclosure to other health care providers, insurance companies, governmental agencies, or defense lawyers representing adverse parties.

15. **Complaints and Grievances**. All lawyers in Texas have an obligation to maintain a high standard of ethical conduct toward their clients and others. To enforce this standard, the State Bar of Texas investigates and prosecutes complaints of professional misconduct against attorneys licensed in Texas. Although not every complaint against or dispute with a lawyer involves professional misconduct, the State Bar office of General Counsel will provide clients with information about how to file a complaint. If Clients feel that misconduct may have occurred, or if Clients

have questions regarding the disciplinary process, Clients may call or write the State Bar of Texas, P.O. Box 12487, Austin, Texas 78711, (512) 463-1381 or 1-800-932-1900 (toll free). By Client's signature below, Clients acknowledge a receipt of the Texas Lawyer's Creed, which is attached to this agreement.

16. **Optional Provisions Regarding Authorized Agents**. I agree that ________________________ ________________ is/are authorized by me to receive confidential information from the Attorney, but it is not intended by me to have that information disclosed to third persons.

I designate _______________________________________ as my agent(s) to obtain legal services from or to act on advice rendered by the Law Firm on my behalf and to have all Claims & Litigation powers under Section 752.110, Texas Estates Code. This is intended to be a power of attorney. This power of attorney is not affected by the subsequent disability or incapacity of the principal.

ACKNOWLEDGEMENT OF AGREEMENT

We have discussed with you the terms and conditions of our engagement to avoid any misunderstanding later.

By your signature below, you acknowledge that, in addition to having read this agreement in its entirety, we have answered any questions that you may have concerning this agreement to your satisfaction and understanding and that you understand the agreement and consider to be fair and reasonable.

By your signature, you also acknowledge that you have been advised by us to retain independent legal counsel to advise you in connection with the negotiation and execution of this agreement. By signing below, you are agreeing to the terms and conditions contained in this engagement letter.

WITNESS OUR HANDS on this the _____day of ____________, 2019.

____
Client

_______ Yes. I understand that email is not a secure communication. Attorneys may
Initial communicate with me via email.
Preferred email address: ____

_______ No. Please do not communicate with me via email.
Initial

STATE OF TEXAS §
§
COUNTY OF ____________________ §

The foregoing instrument was acknowledged before me on the _____day of ______________________, 2019 by _______________________________(client).

____
Notary Public, State of Texas

I hereby accept the above-mentioned employment as attorney of record.

____
Attorney

EXHIBIT A
Expense Schedule – 2019

Expenses

Photocopies	10¢ per page in firm, or cost of copy service

Color Photocopies	$1.00 per copy, or cost of copy service
Long Distance Fax	Long distance call expense + 10%
Long Distance Calls	Cost to firm + 10%
Other Expenses	Cost to firm
Costs Advanced	Cost to firm
Mileage	54.5¢ per mile

APPENDIX KK

HIPAA Release and Provisions

HIPAA Release

Release – Authorization to Disclose Protected Health Information

I, ________________, Principal, authorize, with this HIPAA Release – Authorization to Disclose Protected Health Information ("Authorization"), any covered entity or health care provider to disclose all of my protected health information, including mental health records (excluding psychotherapy notes); drug, alcohol, or substance abuse records; genetic information (including genetic test results); and HIV/AIDS test results/treatment, at the request of any of the following Authorized Recipients:

____

____

____

This Authorization is effective immediately and has no expiration date. It shall expire only in the event I revoke this Authorization in writing and is not affected by my subsequent disability or incapacity.

This Authorization may be revoked at any time by giving written notice stating my intent to revoke to the covered entity or health care provider. Proof of receipt of my written revocation may be by certified mail, registered mail, facsimile, or any other method evidencing receipt by the Authorized Recipients. I understand that prior actions taken in reliance on this Authorization by the Authorized Recipients, who had permissions to access my health information, will not be affected. There are no exceptions to my right to revoke this Authorization.

My refusal to sign this form will not stop disclosure of health information that has occurred prior to revocation or that is otherwise permitted by law without my specific authorization or permission, including disclosures to covered entities as provided by Texas Health & Safety Code § 181.154(c) and/or C.F.R. § 164.502(a)(1).

I understand that I cannot be denied treatment based on a failure to sign this Authorization, and that a refusal to sign will not affect the payment, enrollment, or eligibility for any benefits.

I further understand that information disclosed pursuant to this Authorization may be subject to re-disclosure by the recipient and may no longer be protected by federal or state privacy laws.

____
(SIGNATURE)

SWORN TO and **SUBSCRIBED** before me on the _____ day of ______________, 2016 by ____________________________, Principal.

____
Notary Public, State of Texas

APPENDIX KK (cont.)
HIPAA Provisions

Under Texas Health and Safety Code Sec. 181.154 – HB 300, effective September 1, 2002.

