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ENGAGEMENT LETTERS
WHY BOTHER?

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ENGAGEMENT LETTERS

WHY BOTHER?

I. Reasons to Bother

A. Establish the Client. Probably the majority of the clients in an estate planning practice are couples (husband/wife, same sex partners, and increasingly, married same sex couples). In estate administration, there is always much discussion regarding the identity of the client. Is it the estate? Is it the personal representative? All of these issues create an inherent conflict of interest. All of the parties knowing up front and designating the client will go a long way should a conflict arise later in the representation.

B. Establish the Scope of the Work. Having in writing exactly what you will and will not be doing helps the clients understand up front what they are paying for. It also helps you understand the full extent of the expectations placed on you by the client.

C. Show Conflicts. Your engagement letter can show the parties up front that there is a conflict between them and you will not later be hearing from one spouse that they want to change their will to include their lover that the other spouse does not know about. If you tell them this up front, the cheating spouse will know not to come back to you and save you numerous hours on the telephone with the State Bar ethics hotline.

D. Avoid Malpractice. Many malpractice carries want to see your engagement letters. It is a huge factor in reducing your risk. This list of reasons to bother are the essential elements of an engagement letter and should be included in every one you have a client sign.

E. Get Paid. Put in writing what you are charging. There are times that a client will come back to you and say they did not understand the fee arrangement or that they were expecting you to do something that was not included in your initial agreement but now they do not want to pay for. Many attorneys do not sue for collection, but if you do, a written agreement is essential.

II. Rules of Professional Conduct and Other Law and Commentary Bearing on Issues of Reasons to Use Engagement Letters

A. Georgia Rules of Professional Conduct

1. Rule 1.6: Confidentiality of Information

a. A lawyer shall maintain in confidence all information gained in the professional relationship with a client, including information which the client has requested to be held inviolate or the disclosure of which would be embarrassing or would likely be detrimental to the client, unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, or are required by these Rules or other law, or by order of the Court.

b.

1. A lawyer may reveal information covered by paragraph (a) which the lawyer reasonably believes necessary:

   i. to avoid or prevent harm or substantial financial loss to another as a result of client criminal conduct or third party criminal conduct clearly in violation of the law;

   ii. to prevent serious injury or death not otherwise covered by subparagraph (i) above;

   iii. to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

   iv. to secure legal advice about the lawyer's compliance with these Rules.

2. In a situation described in paragraph (b)(1), if the client has acted at the time the lawyer learns of the threat of harm or loss to a victim, use or disclosure is permissible only if the harm or loss has not yet occurred.

3. Before using or disclosing information pursuant to paragraph (b)(1), if feasible, the lawyer must make a good faith effort to persuade the client either not to act or, if the client has already acted, to warn the victim.

c. The lawyer may, where the law does not otherwise require, reveal information to which the duty of confidentiality does not apply under paragraph (b) without being subjected to disciplinary proceedings.

d. The lawyer shall reveal information under paragraph (b) as the applicable law requires.

e. The duty of confidentiality shall continue after the client-lawyer relationship has terminated.

The maximum penalty for a violation of this Rule is disbarment.

Comment

[1] The lawyer is part of a judicial system charged with upholding the law. One of the lawyer's functions is to advise clients so that they avoid any violation of the law in the proper exercise of their rights.

[2] The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance.

[3] Almost without exception, clients come to lawyers in order to determine what their rights are and what is, in the maze of laws and regulations, deemed to be legal and correct. The common law recognizes that the client's confidences must be protected from disclosure. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[4] A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.

[4A] Information gained in the professional relationship includes information gained from a person (prospective client) who discusses the possibility of forming a client-lawyer relationship with respect to a matter. Even when no client-lawyer relationship ensues, the restrictions and exceptions of these Rules as to use or revelation of the information apply, e.g. Rules 1.9 and 1.10.

[5] The principle of confidentiality is given effect in two related bodies of law, the

attorney-client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. Rule 1.6 applies not merely to matters communicated in confidence by the client but also to all information gained in the professional relationship, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope. The requirement of maintaining confidentiality of information gained in the professional relationship applies to government lawyers who may disagree with the client's policy goals.

Authorized Disclosure

[6] A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority. In litigation, for example, a lawyer may disclose information by admitting a fact that cannot properly be disputed, or in negotiation by making a disclosure that facilitates a satisfactory conclusion.

[7] Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

[7A] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized paragraph (b)(1)(iv) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

Disclosure Adverse to Client

[8] The confidentiality rule is subject to limited exceptions. In becoming privy to information about a client, a lawyer may foresee that the client intends serious harm to another person. The public is better protected if full and open communication by the client is encouraged than if it is inhibited.

