The Anatomy of an Engagement Letter  
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by  
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I. Revised Rules of Professional Conduct


1. The Montana Revised Rules are based generally upon the 2002 American Bar Association Revised Model Rules, with some significant variations. For a word-by-word comparison of the ABA Revised Model Rules and the Montana Revised Rules, as well as a word-by-word comparison of the Montana Revised Rules vis-a-vis the old rules, see the State Bar of Montana’s Website at http://www.montanabar.org/attyrulesandregs/ethicsrulecomparison.

B. Writings. The Montana Revised Rules implement several new writing requirements, including the following non-exclusive list:

1. Montana Revised Rule 1.5(b)(Fees) requires that the attorney provide a written communication to the client regarding (i) the scope of the representation, (ii) the basis or rate of the fee and (iii) expenses for which the client will be responsible. There are exceptions for (1) existing clients and (2) matters involving fees and costs of $500 or less which we will look at in more detail in a moment.

   a. The Montana Revised Rule is a variation from the ABA Revised Rule. The ABA Rule 1.5 requires a communication of the scope of
representation, fees and expenses, but only recommends, rather than mandates, written communications except with regard to contingent fee and shared fee matters.

2. Revised Rule 1.7(b)(Conflict of Interest: Current Clients) allows an attorney to represent certain current clients with conflicting interests if each client gives informed consent, confirmed in writing. Under the prior rules, the clients’ consent did not have to be confirmed in writing.

3. Montana Revised Rule 1.8(f)(Special Rules) provides that a lawyer shall not accept compensation for representing a client from one other than the client unless the client provides written informed consent. The requirement of a writing is a revision of the prior rule.

4. As under the previous rules, Revised Montana Rule 1.8(a)(Special Rules) prohibits a lawyer from entering into a business transaction with a client, or from acquiring a pecuniary interest adverse to a client, unless certain requirements are met. As amended, paragraph 1.8(a)(3) also now requires the lawyer to advise the client in writing of the desirability of seeking independent legal counsel in the transaction, and under paragraph 1.8(a)(4) the attorney must obtain the client's signed and written informed consent to enter into a business transaction with the client.

5. Revised Rule 1.20(Duties to Prospective Clients) is new and specifically sets forth duties to a prospective client, including the duty of confidentiality with regard to any confidential information provided by the prospective client to the attorney. If representation is declined, the attorney may not represent an adverse party where harmful information was disclosed by the prospective client, unless the prospective client gives informed consent, confirmed in writing (or unless a screening of the lawyer involved takes place, that lawyer does not participate in the fee, and the client is notified).

   a. This outline will briefly analyze the growing practice of “pre-engagement” disclaimers, whereby prospective clients waive any right to confidentiality of disclosed information unless they in fact become clients of the firm.

6. Montana Revised Rule 1.9(Duties to Former Clients) continues to prohibit an attorney who has formerly represented a client in a matter from representing another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client. Under the prior rule, an exception was provided if the former client “consents after consultation.” Under the Revised Rule, in order to proceed the former client
must give informed consent, confirmed in writing.

7. Montana Revised Rule 1.9(b)(Duties to Former Clients) adds a new provision regulating representation of clients by an attorney who has moved to a new firm, when an adverse party was represented by the attorney’s prior firm. If the transferring lawyer acquired material confidential information, neither the lawyer nor her firm may undertake representation adverse to that client in the same or a related matter unless the former client gives informed consent, confirmed in writing.

   a. Under Montana Revised Rule 1.10(c)(Imputation) (which is a variation from the ABA Revised Model Rule), even if the new attorney did acquire material confidential information before joining her new firm, the new firm may continue to represent an adverse client if the new attorney is timely screened from any participation in the matter and in the sharing of any fee relating to the matter, and the former client is given written notice of the representation (but no consent from the former client is required).

C. Definitions. The Montana Revised Rules incorporates a list of definitions as new Rule 1.0(Terminology). Some of the more important definitions include:

1. “Consult” or “consultation” denotes “communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.”

2. “Informed consent” denotes “the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.” The “informed consent” concept of the Montana Revised Rules replaces the earlier rules’ concept of "consent after consultation"

3. “Writing” or “written” denotes “a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostatting, photography, audio or video recording and e-mail.” A “signed writing” includes the electronic equivalent of a signature, such as “an electronic sound, symbol or process which is attached to a writing and executed or adopted by a person with the intent to sign the writing.”

   a. As noted in Montana Ethics Opinion 040809, “arguably, even a message left by the lawyer on the client’s voice mail” may suffice to satisfy the writing requirement.
4. “Confirmed in writing,” when used in reference to the informed consent of a person, denotes “informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent... If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.” In other words, the requirement of a written confirmation can in most situations be satisfied by a letter from the lawyer to the client that need not be signed by the client.

   a. There are only three rules that require a client actually to sign an informed consent: Rule 1.5(c) on contingent fees, Rule 1.8(a) on business transactions with clients (including attorney liens), and Rule 1.8(g) on aggregate settlements.