Because [LAW FIRM] gathers, stores, and electronically transmits medical records (Protected Health Information or "PHI") in the course of our representation of our clients, we are required to post a notice to clients that their protected health information is subject to electronic disclosure. Texas and federal law prohibits any electronic disclosure of a client's protected health information to any person without a separate authorization from the client or the client's legally authorized representative for each disclosure. This authorization for disclosure may be made in written or electronic form or in oral form if it is documented in writing by our law firm.

The authorization for electronic disclosure of protected health information described above is not required if the disclosure is made to another covered entity, as that term is defined by Section 181.001, or to a covered entity, as that term is defined by Section 602.001, Insurance Code, for the purpose of treatment; payment; health care operations; performing an insurance or health maintenance organization function described by Section 602.053, Insurance Code; or as otherwise authorized or required by state or federal law. In other words, no further release is necessary for electronic disclosure to health care providers, insurance companies, governmental agencies, or defense lawyers representing adverse parties.

APPENDIX LL

Engagement Agreement with General Terms and Conditions (attached)

John Doe
2 Blank Street
Anywhere, Texas

Dear Client:

Law Firm is pleased to have the opportunity to represent John Doe ("you"). Thank you for selecting us. Our relationship will be governed by this letter and the attached terms and conditions.

You have asked us and we have agreed to (describe the work to be done) (the "Matter").

Compensation Arrangements

We will bill you for our work at ow· preferred hourly rates. Bill Smith will work on the Matter. His hourly rate for this work during 2020 is $XXX. We will also involve other lawyers and paraprofessionals as needed to execute our assignments. We will send, and you agree to pay, a periodic statement, usually monthly, for services rendered and expenses posted during the previous interval.

Conflicts

We have run a conflict check on the names provided to us by you and believe we are free of conflicts. If we identify a conflict after our work on the Matter has begun, you agree to use reasonable efforts to help us resolve the conflict to the satisfaction of all parties. We do not check to determine whether other clients of the Firm may be yam competitors or may take positions on certain issues that may be adverse to or inconsistent with positions you may favor.

Although we are not aware of a conflict created by the Matter at this time, we represent many clients, and it is possible that the Firm may take on work for other clients that may give rise to conflicts in the future. The Firm will not take on any representation adverse to you in any matter substantially related to the Matter, nor will the Firm allow lawyers working for you to simultaneously work adversely to you. In other matters, you consent to the Firm's representation of clients in matters directly adverse to you, so long as that adverse representation is not substantially related to the matters we have been engaged to handle on your behalf, and so long as we believe, in our reasonable professional judgment, that our responsibilities to you and the other client would not be adversely limited by the concurrent representations. You also consent to our undertaking matters not adverse to you for any party to whom you are adverse in any of the matters we may handle for you from time to time.

If the terms and scope of our engagement outlined in this letter are acceptable to you, please so indicate by signing below. We look forward to working on your behalf.

Sincerely,

____
Law Firm

ACCEPTED, ACKNOWLEDGED, AND AGREED:

____
Client

General Terms and Conditions

1. This engagement is only for the Matter identified in the engagement letter and any other matters that we mutually agree in writing or email to include in our engagement. If you do not countersign the engagement letter but continue to instruct us on the Matter, you will be deemed to have accepted the engagement letter and these terms and conditions. Any amendments or modifications to this letter must be in writing. You or we may terminate the engagement letter at any time, provided that we comply with the applicable rules of professional conduct. Once our work on the Matter is complete, unless we have accepted other work from you, our representation of you will conclude and our attorney-client relationship shall end.

2. We treat our relationship and communications with you as confidential, but there may be occasions when we will need to disclose your identity as a client for purposes of identifying and dealing with conflicts of interests. We will not disclose your identity as a client or any other information relating to our representation of you to anyone outside the firm and we will establish an inclusive ethical wall within the firm to maintain the highest level of confidentiality with respect to this engagement. We will transmit information and communicate with you regarding the Matter by email, unless you request that we not use email.

3. In addition to the lawyers identified in the attached engagement letter, we may use other lawyers and non-lawyer staff in order to handle the Matter efficiently and control legal costs. Our hourly rates usually increase at the beginning of each calendar year to take into account current levels of legal experience, changes in overhead costs, and other factors. Services rendered after the date of any rate change will be billed at the new rates.

4. We charge our clients for certain identifiable costs incurred by the Firm on their behalf. These costs include such items as photocopies, filing and other governmental fees, deposition costs, expert witness fees, messenger services, travel expenses, and other such items that must be paid on your behalf; such direct charges, if paid by us, are invoiced to you without markup. In addition, costs may include other items such as computerized research, long-distance telephone charges, and other such services that we may buy in bulk and then allocate across all of our clients and in-house operations based generally on usage. We do not mark up these charges, which generally track our actual cost of such items.