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2. Rule 1.7: Conflict of Interest: General Rule

a. A lawyer shall not represent or continue to represent a client if there is a significant risk that the lawyer's own interests or the lawyer's duties to another client, a former client, or a third person will materially and adversely affect the representation of the client, except as permitted in (b).

b. If client informed consent is permissible a lawyer may represent a client notwithstanding a significant risk of material and adverse effect if each affected client or former client gives informed consent, confirmed in writing, to the representation after:

    1. consultation with the lawyer, pursuant to Rule 1.0(c);

    2. having received in writing reasonable and adequate information about the material risks of and reasonable available alternatives to the representation, and

    3. having been given the opportunity to consult with independent counsel.

c. Client informed consent is not permissible if the representation:

    1. is prohibited by law or these Rules;

    2. includes the assertion of a claim by one client against another client represented by the lawyer in the same or substantially related proceeding; or

    3. involves circumstances rendering it reasonably unlikely that the lawyer will be able to provide adequate representation to one or more of the affected clients.

The maximum penalty for a violation of this Rule is disbarment.

Comment

Loyalty to a Client

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. If an impermissible conflict of interest exists before representation is undertaken the representation should be declined. The lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the parties and issues involved and to determine whether there are actual or potential conflicts of interest.

[2] Loyalty to a client is impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other competing responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. Paragraph (a) addresses such situations. A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. Consideration should be given to whether the client wishes to accommodate the other interest involved.

[3] If an impermissible conflict arises after representation has been undertaken, the

lawyer should withdraw from the representation. See Rule 1.16. Where more than one client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by Rule 1.9. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment 4 to Rule 1.3 and Scope.

[4] As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client's informed consent. Paragraphs (b) and (c) express that general rule. Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require informed consent of the respective clients.

Consultation and Informed Consent

[5] A client may give informed consent to representation notwithstanding a conflict. However, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's informed consent. When more than one client is involved, the question of conflict must be resolved as to each client. Moreover, there may be circumstances where it is impossible to make the disclosure necessary to obtain informed consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to give informed consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to give informed consent. If informed consent is withdrawn, the lawyer should consult Rule 1.9 and Rule 1.16.

[5A] Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See Rule 1.0(b). See also Rule 1.0(s) (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See Rule 1.0(b). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

Lawyer's Interests

[6] The lawyer's personal or economic interests should not be permitted to have an adverse effect on representation of a client. See Rules 1.1 and 1.5. If the propriety of a lawyer's own conduct in a transaction is in serious question, it may be difficult or

impossible for the lawyer to give a client objective advice. A lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed interest.

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Interest of Person Paying for a Lawyer's Service

[10] A lawyer may be paid from a source other than the client, if the client is informed of that fact and gives informed consent and the arrangement does not compromise the lawyer's duty of loyalty to the client. See Rule 1.8(f).....

Non-litigation Conflicts

[11] Conflicts of interest in contexts other than litigation sometimes may be difficult to assess. Relevant factors in determining whether there is potential for material and adverse effect include the duration and extent of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will arise and the likely prejudice to the client from the conflict if it does arise.

[12] In a negotiation common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them.

[13] Conflict questions may also arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. The lawyer should make clear the relationship to the parties involved.

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3. Rule 1.16: Declining or Terminating Representation

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

    1. the representation will result in violation of the Georgia Rules of Professional Conduct or other law;

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

    3. the lawyer is discharged.

b. except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:

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

    2. the client has used the lawyer's services to perpetrate a crime or fraud;

    3. the client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;

    4. the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

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

    6. other good cause for withdrawal exists.

c. When a lawyer withdraws it shall be done in compliance with applicable laws and rules. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

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

The maximum penalty for a violation of this Rule is a public reprimand.

Comment

[1] A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion. But see Rule 1.2(c): Scope of Representation.

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Discharge

[4] A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

[5] Whether a client can discharge appointed counsel may depend on applicable law. To the extent possible, the lawyer should give the client an explanation of the

consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring the client to be self-represented.

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Optional Withdrawal

[7] The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer also may withdraw where the client insists on a repugnant or imprudent objective. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient.

[8] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

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B. State Bar of Georgia Advisory Opinion

1. Formal Advisory Opinion No. 03-2, Issued by the Formal Advisory Opinion Board of the State of Georgia on September 11, 2003

QUESTION PRESENTED:

Does the obligation of confidentiality described in Rule 1.6, Confidentiality of Information, apply as between two jointly represented clients?

SUMMARY ANSWER:

The obligation of confidentiality described in Rule 1.6, Confidentiality of Information, applies as between two jointly represented clients. An attorney must honor one client's request that information be kept confidential from the other jointly represented client. Honoring the client's request will, in most circumstances, require the attorney to withdraw from the joint representation.

OPINION:

Unlike the attorney-client privilege, jointly represented clients do not lose the protection of confidentiality described in Rule 1.6, Confidentiality of Information, as to

each other by entering into the joint representation. See, e.g., D.C. Bar Legal Ethics Committee, Opinion No. 296 (2000) and Committee on Professional Ethics, New York State Bar Association, Opinion No. 555 (1984). Nor do jointly represented clients impliedly consent to a sharing of confidences with each other since client consent to the disclosure of confidential information under Rule 1.6 requires consultation. Id. Consultation, as defined in the Rules, requires "the communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question." Terminology, Georgia Rules of Professional Conduct.