II Engagement Letters

A. Rule 1.5(b) Compliance. Although the requirement of a writing may be satisfied by e-mail or even an audio recording, most Montana lawyers are using engagement letters to meet the requirements of Montana Revised Rule 1.5(b). The minimal content of the writing must include (i) the scope of the representation, (ii) the basis or rate of the fee and (iii) expenses for which the client will be responsible. The writing must be provided before or within a reasonable time after commencing the representation.

   1. This outline does not address the special rules applying to contingent fee contracts (Rule 1.5(c)), shared fee agreements (Rule 1.5(e)), business transaction agreements between lawyers and their clients (Rule 1.8) and attorney lien agreements (Rule 1.8).

B. Exceptions to Rule 1.5(b). Montana Revised Rule 1.5(b) provides two exceptions relating to the requirement of a communication regarding representation.

   1. The first exception applies to regularly represented clients, and reads as follows:

   “The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate.” (Emphasis supplied)

   a. Any changes in the basis or rate of the fee or expenses shall also be communicated in writing. This applies to existing clients.
2. The second exception applies “in any matter in which it is reasonably foreseeable that total cost to a client, including attorney fees, will be $500 or less.” (Emphasis supplied) If a fee and expenses are reasonably anticipated to be $500 or less, “this paragraph [c] does not apply,” which seemingly means that there is no requirement of any communication, verbal or written, regarding the scope of representation or fees.

3. Although an exception may apply to the general requirement of a written communication regarding the scope of representation and basis of fees and expenses, there may be other provisions of the Montana Revised Rules requiring a written communication to the client, such as matters involving contingent or shared fees, or where a client has waived a conflict, all of which must involve a writing, as discussed in Section I.B above.

C. Other Purposes. In addition to addressing fees, expenses and scope of representation, we will also discuss the use of engagement letters for other purposes, including:

1. Identification of the client and, for entity clients, those persons with whom the attorney is authorized to discuss confidential information;

2. Disclosure of such information as is necessary to allow the client to make an informed consent regarding waivers of conflicts, and use of the engagement letter as written confirmation of such waivers;

3. Explaining confidentiality rules in multiple representations;

4. Identifying proposed staffing as well as agents of client or lawyer;

5. Describing responsibilities of lawyer and client;

6. Specifying grounds for withdrawal or termination, and describing the firm’s file retention policies;

7. If appropriate, specifying methods of resolution of fee disputes or other matters between the lawyer and client.

D. Advantages of Engagement Letters. In his excellent article, *Ethical Considerations When Representing Organizations*, 3 Wyo. L. Rev. 581 (2003), Professor Burman makes a statement with which I wholeheartedly agree:

A lawyer in private practice has much more freedom about whom the lawyer will represent. That freedom makes it imperative that the client's identity be addressed
in an engagement letter [and other items noted at C above].... Lawyers who choose not to use engagement letters, however, are asking for trouble. Without an express agreement about the representation, the agreement between the attorney and the client may be implied. Whenever an implied agreement arises, there will be at least two versions of the agreement, the client's and the lawyer's.... A contest with a client over the existence and/or terms of an implied agreement is always dangerous for a lawyer since the lawyer has the burden of clarifying the existence and terms of the relationship because the attorney-client relationship is not one between equals. The lawyer has a fiduciary relationship with each client, and the benefit of any doubt will go to the client, the subordinate one in the relationship. Accordingly, in a dispute between a client and a lawyer about the existence and/or terms of their implied agreement, the lawyer is likely to lose.

(Footnotes omitted; emphasis supplied).

1. Rule 1.5(b) does not require the client to sign the engagement letter, but their signature is persuasive evidence of the client's mutual consent to the terms and conditions of the agreement.

E. Caveat. Is an engagement letter the last word on the attorney-client relationship? Can an attorney “contract around” his or her ethical or common law responsibilities? In refusing to enforce a waiver of future conflicts of interest, the court in Worldspan L.P., et al. v. The Sabre Group Holdings, Inc., 5 F.Supp. 2d 1356 (N.D. Ga. 1998) stated:

“The language of an engagement letter, while important to determine the nature and scope of any consent to representation of other clients, and to what extent such consent, if any, is "informed", does not definitively circumscribe the scope of the lawyer's professional responsibility under the circumstances.”