5. We may outsource certain functions or hire consultants or other vendors to assist us, including delivery, storage, duplicating, information technology, and collection of older accounts receivable. They are all bound by duties of confidentiality.

6. Law Firm will hold and process any personal data that you provide to us in accordance with its obligations under applicable data privacy laws. The Firm will use personal data provided to it only in conjunction with its representation of you (including the administration of that representation) and the Firm may (a) provide the personal information to third parties, and (b) hold the personal data in the United States, for this purpose. Additionally, we may use the personal information provided to the Firm to send you information about our services, alerts, updates, and invitations to training and events that may be of interest to you. You can adjust your preferences so as not to receive any such information at any time. Full details are contained in the Firm's privacy policy, which is available at www.lawfirm.com. In providing the personal data to the Firm, you are confirming that you have all necessary notices and consents in place to enable the lawful transfer of the personal data to the Firm and its use as set out above. You will provide us, at no cost to the Firm, with any reasonable assistance in complying with any obligations that the Firm has under applicable data privacy laws in relations to the personal data that you provide to us, including data breach notification, data protection impact assessments, prior consultation with supervisory authorities, the fulfillment of a data subject's rights, and any inquiry, notice, or investigation by a supervisory authority. The Firm shall he entitled to charge you for its cost of compliance.

7. We will maintain a file of electronic documents during the representation (the "Matter File"). Documents containing our attorney work product, mental impressions or notes and drafts of documents shall be and remain our property and are not considered part of your Matter File. In addition, our internal emails, documents containing or reflecting our internal deliberations or self-evaluations, and our internal databases shall remain our property and are not considered part of your Matter File. At the conclusion of this Matter or any other representation we undertake on your behalf, all documents or data we have in the Matter File relating to the Matter (or other representation, as applicable), whether we may have received them from you, received them from others, or created them ourselves, may

be handled and ultimately destroyed, without further notice to you, in accordance with our record retention policy then in effect (currently providing for a retention period of eight years for most matters).

8. Nothing contained herein should be construed to give rise to any fiduciary or other duty by Law Firm to any third party; no third parties are intended to be beneficiaries hereof.

9. If this representation includes litigation or other claims against you, you may have insurance or indemnity that would cover liability or legal fees or both. If you wish for the Firm to advise or represent you in connection with any potential insurance or indemnity coverage issues, you must affirmatively request that such inquiry be added to the scope of the Firm's engagement.

10. Under the rules of certain jurisdictions, to the extent such rules are applicable to this engagement, you may have the right to request binding arbitration of fee disputes in certain circumstances.

11. Our fees shall be net of any business taxes, withholding taxes, sales taxes, value added taxes or similar taxes that may be imposed by any jurisdiction. If such taxes are applicable to the payments payable to us under this engagement letter, the amount payable to us shall, to the extent permitted by applicable law, be grossed up to include the said tax incurred in addition to the net amount of fees and expenses payable to us.

12. **MEDIATION. In the event that any claim or dispute should arise between us and cannot be resolved by agreement, such claim or dispute shall first be submitted to non-binding mediation before a mediator selected by mutual agreement, or failing such agreement, by an alternative dispute resolution organization selected by you.**

13. **ARBITRATION. Any claim or dispute arising out of or in connection with our services or this engagement agreement, including any question regarding its existence, validity, termination, or the performance by us of our services hereunder, that has not been resolved by agreement or mediation shall be referred to and resolved by confidential arbitration before three neutral arbitrators. For clients based or disputes arising from matters in the United States, the arbitration shall be administered by the American Arbitration Association in accordance with its Commercial Arbitration Rules, and the arbitrators shall issue a reasoned award. The seat of the arbitration shall be a location mutually agreed by the parties, or at a neutral location in the United States selected by you. The award of the arbitrators may be appealed in accordance with the AAA's Optional Appellate Arbitration Rules, which shall apply in the event of appeal. Arbitration can often result in cost and time savings over litigation in the courts. There may be less fact and document discovery, which can help the process move more quicldy, and the application of the rules of evidence may be more relaxed in arbitration. However, you should be aware that arbitration requires that you waive any right you may have to a trial by jury or to pursue a judicial appeal.**

APPENDIX MM

Power of Attorney and Attorney Employment Contract

1. Parties and Scope of Representation: I, the undersigned client (hereinafter referred to as "Client"), retain and hire Perdue & Kidd, 777 Post Oak Blvd., Suite 450, Houston, Texas 77056 ("Attorney") to represent me for the claims that I may have individually and in my representative capacity arising out of ______________________________________ that occurred on or about ______________, 20_____.