When one client in a joint representation requests that some information relevant to the representation be kept confidential from the other client, the attorney must honor the request and then determine if continuing with the representation while honoring the request will: a) be inconsistent with the lawyer's obligations to keep the other client informed under Rule 1.4, Communication; b) materially and adversely affect the representation of the other client under Rule 1.7, Conflict of Interest: General Rule; or c) both.

The lawyer has discretion to continue with the representation while not revealing the confidential information to the other client only to the extent that he or she can do so consistent with these rules. If maintaining the confidence will constitute a violation of Rule 1.4 or Rule 1.7, as it most often will, the lawyer should maintain the confidence and discontinue the representation.

Consent to conflicting representations, of course, is often permitted under Rule 1.7. Consent to continued joint representation in these circumstances, however, ordinarily would not be available either because it would be impossible to conduct the consultation required for such consent without disclosing the confidential information in question or because consent is not permitted under Rule 1.7 in that the continued joint representation would "involve circumstances rendering it reasonably unlikely that the lawyer will be able to provide adequate representation to one or more of the affected clients." Rule 1.7(c)(3).

Whether or not the attorney, after withdrawing from the representation of the other client, can continue with the representation of the client who insisted upon confidentiality is governed by Rule 1.9: Conflict of Interest: Former Clients and by whether or not the consultation required for the consent of the now former client can be conducted without disclosure of the confidential information in question.

The potential problems that confidentiality can create between jointly represented clients make it especially important that clients understand the requirements of a joint representation prior to entering into one. When an attorney is considering a joint representation, consultation and consent of the clients is required prior to the representation "if there is a significant risk that the lawyer's . . . duties to [either of the jointly represented clients] . . . will materially and adversely affect the representation of [the other] client." Rule 1.7. **Whether or not consultation and consent is required, however, a prudent attorney will always discuss with clients wishing to be jointly represented the need for sharing confidences between**

them, obtain their consent to such sharing, and inform them of the consequences of either client's nevertheless insisting on confidentiality as to the other client and, in effect, revoking the consent. If it appears to the attorney that either client is uncomfortable with the required sharing of confidential information that joint representation requires, the attorney should reconsider whether joint representation is appropriate in the circumstances. If a putative jointly represented client indicates a need for confidentiality from another putative jointly represented client, then it is very likely that joint representation is inappropriate and the putative clients need individual representation by separate attorneys.

The above guidelines, derived from the requirements of the Georgia Rules of Professional Conduct and consistent with the primary advisory opinions from other jurisdictions, are general in nature. There is no doubt that their application in some specific contexts will create additional specific concerns seemingly unaddressed in the general ethical requirements. We are, however, without authority to depart from the Rules of Professional Conduct that are intended to be generally applicable to the profession. For example, there is no doubt that the application of these requirements to the joint representation of spouses in estate planning will sometimes place attorneys in the awkward position of having to withdraw from a joint representation of spouses because of a request by one spouse to keep relevant information confidential from the other and, by withdrawing, not only ending trusted lawyer-client relationships but also essentially notifying the other client that an issue of confidentiality has arisen. See, e.g., Florida State Bar Opinion 95-4 (1997) ("The attorney may not reveal confidential information to the wife when the husband tells the attorney that he wishes to provide for a beneficiary that is unknown to the wife. The attorney must withdraw from the representation of both husband and wife because of the conflict presented when the attorney must maintain the husband's separate confidences regarding the joint representation.") A large number of highly varied recommendations have been made about how to deal with these specific concerns in this specific practice setting. See, e.g., Pearce, Family Values and Legal Ethics: Competing Approaches to Conflicts in Representing Spouses, 62Fordham L. Rev. 1253 (1994); and, Collett, And The Two Shall Become As One . . . Until The Lawyers Are Done, 7 Notre Dame J. L. Ethics & Public Policy 101 (1993) for discussion of these recommendations. Which recommendations are followed, we believe, is best left to the practical wisdom of the good lawyers practicing in this field so long as the general ethical requirements of the Rules of Conduct as described in this Opinion are met.

2. Formal Advisory Opinion No. 91-1, Issued by the Supreme Court of Georgia on September 13, 1991

This opinion relies on Standard of Conduct 30 and Ethical Consideration 5-6 that bear upon matters directly addressed by Rule 1.7.

The Form Notification and Consent Letter, which is an addendum to this opinion, continues to be useful and valid.

For an explanation regarding the addition of headnotes to the opinion, click here.

Ethical propriety of drafter of will serving as executor.

> It is not ethically improper for a lawyer to be named executor or trustee in a will or trust he or she has prepared when the lawyer does not consciously influence the client in the decision to name him or her executor or trustee, so long as he or she obtains the client's written consent in some form or gives the client written notice in some form after a full disclosure of all the possible conflicts of interest. In addition, the total combined attorney's fee and executor or trustee fee or commission must be reasonable and procedures used in obtaining this fee should be in accord with Georgia law.