III. Identification of the Client

A. Common Law Principles. As noted in Paragraph 18 of the Preamble “principles of substantive law external to these Rules determine whether a client-lawyer relationship exists.... Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.” The identification of the client is a component of the inquiry as to whether a client-lawyer relationship exists.

B. Who Is the Client? At first glance, “who is the client” appears to be a relatively simple question to answer. But for the transactional attorney, there are various types of representation where the answer is not always clear.

1. With regard to an attorney’s representation of a fiduciary, such as a personal representative of an estate, a trustee of a trust, or a guardian of an incapacitated person, there is a split of authority as to whether the attorney represents the
fiduciary or the estate. As noted in Comment 27 to Rule 1.7 governing conflicts of interest, “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.”

a. The majority of courts have ruled that the attorney represents the fiduciary (see, for example, Huie v. DeShazo, 922 S.W.2d 920 (Tex. 1996)); a minority have ruled that the fiduciary represents the estate or trust and its beneficiaries (see, for example, Riggs Nat’l Bank v. Zimmer, 355 A.2d 709 (Del. Ch. 1976)).

b. Even those jurisdictions which have held that the attorney represents the fiduciary have also ruled that the attorney has certain duties toward the beneficiaries of the estate or trust. See, for example, In re Estate of Gory, 570 So. 2d 1381 (Fla. Dist. Ct. App. 1990)(although the attorney-client relationship was between the attorney and the fiduciary, the attorney owed a fiduciary duty to the beneficiaries); Charleston v. Hardesty, 839 P.2d 1303 (Nev. 1992) (attorney for trustee owes duty of care and fiduciary duty to beneficiaries).

c. The Montana Supreme Court has not specifically addressed the issue of the identity of the client in a fiduciary setting. They commonly refer to the attorney as representing “the estate,” without specifying whether that means the personal representative or the beneficiaries.

2. When a spouse or the adult children of an incapacitated senior citizen comes to an attorney for advice as to the qualification of the senior citizen for Medicaid, who does the attorney represent? The senior citizen? The non-institutionalized spouse? The adult children? The family as a whole? Again, neither the Montana Revised Rules nor the ABA Revised Model Rules provide much guidance or direction to assist the attorney in the identification of the client. For an article discussing the client identification problems in representing Medicaid planning clients, see D. Rosenfeld, Whose Decision Is It Anyway?: Identifying the Medicaid Planning Client, 6 Elder L.J. 383 (1998).

3. When four entrepreneurs walk into your office, seeking advice as to the formation of a corporation, whom do you represent? All of the individuals? One or more of the individuals? The corporation? Can you represent the corporation, if it has not yet been formed?

a. In Meyer v. Mulligan, 889 P.2d 509 (Wyo. 1995), two married couples asked a lawyer to form a corporation to purchase a motel, with each
couple contributing one-half of the capital. When one of the couples subsequently sued the lawyer for malpractice, the Wyoming Supreme Court was faced with the issue of identifying the lawyer’s client, and the court noted the difficulty of making this determination. The Wyoming Supreme Court concluded that the attorney did, in fact, represent the corporation, though it did not specify whether that representation commenced only after formation of the entity. In addition to the corporation, the Court determined that the attorney could have possibly represented the plaintiff couple, remanding the case to the District Court to resolve this factual issue.

b. In the context of a closely held corporation, many courts have ruled that the attorney represents both the corporation and the owners. See, for example, Woods v. Superior Court of Tulare County, 149 Cal. App. 3d 931 (1983) where the court held that representation of a family corporation necessarily encompasses individual representation of the shareholders; In re Brownstein, 602 P.2d 655 (Or. 1979)( "the attorney in [the close corporation context] represents the corporate owners in their individual capacities as well as the corporation unless other arrangements are clearly made.") Commentators refer to this as the “family entity” or “aggregate” model. For a critique of this model, see Collett, The Ethics of Intergenerational Representation, 62 Fordham L. Rev. 1453 (1994).