2. Power of Attorney. Client hereby fully authorizes and empowers Attorney to act on Client's behalf to (a) make claims for compensation; (b) bring lawsuits on claims, if necessary; (c) to prosecute lawsuits to final judgment; and (d) to negotiate a compromise and/or settlement of the claims with or without a lawsuit in any way or manner that Attorney may deem best or advisable. Client agrees that Attorney shall exclusively make all decisions involving strategy in negotiations and prosecution of the lawsuit.

3. Attorney's Fees: In consideration of the services to be rendered for Client by Attorney hereunder, Client assigns and conveys to Attorney an undivided interest in Client's claims equal to 40% of the gross recovery through settlement or judgment of the claims and 45% after an appeal has been initiated. IF THERE IS NO RECOVERY, CLIENT SHALL OWE ATTORNEY NOTHING.

4. Costs, Expenses and Expense Lien: Client pays no up-front costs or expenses. Attorney will incur costs and expenses for the prosecution of Client's claims for which Client assigns and conveys to Attorney an undivided interest in Client's claims equal to the amount of the expenses and creates a lien in favor of Attorney in the amount of the costs and expenses incurred. Client agrees to reimburse Attorney for the Expense Lien from any settlement or judgment. Client specifically authorizes Attorney to deduct the Expense Lien from the proceeds recovered after attorneys' fees are calculated. IF THERE IS NO RECOVERY, CLIENT SHALL OWE ATTORNEY NOTHING.

5. Termination of Agreement: This Agreement terminates at the funding of any settlement or judgment. If Client terminates this Agreement before funding without good cause to do so, this Agreement will be deemed to have been breached and Attorney shall have the right to receive the full amount of attorney's fees and Expense Lien from any settlement or judgment obtained by Client, regardless of whether through or as a result of other counsel. Attorney may withdraw from Client's representation in the claim at any time with written notice for any reason recognized under Texas law. Attorney forfeits any claim to recover any attorney's fees or expenses unless there is good cause for the withdrawal.

6. Cooperation: Client agrees to fully cooperate with the Attorney, disclose all relevant facts, promptly advise the Attorney of any change in address or telephone number, and promptly comply with all reasonable requests of the Attorney on all matters related to this Agreement. Client understands that failure to fully cooperate may be a basis for termination of this Agreement.

7. Settlement: Attorney may not settle Client's claim without Client's consent, which shall not be unreasonably withheld. Client agrees not to settle or offer to settle Client's claim with any party without the prior written consent of Attorney.

8. Favorable Outcome Not Guaranteed. Client understands that Attorney makes no promise or guarantee of any kind concerning the outcome of Client's claim.

9. Limited Power of Attorney to Execute Documents. Client grants to Attorney a limited power of attorney to execute all documents related only to this case where Attorney is retained, including pleadings, contracts, checks or drafts, settlement agreements, compromises, releases, verifications, dismissals, and orders. This power of attorney shall apply only to matters related to this case.

10. This is a Contract: This Agreement is a contract that shall survive Client's death or incompetency.

11. Texas Law Applies: Texas law applies to this Agreement. Any claims of any kind relating to the legal services provided or arising under this contract must be filed only in a court of competent jurisdiction in Harris County, Houston, Texas.

12. Bankruptcy: Bankruptcy may affect Client's claims. Client represents that Client is not in bankruptcy at the time this Agreement is signed. Client must advise Attorney about any prior bankruptcy filings. Client further expressly agrees to consult with Attorney before filing for bankruptcy.

13. Child Support: Child support liens attach to any recovery by Client. Client must inform Attorney of any child support obligation.

14. Social Media: Client understands that insurance companies and defendants monitor all social media sites looking for information to use against Client. Client agrees to not post anything on any social media site during the pendency of Attorney's representation without Attorney's express consent.

15. Agreement to Joint Representation: Client understands that Attorney may represent other people who have similar claims as Client who are not in conflict with Client. Client understands that the work performed for one of Attorney's similarly situated clients benefits all clients and agrees to the joint representation. Client also agrees to pay his/her fair or pro rata share of "common benefit expenses" of joint representation for things which benefit all similarly situated clients.

16. Acknowledgments and Representations: Client's signature below acknowledges that Client has read this 2-page Agreement completely and carefully and agrees to be bound by all of its provisions. Client acknowledges that any questions that Client has about this Agreement were answered by Attorney to Client's satisfaction before signing it. Client may consult with an independent attorney before signing this agreement, but Client is not required to do so. The signature on behalf of Attorneys below indicates Attorneys' acceptance of this Agreement.

AGREED:

______________________________	______________________________
Client signature and date	Attorney signature and date

Notice to Client

The State Bar of Texas investigates and prosecutes professional misconduct committed by Texas attorneys. Although not every complaint against or dispute with a lawyer involves professional misconduct, the State Bar Office of General Counsel will provide you with information about how to file a complaint. For more information, call toll-free 1-800-932-1900.

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