QUESTION PRESENTED:

Is it ethically proper for a lawyer to be named executor or trustee in a will or trust he or she has prepared?

OPINION:

Disciplinary Standard of Conduct No. 30 provides:

> Except with the written consent or written notice to his client after full disclosure a lawyer shall not accept or continue employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property or personal interests.

The financial interests of an executor or trustee reasonably may affect an attorney's independent professional judgment on behalf of the client. The conduct in question falls clearly within the coverage of Standard No. 30. Standard No. 30, however, provides exceptions for this type of conflict. These exceptions to a conflict of interest are the client's written consent or written notice to the client after full disclosure. These exceptions are in question here.

There is no limitation on client consent in Standard No. 30 unless the "appearance of impropriety" prohibition of Canon 9 of the Georgia Code of Professional Responsibility creates an implied limitation. It is our opinion that the conduct in question does not necessarily create an "appearance of impropriety," and we note that the "appearance of impropriety" prohibition is not included in the Standards of Conduct.

This opinion finds support in the interpretive guidance of the aspirational statement in Ethical Consideration 5-6.

> EC 5-6 - A lawyer should not consciously influence a client to name him as executor, trustee or lawyer in an instrument. In those cases where a client wishes

> to name his lawyer as such, care should be taken by the lawyer to avoid even the appearance of impropriety.

The implication of Ethical Consideration 5-6 is that the naming of an attorney as executor or trustee in a will or trust he or she has prepared does not per se create an appearance of impropriety, but that such an arrangement creates a risk of appearing to be improper, which must be guarded against by the attorney.

A testator's or settlor's freedom to select an executor or trustee is an important freedom, and it should not be restricted absent strong justification. For a variety of reasons, the attorney may be the most appropriate choice of fiduciary for the client. The risk that some lawyers may take advantage of a lawyer-client relationship to benefit themselves in a manner not in the client's best interest should not outweigh that freedom.

This risk of self-dealing instead creates the need for restrictions that offer assurance that the naming of the lawyer as executor or trustee is the informed decision of the testator or settlor. An attorney's full disclosure is essential to the client's informed decision and consent. Disclosure requires notification of the attorney's potential interest in the arrangement; i.e., the ability to collect an executor's or trustee's fee and possibly attorneys fees. Unlike a real estate transaction where an attorney has a personal interest in the property, being named as executor or trustee does not give the attorney any personal interest in the estate or trust assets other than the fee charged. Waiver of State law fiduciary requirements in the document is permissible as long as waiver is ordinary and customary in similar documents for similar clients that do not name the attorney as fiduciary.[1]

In the light of the above, full disclosure in this context should include an explanation of the following:

> 1. All potential choices of executor or trustee, their relative abilities, competence, safety and integrity, and their fee structure;
> 2. The nature of the representation and service that will result if the client wishes to name the attorney as executor or trustee (i.e., what the exact role of the lawyer as fiduciary will be, what the lawyer's fee structure will be as a lawyer/fiduciary, etc.);
> 3. The potential for the attorney executor or trustee hiring him or herself or his or her firm to represent the estate or trust, and the fee arrangement anticipated; and
> 4. An explanation of the potential advantages to the client of seeking independent legal advice.

These disclosures may be made orally or in writing, but the client's consent or the attorney's notice to the client should be in writing.

The client's consent could be obtained by having the client sign a consent form that outlines the information described above.

Consistent with other jurisdictions that have addressed the issue and the Standards and Rules of the Georgia Bar, it our opinion that it is ethically permissible for testator or settlor to name as executor in a will or trustee of a trust the lawyer who has prepared the instrument when the lawyer: (a) does not promote himself or herself or consciously influence the client in the decision; (b) fully discloses the conflict as described above, and (c) either obtains client consent in some form of writing or notifies the client in writing.[2]

Any executor or trustee is allowed by Georgia law to hire legal counsel, according to the needs of the estate or trust he represents, and pay reasonable fees for their services. O.C.G.A. §53-7-10. An attorney who has ethically named himself or herself as executor or trustee in an instrument he or she has prepared may act as an attorney for the estate or hire a member of his or her firm as attorney. The fiduciary and the attorney, however, must exercise caution to avoid actual or perceived conflicts of interest in this circumstance.

When a lawyer has ethically named himself or herself as executor or trustee in an instrument he or she has prepared, the lawyer can receive fees for performing both services. If, however, any costs of preparation or execution overlap, the attorney must see that these costs are charged only once. He or she may not charge both the client and the estate or trust for a single task.

As a lawyer prepares a will or trust instrument, he or she is performing services for the client-testator/settlor as a lawyer. It is the lawyer's task at this time to make sure the client's wishes for the later disposition and distribution of the client's property are integrated into a plan acceptable to the client.