4. The Montana Supreme Court recently addressed this issue in the context of determining whether the attorney-client privilege applied to prevent a director from deposing an attorney who served as corporate counsel during the director’s tenure. The corporation, Inter-Fluve, was owned by three shareholders, each of whom was a director. The corporation fired one of the three, Miller, from his position as president. In the ensuing litigation, Miller sought to depose the corporation’s attorney, who refused, citing the attorney-client privilege he owed to his corporate client. The Montana Supreme Court, in an opinion authored by Justice Nelson, had this to say:

In order to determine whether Miller is entitled to discover the attorney-
client communications at issue, we must ascertain who the client was with respect to those communications. Inter-Fluve contends that only the corporation is the client, not individual directors, and thus the attorney-client privilege belongs only to the corporation. Hence, Inter-Fluve argues that Miller is not entitled to discover the attorney-client communications at issue because he was never the client.

While we accept the premise that the corporation is the client, we observe that a corporation can only act through a person or persons to carry out its many functions, such as receiving legal advice and waiving or asserting the attorney-client privilege....

Thus, we conclude that while Inter-Fluve was the client with respect to the attorney-client communications at issue here, the directors were joint clients with Inter-Fluve. As corporate directors are jointly responsible for the proper management of a corporation, it is consistent with this joint obligation that they be treated as joint clients with the corporation when legal advice is rendered to the corporation through one of its officers or directors. (Emphasis supplied).


a. **Query:** should different rules govern “who is the client” for purposes of the attorney-client privilege, versus determining whether an attorney-client relationship exists for purposes of a legal malpractice claim? If the same test applies, do directors now possess an individual claim, as a joint client, for breach of duty against corporate counsel?

b. Would this issue have been resolved differently if there had been an engagement letter identifying the corporation as the sole client?

c. In contrast to the Inter-Fluve decision, in Stott v. Fox, 805 P2d 1305 (Mt. 1990), the plaintiff brought an action for attorney malpractice on his own behalf. The Supreme Court found that the plaintiff was a shareholder of the corporation that the defendant had allegedly misrepresented. The court ruled that no attorney-client relationship existed between shareholders of a corporation and an attorney representing the corporation.

C. **Is There a Duty to Identify the Client?** Is there ever a duty on the part of the attorney to identify the client? Many authorities say yes, particularly in a situation where there may be some confusion as to whom the attorney represents.
1. Comment 2\(^2\) to Rule 1.7 (Conflict of Interests) states:

Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients. Thus, where there is a conflict of interest there is a duty to clearly identify the clients.

2. Section 14 of the Restatement (Third) of the Law Governing Lawyers\(^3\) sets forth the following rules for formation of an attorney-client relationship:

“A relationship of client and lawyer arises when:
(1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either
   (a) the lawyer manifests to the person consent to do so; or
   (b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services; or
(2) a tribunal with power to do so appoints the lawyer to provide the services.”

3. With regard to fiduciaries, Comment f to Section 14 of the Restatement provides:

In trusts and estates practice a lawyer may have to clarify with those involved whether a trust, a trustee, its beneficiaries or groupings of some

\(^2\)Paragraph (15) to the Preamble to the Montana Revised Rules states that “Comments do not add obligations to the Rules, but provide guidance for practicing in compliance with the Rules.” The Montana Supreme Court did not include the Official Comments in its adoption of the Revised Rules, but presumably the ABA Comments are the Comments referred to in Paragraph 15. However, to the extent that Montana has adopted a variation of an ABA Revised Rule, any Official Comment relating to that particular rule may not be applicable as a result of the variation.

\(^3\)A recent significant development in the body of law governing the conduct of lawyers is the American Law Institute’s adoption in 1998 (and publication in 2000) of the Restatement (Third) of the Law Governing Lawyers (referred to in this outline as the "Restatement"). Although issued as part of the Restatement Third series, there is no prior Restatement on this topic. The Restatement is not binding on any jurisdiction, but the Restatement incorporates many aspects of the attorney-client relationship covered by state ethical codes and disciplinary proceeding decisions. In In re Rule of Professional Conduct, 299 Mont. 321 (2000), the Montana Supreme Court specifically noted that “we are in no way bound by the Restatement in interpreting Montana's Rules of Professional Conduct.”
or all of them are clients and similarly whether the client is an executor, an estate, or its beneficiaries. (Emphasis supplied)

a. See also the commentaries on the 1985 Model Rules of Professional Conduct adopted by the Board of Regents of The American College of Trust and Estate Counsel in October 1993, reprinted at 28 Real Prop., Prob. & Tr. J 865, 886 (the “ACTEC Commentaries”), which state, regarding Rule 1.2:

As a general rule, the lawyer for the fiduciary should inform the beneficiaries that the lawyer has been retained by the fiduciary regarding the fiduciary estate and that the fiduciary is the lawyer's client; that while the fiduciary and the lawyer will, from time-to-time, provide information to the beneficiaries regarding the fiduciary estate, the lawyer does not represent them; and that the beneficiaries may wish to retain independent counsel to represent their interests.