The lawyer acting in his or her capacity as an executor or trustee is performing a different function altogether. It is the lawyer's task as executor or trustee to effectively implement the integrated plan for disposition and distribution of the testator's or settlor's property. Not only is the lawyer's function different, the tasks are different. The lawyer should still be appropriately and reasonably compensated whether the compensation is provided in the instrument or by statute, but an attorney acting as a fiduciary should not double dip fees charged to the client or estate.

Georgia law provides that an attorney serving as an administrator cannot double dip in fees. See McDow v. Corley 154 Ga. App. 575 (1980); and Davidson v. Story, 106 Ga. 799, 32 S.E. 867 (1899). It is recognized that if the attorney is serving as both executor or trustee and as legal counsel, it maybe difficult to sort out each task performed as one performed clearly in one capacity or the other. Any fees above Georgia's statutory provisions for compensating executors that an attorney may incur in a dual role as lawyer and fiduciary must be collected by filing an application for extra compensation with the Probate Court under O.C.G.A. §53-6-150. McDow, 154 Ga. App. at 576; and Davidson, 106 Ga. at 801. In keeping with both Georgia law and ethical considerations, the total fees charged by an attorney in such a dual role should be reasonable.[3]

Addendum to Formal Advisory Opinion No. 91-R1
Form Notification and Consent Letter

[MR. OR MS. FULL NAME]
[ADDRESS]
[CITY, STATE ZIP]

Dear [MR. OR MS. LAST NAME]:

Because you have asked me to serve as Executor and Trustee under your will, I must explain certain ethical considerations to you and obtain your written consent to the potential conflicts of interests that could develop. The purpose of this letter is to summarize our discussions about your naming me as fiduciary in your will.

A lawyer cannot prepare a will or trust in which the client names that lawyer as fiduciary unless that decision originates with the client. The lawyer should never suggest that he/she be named or promote himself/herself to serve in that capacity.

Others who might serve as your fiduciaries include your spouse, one or more of your children, a relative, a personal friend, a business associate, a bank with trust powers, your accountant, or an investment advisor.

I can serve as executor and trustee if that is your desire. The potential conflict arises primarily from the probability that I will hire this firm to serve as attorneys for the estate and trust. An attorney is entitled to compensation for legal services performed on behalf of the estate and trust, and the executor and trustee are also entitled to compensation for services in that capacity. When a lawyer has been named as executor and trustee pursuant to the ethical requirements of the State Bar, he/she can receive fees for performing services both as executor and trustee and as attorney as long as he/she charges only once for any single service. Further, the total compensation for serving as both fiduciary and attorney must be reasonable. If you name me as executor and trustee in your will, I and the other lawyers in my firm will charge at our normal hourly rates for all services performed. [NOTE: Modify the preceding sentence as appropriate.]

I must also point out to you that a lawyer's independence is compromised when he/she acts as both fiduciary and as lawyer for the fiduciary. Some of the potential conflicts in this regard are:

1. The question whether a particular task is "legal" or "fiduciary" in nature;

2. The question whether services being performed are really necessary in the circumstances;

3. The propriety of giving the fiduciary broad disrectionary powers and exemption from bond;

4. The lack of independent review of the document by an attorney other than the one who drafted it; and

5. There may be other potential conflicts that have not occurred to me.

In accordance with the ethical requirements of the State Bar of Georgia, it is necessary for me to obtain your statement that the potential conflicts of interests have been explained to you. In that regard, please review the statement of consent below. If it is satisfactory to you, please sign and return the enclosed copy to me. If you want to discuss any point further, please call. If you decide not to execute the consent, please advise me whom you would like to serve as executor and trustee instead of me.

If you have any doubt concerning the information contained in this letter or the effect of signing the consent, you should discuss it with another lawyer of your choice.

Sincerely,

_____
Attorney

CONSENT

I, _____ (Client) _____, have voluntarily named as executor and trustee in my will and trust, _____(Attorney) _____, who prepared the instrument in his/her capacity as my attorney. Mr./Ms. _____ (Attorney) _____ did not promote himself/herself or consciously influence me in the decision to name him/her as executorand trustee. In addition, Mr./Ms. _____ (Attorney) _____ has disclosed the potential conflicts which he/she thinks might arise as a result of his/her serving as both executor and trustee and as attorney for the estate and trust. An explanation of the different roles as fiduciary and attorney, an explanation of the risks and disadvantages of this dual representation, an explanation of the manner in which his/her compensation will be determined, and an opportunity to seek independent legal advice were provided to me prior to my signing this consent.

Date_____ _____

(Signature)

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[1] For example, granting broad powers to a fiduciary or relieving the fiduciary of return or bond requirements is a common practice, can substantially reduce the expense of administration of an estate or trust, and does not relieve the fiduciary of the duty to

administer the estate properly in or reduce substantially the rights of the beneficiaries to enforce that duty. On the other hand, a provision that attempted to relieve the fiduciary of negligence would probably not be ordinary and customary and would be improper.