4. With regard to business entities, Comment f to Article 14 of the Restatement states:

Whether the lawyer is to represent the organization, a person or entity associated with it, or more than one such persons and entities is a question of fact to be determined based on reasonable expectations in the circumstances.... [A] a lawyer's failure to clarify whom the lawyer represents in circumstances calling for such a result might lead a lawyer to have entered into client-lawyer representations not intended by the lawyer. Hence, the lawyer must clarify whom the lawyer intends to represent when the lawyer knows or reasonably should know that, contrary to the lawyer's own intention, a person, individually, or agents of an entity, on behalf of the entity, reasonably rely on the lawyer to provide legal services to that person or entity. (Emphasis supplied)

a. Montana Revised Rule 1.13(d) requires an attorney to explain the identity of the organizational client when dealing with the organization’s constituents when the lawyer knows that the organization’s interests are adverse to those of the constituents with whom the lawyer is dealing.

b. In Rosman v. Shapiro, 653 F. Supp. 1 (S.D.N.Y. 1987), a law firm represented a corporation owned by two shareholders. Over time the shareholders became unfriendly, and the law firm represented the corporation and shareholder Shapiro in a suit against the other shareholder, Rosman. Rosman sought to disqualify the law firm. The
court stated:

It is clear that Rosman reasonably believed that Zisman was representing him. Although, in the ordinary corporate situation, corporate counsel does not necessarily become counsel for the corporation's shareholders and directors... where, as here, the corporation is a close corporation consisting of only two shareholders with equal interests in the corporation, it is indeed reasonable for each shareholder to believe that the corporate counsel is in effect his own individual attorney. (Emphasis supplied)


5. In International Tele-Marine Corp. v. Malone & Assocs., 845 F. Supp. 1427 (D. Colo. 1994), an investment firm entered into an agreement with International Tele-Marine Corporation to take it public. Both the investment firm and ITC hired their own legal counsel in connection with the public offering. As is customary in the underwriting industry, ITC agreed to pay whatever legal fees were incurred by the investment firm in connection with compliance with state securities laws, and entered into an agreement with the lawyers for the investment firm to that effect. When things fell apart, ITC sued the attorneys for the investment firm for breach of duty, alleging that the attorneys represented not only the investment firm, but ITC itself. The attorneys for the investment firm filed a motion for summary judgment, on the basis that they represented the investment firm only, and that there was no attorney-client relationship with ITC. The court denied the motion, stating as follows:

Here, there is evidence upon which a jury could conclude that ITC reasonably believed that [the law firm] had agreed to represent it.... Had [the law firm] intended to limit its duties to ITC, it could and perhaps should have disclosed that intent in the Fee Engagement Letter. Cf. Parker v. Carnahan, 772 S.W.2d at 157 (attorney should have informed non-client that he was not representing that person's interest if attorney knew that a
reasonable person would mistakenly have believed that the attorney was providing representation). Thus, while it may have been obvious that [the law firm] was representing [the underwriter] as "Underwriter's counsel" pursuant to the Letter Agreement, and while fee-shifting arrangements may be common in the securities industry, the existence of an attorney-client relationship between ITC and [the law firm] must be resolved by the jury. Therefore, summary judgment is inappropriate on the issue of the existence of an attorney-client relationship. (Emphasis supplied.)

6. In some situations, you undoubtedly do represent both the corporation and the shareholders. For example, if in the sale of a corporation which could be structured as either an asset sale or a stock sale, depending upon the ultimate outcome of negotiations with a purchaser, you do represent the interests of the shareholders as well as the corporation.

D. Use of Engagement Letter to Identify a Client. An engagement letter is persuasive evidence that the person identified as the client in the engagement letter is, in fact, the client. See, for example, SEC v. Save the World Air, Inc., 2005 U.S. Dist. LEXIS 8572, where the court ruled that an individual officer was not an attorney’s client when the engagement letter identified the corporation as the client. Accord, Vistar Bank v. Thompson, 253 Neb. 166 (1997)(the individual incorporator to whom the engagement letter was addressed was the client, rather than the corporation formed as a result of the engagement).