[2] In Pennsylvania, an attorney ethically may act as co-executor in a will that he or she prepares as long as the attorney advises the client (in a way never specified) of the potential problem that the attorney may be required to testify regarding the will if it is challenged. Professional Guidance Opinion 80-2 of the Philadelphia Bar Association. The attorney also may not take advantage of his position as draftsman to promote himself or herself or "sell" the ideas to the client. See also Professional Guidance Opinion 8-17 of the Philadelphia Bar Association (concerning an attorney naming himself successor-trustee in a will he drafted).

[3] In accord. Okl. Opin. No. 298 (Feb. 28, 1991) (attorney serving as executor of estate and as attorney for the estate may charge reasonable fees for each so long as charges do not overlap.); Ala. Opin. No. 81-503 (undated) (attorney may serve as administrator of estate and as attorney for the estate and may charge reasonable fees for each); Wis. Opin. No. E-80-14 (Dec. 1980) (a lawyer, appointed as guardian, may serve as attorney for the guardian, and may charge reasonable fees for performing in both capacities).

III. Sample Form Engagement Letters

The American College of Trust and Estate Counsel

Excellent public website with forms:

http://www.actec.org/public/EngagementLettersPublic.asp

I. LEGAL SERVICES AGREEMENT for Estate Planning (Couple)

Name of Client: _____
Address: _____
_____
Telephone: _____
Email: _____

We are pleased that you have engaged Galardi Law to represent you in connection with estate planning matters. This Agreement is to confirm our understanding of our relationship in connection with this matter.

A. Scope of Legal Work

You have asked us to assist you in estate planning (including a review of your present wills), and preparing new wills (or codicils) as needed, together with related documents such as advanced health care directives and powers of attorney governing finances. As part of this representation, we include advice concerning the federal and state estate tax laws as they apply to your planning, and an analysis estimating the potential estate taxes which one or the other of your estates might bear if either or both of you were to die within the next two to three years (as the federal and state tax laws presently stand). Our services include a review with you of your list of property, retirement accounts and life insurance, how you own your property, and how you have your beneficiaries designated on your life insurance and your retirement assets. You are responsible for assuring that the information that is provided to us is accurate. Our engagement and the services we will render to you are limited to the legal services described for your estate planning matters. You are not relying on this firm for other matters, although together we may agree that we will broaden the scope of our work for you. To assure that your estate plan works efficiently, we may advise you to make certain changes in your life insurance or retirement account beneficiaries, or the way you own certain assets. If you wish to have our help with these, we are always available to assist, but these are not within the scope of our assignment described above.

B. Legal Fees and Other Charges

The firm's fees will be based on a non-refundable flat fee in the amount of $_____. An initial fee will be required of one-half of the legal fees with the remainder paid upon signing of the documents. If the documents are not signed within a month of our initial meeting, the remaining fee will be due and payable at that time. In addition to the legal fees, you will be charged for all expenses attributable to the services rendered. These expenses will include, but are not limited to travel time and costs, delivery and courier services, express mail, facsimiles and document reproduction. Should you require additional services including preparation of deeds, other documents, or if the complexity of the matter is greater than initially anticipated, our fees will be based on the firm's usual hourly billing rates. Our current hourly rates are as follows:

a. Partner - $_____.00 per hour;
b. Paralegal - $_____.00 per hour.

C. Role as Joint Counsel

In the firm's joint representation of the two of you on the estate planning, we will strive to represent each of you in a professional manner, with our ultimate goal to reach an arrangement regarding your estate planning that is mutually advantageous to each of you and is compatible with interests of each of you. Because we will be representing both of you in carrying out this representation, we must consider the interest of each of you—not the interests of any one person. As you are probably aware, one advantage to separate legal representation for each of you is that your respective legal counsel would be acting solely on your behalf—looking out for your best interests exclusively without regard to the interests of the other person. On the other hand, separate representation for each of you is generally more costly, more contentious, and more time-consuming than joint representation.

D. Attorney-Client Privilege and Future Conflict

It is important that you both understand that because we will be representing both of you, each of you is considered a client of this firm. Accordingly, matters that one of you might discuss with us must be disclosed to the other person. You have asked this firm to represent both of you on a joint basis. If the two of you ever have a difference of opinion concerning the proposed plan for disposition of your property, we can point out the pros and cons of such differing opinions. However, ethical considerations prohibit us from advocating one of the positions over the other. In the event such differences cannot be amicably resolved, it may be necessary to refer each of you to separate lawyers. If this occurs, we must withdraw from the joint representation and we would not be able to represent either of you in connection with the estate planning. Executing this Legal Services Agreement indicates that you understand this restriction. Furthermore, you are indicating your consent to having this firm represent both of you on these terms and condition.

E. Disclosure of Information/Open Relationship

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

F. Termination

Once this matter is completed, the engagement is terminated and we will no longer have an attorney/client relationship unless you choose to renew the relationship and retain me in the future. We will retain a soft (computer) copy of your legal files. We do not retain any originals of your documents. We reserve the right to charge administrative fees and costs associated with researching, retrieving, copying and delivering such files if you need a copy in the future.

G. Confidentiality

As a matter of professional responsibility, this firm must preserve the confidences and secrets of our clients. Estate planning is a highly personal matter and to be successful, it requires that you disclose information about you and your family relationships and personal affairs that you most likely regard as highly confidential. You agree to make a complete disclosure of your family and financial matters and your intentions concerning disposition of your estate, because a failure to do so will make it impossible for us to give proper advice to you.

All information disclosed to us will be kept confidential and we will not disclose it to others outside of our office. If other persons outside of this firm are working with us on your assignment with your permission (for example, professionals such as an accountant, a bank trust officer, financial planner, an insurance agent or another law firm), you agree that we may disclose such information to them as we deem to be necessary to allow them to fulfill their role in your work.

H. Consultation with Others

The firm reserves the right to determine which firm personnel are assigned to this matter, based upon considerations of time and degree of expertise in any given situation. You also authorize us to consult

with others having the knowledge and experience we deem reasonably necessary to fulfill our work for you in a professional and expert manner, and to incur fees with them on your behalf (whether they bill this firm or you directly). We will consult with you from time to time about the persons involved in your work. Our firm will, of course, remain responsible for the entire matter.

We appreciate the opportunity to work with you in connection with these very important personal matters and look forward to a pleasant and mutually rewarding professional relationship.

Mary B. Galardi

I. CLIENT ACKNOWLEDGEMENT

I have reviewed and agree with the terms of this Legal Services Agreement. I consent to have the law firm of Galardi Law represent me on the terms and conditions in this Agreement. I also understand and agree that communications and information which you receive from me relating to these matters may be shared with other professionals working for me as you deem necessary.

Client _____ *Date* _____

Client _____ *Date* _____

Prior Legal Representation

Galardi Law is currently performing (and in the past has performed) certain legal services for _____. We do not believe that our relationship with _____ will adversely affect our ability to fairly and impartially represent each of you in the estate planning process. If we determine, at any time, that a material bias in favor of either of you exists such that we cannot fulfill our duties to either of you, then Galardi Law will have to withdraw from this joint representation.

II. LEGAL SERVICES AGREEMENT FOR PROBATE

Name of Client: _____
Address: _____
_____
Telephone: _____
Email: _____

We are pleased that you have engaged Galardi Law to represent you. This Agreement is to confirm our understanding of our relationship in connection with the following legal matter: **Administration/Probate of the Estate of _____.**

A. Scope of Legal Work

You have asked us to assist you in administration/probate of the estate.

Our representation will typically include the following services:

1. Preparation and completion of all notices of appointment of you as administrator/executor and other notices with respect to creditors as are required by the probate laws in the State of Georgia;
2. Assisting you in preparing a complete inventory of all assets of any kind or nature that are subject to probate, and any other non-probate assets such as life insurance, retirement benefits, and other assets;
3. Assisting you in a search for all debts, obligations, and contingent liabilities of the estate in order to determine the financial condition of the estate and advise you regarding any other actions that must be taken by you to secure, reinvest, or protect the assets and provide for the discharge of liabilities, including death taxes owed by the estate;
4. Preparation and completion of all interim reports to the probate court and the beneficiaries as required during the course of the administration of the estate;
5. While our duties extend solely to you in your capacity as administrator/executor of the estate, we will bring to your attention post-death planning issues of interest to the estate and its beneficiaries, such as alternative asset valuation options, use of disclaimers, funding of trusts as provided for in the estate plan, timing of the distribution of assets that is beneficial to the estate and any beneficiaries. We specifically disclaim responsibility to bring these matters to the attention of the estate beneficiaries, who should consult with their own professional advisors;
6. Preparation of a plan of distribution of assets held in the estate, either outright or to separate continuing trusts, for the beneficiaries;
7. Preparation of all reports, notices, consents, receipts, and accounting for closing the estate and your discharge as administrator/executor; and
8. Counseling and advising you on any related questions or matters arising out of the administration of the estate.

Limited Scope Representation: The scope of our representation does not include advice or services regarding accounting, preparation of all tax returns for the estate, including federal estate tax and generation-skipping tax returns, state inheritance tax return, local or state property tax returns, or federal and state fiduciary income tax returns. If you engage other professional advisors on behalf of the estate, you agree to inform us of the same and provide us with specific direction regarding the services they will perform and our responsibility to consult with them.

B. Identification of Client

You understand that we represent you as administrator/executor. We do not represent the beneficiaries of the estate, even though we will, from time to time, provide them with information about the administration of the estate. In appropriate circumstances, we may advise beneficiaries to obtain independent counsel, as we do not represent them. Apart from any applicable legal requirement to notify the beneficiaries that the Will has been probated and the estate administration commenced, we plan to do so and to provide each beneficiary with a copy of the Will. In doing so, we will make it clear that the estate is our client and you in your capacity as the administrator/executor. Furthermore, we will keep the beneficiaries advised as the administration of the estate progresses; for example, by furnishing copies of the formal inventory of the assets as soon as that has been formalized.