1. Not all engagement letter designations of clients are upheld. In Levine v. Television Cablecasting, Inc., 261 Ga. App. 128 (2003), a shareholder caused a closely-held corporation to enter into a fee agreement with a lawyer, pursuant to which the corporation agreed to pay for the legal fees incurred in connection with the shareholder’s divorce. Although ownership of the corporation was at issue in the divorce proceeding, the court determined that the individual shareholder, and not the corporation, was the client.

2. As noted above, in addition to using the engagement letter to identify the client, it is appropriate to disaffirm your representation of any persons or entities who may reasonably believe that you are acting as their counsel.

3. Another important purpose of the engagement letter with regard to business clients is the identification of those persons within the entity who have authority to act on behalf of the entity with regard to the subject of the representation (see Rule 1.13(a), and those persons with whom the attorney can discuss confidential information (see Rule 1.6).
**Business Formation Example**: Three doctors have decided to form a new professional corporation. One of the doctors was your college roommate, and he contacts you to ask if you would provide the necessary legal services to incorporate their firm. How would you identify the client?

[Alternative 1: representation of all individuals]

Dear Mark, Luke and Evan:

Thank you for selecting our law firm to represent the three of you, Mark, Luke and Evan, in connection with the formation of TLC Professional Corporation. We are, for purposes of forming the corporation, representing the three of you jointly, and not the corporation. It is important that all of you understand and consent to the considerations involved in a joint representation, as disclosed below.

[Alternative 2: representation of one of the three individuals]

Dear Mark:

Thank you for selecting our law firm to represent you in connection with the formation of TLC Professional Corporation, of which you will be an incorporator. Although we may be providing copies of documents to the other two incorporators, Luke and Evan, we will not be representing them. To avoid any confusion on their part, a condition of the acceptance of our engagement is that you allow us to (1) clarify to them, in writing, that we do not represent either of them or the corporation to be formed and (2) encourage them to obtain their own legal counsel.

See also the sample engagement letters attached as appendices to this outline.

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4 Of course, if you are representing the individual shareholders, they are the ones responsible for your bill. If the corporation intends to directly pay your fees after its formation, Montana Revised Rule 1.8(f) requires that the client provide written informed consent.
**Fiduciary Example:** You prepared a will for a long-time client, whose spouse is named as the personal representative of the estate as well as a beneficiary under the will.

Dear June:

Please accept our condolences on the death of your husband. We are honored that you have asked us to represent you as the personal representative in administering his estate. It is important that you understand that we are representing you in your fiduciary capacity as a personal representative, and not in your individual capacity as a beneficiary of Jim’s estate. We also need to advise you that although we do not represent any of the beneficiaries of Jim’s estate, we do owe certain duties of care to them, including the duty to make them aware that we are not representing any of their interests as individual beneficiaries of the estate.

Dear Beneficiary:

June Client has retained this firm to represent her as personal representative in the administration of your father Jim’s estate. From time to time, you may receive correspondence and copies of documents from us regarding the status of the estate. We need to clarify at the outset, however, that we will not be representing you. Although you may call and ask us questions regarding the status of the estate, you should not consider information we provide to you as legal advice, nor do our ethical rules allow us to disclose certain confidential information. You are entitled to obtain your own legal counsel to represent your interests in your father’s estate.

### IV. Scope of Representation

A. **Required Content.** Montana Revised Rule 1.5(b) requires that the attorney provide a written communication to the client regarding the scope of the representation (subject to the $500 exception and existing client exception noted at II.B above). Neither the Rules nor the Official Comments provide a definition of “scope of representation.” Rule 1.2, entitled “Scope of Representation,” gives some guidance in stating that “a lawyer shall abide by a client's decisions concerning the objectives of representation.” Rule 1.2(c) states that a “lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.”

1. Note that the client does not have to sign the writing, but it is a good practice to request the client to agree to the terms set forth in the engagement letter by signing and returning a copy, particularly if a limitation of the scope of representation is set forth in the engagement letter.
2. Note that several courts have ruled that in the absence of a valid written understanding to the contrary limiting the scope of representation, a lawyer may assume by operation of law an implied duty to represent or advise a client regarding collateral matters. See e.g., Nichols v. Keller, 15 Cal. App. 4th 1672, 1683–84 (1993).

3. In Keef v. Widuch, 321 Ill. App. 3d 571 (2001), an attorney entered into an agreement to represent a client in a worker’s compensation claim. The attorney did not advise the client regarding a potential product liability claim against the manufacturer of the lathe which injured the client. The statute of limitations had run before the client learned of his potential product liability claim. The client brought a legal malpractice action against the attorney. The attorney argued that his “scope of representation” was limited to the worker’s compensation claim identified in the fee agreement. The court, in allowing the malpractice claim to proceed, first noted that “the attorney has a duty to inform a client about the scope of the attorney's representation.” (Emphasis supplied.) Secondly, if the attorney limits the representation to pursuing a particular claim, “the client must be made to understand that the course of action is not the sole potential remedy and that there exist other courses of action that are not being pursued.”