If you are also a beneficiary of the estate, we must advise you that we only represent you in your capacity as administrator/executor, and you should retain other legal counsel to advise you in your capacity as beneficiary. To the extent you wish to engage us to represent you in your capacity as beneficiary, please be advised that we can only accept the representation if there is no conflict of interest by reason of such relationship. For example, a conflict may arise in distribution of assets to you if one of the other beneficiaries should object to your individual ownership of partial interest in an estate asset; or by reason of the amount of compensation that you may claim. In the event you retain us and such conflict arises, we reserve the right to resign from this portion of the representation based upon applicable legal ethics rules.

C. Legal Fees and Other Charges

The Firm's fees will be based on the firm's usual hourly billing rates. Our current hourly rates are as follows:

c. Partner - $_____.00 per hour;
d. Paralegal - $_____.00 per hour.

If we have provided an estimate of potential fees for the work to be performed, please remember that this is only an estimate. All fees will be based upon our hourly rates for the time spent on each task. Matters such as many rounds of revisions, changes in the scope of an agreement, or lengthy conversations regarding any of the work performed may cause the actual fees for these services to exceed any estimate given.

An initial fee will be required should you decide to use our services in the amount of **$3500**. This fee will be credited to your first bill and any bills thereafter until used at which time you will be billed monthly. In addition to the legal fees, you will be charged for all expenses attributable to the services rendered. These expenses will include, but are not limited to, actual court costs, travel time and costs, delivery and courier services, express mail, air courier services, faxes and copies.

Although the time required to properly perform the services we provide is an important factor in establishing our fees, it is only one of the factors. Whenever we send an invoice, you can be sure that we have carefully reviewed all of the charges and that our fee represents a fair and reasonable charge for the legal services we have rendered.

D. Rate Adjustments

While fee adjustments are generally made on February 1st of each year, we reserve the right to increase or decrease rates at any time and the new rate will be reflected on your next monthly invoice.

E. Invoices

You will receive an invoice on a monthly basis for all fees and expenses. Invoices will be payable twenty (20) days after receipt and are considered past due thirty (30) days after receipt. Interest will accrue monthly at a rate of 18% per annum on all past due accounts. Additionally, it is specifically understood between you and us, subject to general standards of professional responsibility of the legal profession, we will have the right to terminate our representation of you if any fees and expenses, or both, are not paid within sixty (60) days after an invoice is

rendered. If we exercise this right, you shall be liable for all fees and expenses incurred to the date of termination. All bills will show, on a daily basis, the services rendered and the fees expended in connection with the services.

Any questions regarding any monthly invoice submitted to you must be made in writing within thirty (30) days from the date on the statement; and if you do not do so, it is presumed to be correct. You agree to submit any fee disputes still unresolved to the State Bar of Georgia Fee Arbitration Committee for resolution within 45 days of the statement. You agree to pay all costs of collection, including court and attorney's fees incurred in pursuit of delinquent amounts.

F. Termination

Once this matter is completed, the engagement is terminated and we will no longer have an attorney/client relationship unless you choose to renew the relationship and retain me in the future. We will retain a soft (computer) copy of your legal files. We do not retain any originals of your documents. We reserve the right to charge administrative fees and costs associated with researching, retrieving, copying and delivering such files if you need a copy in the future.

G. Confidentiality

As a matter of professional responsibility, we must preserve the confidences and secrets of my clients. All information disclosed to me will be kept confidential and I will not disclose it to others outside of my office. If other persons outside of my office are working with us on your assignment with your permission (for example, professionals such as an accountant, a bank trust officer, financial planner, an insurance agent or another law firm), you agree that I may disclose the information to them that I deem to be necessary to allow them to fulfill their role in your work.

H. Consultation with Others

The firm reserves the right to determine which firm personnel are assigned to this matter, based upon considerations of time and degree of expertise in any given situation. You also authorize us to consult with others having the knowledge and experience we deem reasonably necessary to fulfill our work for you in a professional and expert manner, and to incur fees with them on your behalf (whether they bill this firm or you directly). We will consult with you from time to time about the persons involved in your work. Our firm will, of course, remain responsible for the entire matter.

We appreciate the opportunity to work with you in connection with these very important legal matters and look forward to a pleasant and mutually rewarding professional relationship.

Mary B. Galardi

I. CLIENT ACKNOWLEDGEMENT

I have reviewed and agree with the terms of this Legal Services Agreement. I consent to have the law firm of Galardi Law represent me on the terms and conditions in this Agreement. I also understand and agree that communications and information which you receive from me relating to these matters may be shared with other professionals working for me as you deem necessary.

Client _____ *Date* _____