4. In the case of Landis v. Hunt, 80 Ohio App.3d 662 (1992), the client applied this rationale in filing a legal malpractice lawsuit against the attorney who had representing her as a personal representative in the probate of her husband’s estate. She argued that the probate attorney committed malpractice by failing to advise her of a possible wrongful death claim against the decedent’s treating physician at the time of death. The court disagreed, relying in part upon expert testimony that it was not the part of a probate attorney’s normal practice in the region to investigate wrongful death claims.

5. In Maillard v. Dowdell, 528 So. 2d 512 (Fla. App.1988), clients hired an attorney to represent them in the purchase of a condominium. The clients later brought a malpractice action, because the attorney had failed to look into a pending lawsuit against the condominium association which would have disclosed disputes about the structural soundness of the condominium. In determining the scope of representation, the court noted local practice, stating that duties of an attorney employed to represent the buyer in a real estate transaction are "to investigate the title to real estate, to make a painstaking examination of the records and to report all facts relating to the title . . . ." and give an opinion on the marketability of the title to the property. The court found that investigating the content of any lawsuits pending against the condominium association where the condo was located was not within the scope of representation.
B. Limitations of Scope of Representation. Although Rule 1.2(c) allows the scope of representation to be limited, the limitation must be reasonable and the client must give informed consent.

1. Comment 7 to Rule 1.2 states:

   Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

2. In International Tele-Marine Corp. v. Malone & Assocs., 845 F. Supp. 1427 (D. Colo. 1994), the court noted “even though an attorney can limit the scope of the representation, one cannot disregard circumstances which provide reasonable notice that the client may have legal problems or remedies which fall outside the scope of the undertaking. Although the attorney need not represent or counsel the client concerning such matters, the client should be informed of the need for legal assistance and that the attorney will not be providing such services.” (Emphasis supplied.)

3. Practice Pointer: Your firm should prepare a checklist of matters which should be deliberately considered as being within or outside of the scope of representation for standard types of transactional representations, such as formation of entities or probates of estates. For example, in the formation of a business entity, you may want to specifically state in the engagement letter whether certain tax matters, such as filing of any S Corporation elections or obtaining taxpayer identification numbers, are within or outside of the scope of representation. For probates, such matters may include preparation and filing of the decedent’s final income tax returns and estate income tax returns.

C. Coordination of “Scope of Representation” with Identification of the Client. Make sure that your scope of representation, as explained in the engagement letter, is consistent with your identification of the client. For example, if, in the context of the formation of a new business entity, you’ve identified the individual owners as your clients, it would be inappropriate to include, within your “scope of representation” that you will provide post-formation advice to the corporation on an on-going basis. Although that may, in fact, be your intent, what you need to do in that situation is provide a new engagement letter to your new client, the corporation, after it has been formed.

D. Future Services. Many firms include language in an engagement letter, particularly for new clients, to the effect that “this Agreement will govern all future services we may perform for you.” There are pros and cons associated with this practice, and this sort of language should not be used without careful consideration on a client-by-client basis.
1. One advantage is that you have established a contractual framework which will govern future matters. Thus, until you enter a new agreement or advise a client of a change in fees, the billing structure set forth in the initial engagement letter will govern future services.

2. Some of the disadvantages?
   
a. If you are using your engagement letter to disclose conflicts and obtain informed consent, the original letter generally will be inadequate to adequately inform clients of future conflicts. Thus, you will have to send a separate letter in any event for any new matter that raises a conflict. Some firms try to avoid this problem by including, in the original letter, a “waiver” of future conflicts. We’ll discuss a waiver clause later.

b. The scope of representation contained in the original letter may not suffice for future services. Thus, you are presented with the decision of whether to send a new explanation of the scope of representation for each new matter. Rule 1.5(c) exempts existing clients who are charged on the same basis from the requirement of a written (but not verbal) explanation of the scope of representation, but you then place yourselves in the situation of a possible misunderstanding, and are certainly in a less better position to defend against a client’s claim that you promised to do something which you in fact did not agree to do.

c. By stating that you intend to provide services in the future, you give rise to a good argument on behalf of this particular client that he or she will remain your client indefinitely. For example, if you prepare a will for a client and include the future services language, a few years later when you are asked to take a matter adverse to this client, you arguably will be required to abide by the rules governing current clients and obtain informed consent, confirmed in writing (versus the less stringent “former client” rules, which allow you to take an unrelated matter without obtaining informed consent). In contrast, if you indicate that the representation will terminate upon completion of this particular matter, you have persuasive evidence, after the matter is completed, that this particular person is a former, rather than a current, client.

V. Fees and Expenses

A. Required Written Communication. Montana Revised Rule 1.5(b) requires that the attorney provide a written communication to the client regarding the basis or rate of the fee and expenses for which the client will be responsible. This is subject to the $500 exception and the existing client exception noted above.
1. Changes in the basis of fees or expenses must be communicated in writing as well. The $500 exception applies to this requirement, but not the existing client exception.

2. In the engagement letter, it is not uncommon to include language such as “our hourly rates are subject to regular revision, and you agree to pay for our services at the rates prevailing at the time those services were performed.” This language indicates consent of the client to a change in fees, but nonetheless the Rule requires that you provide written advice of any changes in fees within a reasonable time of their implementation.

3. Note that the client does not have to sign the writing informing the client of the basis of fees and expenses, unless it is a contingent or shared fee agreement, or it involves an attorney lien or business transaction between the attorney and client. Nonetheless, it is a good practice to request a client’s signature on the engagement letter.

B. Reasonable Fee; Expenses. Montana Revised Rule 1.5(a) has been amended to explicitly prohibit a lawyer from charging a fee that is unreasonable. The language of the previous version of the Rule required that "[a] lawyer's fee shall be reasonable." The language of the new version of the Rule -- "A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses" -- is intended to more forcefully prohibit unreasonable fees. Eight factors are set forth in determining the reasonableness of a fee. Comment 1 clarifies that the enumerated factors are not exclusive and that not all factors will be relevant in each instance.

1. Montana Revised Rule 1.5 now explicitly prohibits a lawyer from charging an unreasonable amount for expenses incurred while representing a client (but ABA Ethics Opinion 93-379 had previously stated that the reasonableness standard set forth in the previous version of Model Rule 1.5(a) was applicable to expenses as well as to fees). ABA Opinion 93-379 sets forth guidelines with respect to charges for expenses (and whether or not a lawyer may add surcharges or is limited to charging actual expenses).

2. When costs associated with legal services of a contract lawyer are billed to the client as fees for legal services, the amount that may be charged for such services is governed by the requirement of Model Rule 1.5(a) that a lawyer’s fee shall be reasonable. A surcharge to the costs may be added by the billing lawyer if the total charge represents a reasonable fee for services provided to the client. When legal services of a contract lawyer are billed to the client as an expense or cost, in the absence of any understanding to the contrary with the client, the client may be charged only the cost directly associated with the services, including expenses incurred by the billing lawyer to obtain and provide the benefit of the contract.
lawyer’s services. ABA Ethics Committee Opinion 00-420.

3. See the engagement letters attached as appendices for sample language regarding fees and expenses.

C. Staffing. It is also appropriate to include language regarding the staffing of your client’s case in the engagement letter. This is important for several reasons.

1. Under the principles of contract law, a person (such as an attorney) who has agreed to perform a duty for another (such as a client) may not delegate the non-administrative aspects of that duty when the client has a substantial interest in the personal performance of the obligor. Section 318, Rest. (2d) of Contracts. For example, if a client has hired you because of your reputation as a brilliant estate planning lawyer, without the consent of the client you cannot delegate your duty to prepare the will to an associate or paralegal. An engagement letter signed by a client can provide this consent.

2. A lawyer is an agent of his client. Under principles of agency law, there are certain duties an agent cannot delegate to a sub-agent without the client’s consent. See Section 18, Rest. (2d) of Agency.

3. In Garnick & Scudder, P.C. v. Dolinsky, 45 Mass. App. Ct. 925 (1998), a law firm entered into a fee agreement with the client that was signed by a single attorney, and apparently made no reference to possible staffing or fees on the part of associates or paralegals. The firm obtained a favorable judgment for the client. The firm then billed the client for fees of $21,691.25, which included fees billed by the signing attorney, his associates and a paralegal. The client refused to pay and the law firm brought a breach of contract action against the client. The trial court awarded fees for the attorney who signed the fee agreement, but refused to award fees for the other attorneys or for the paralegal. In affirming the trial court’s decision, the appellate court noted the duty of the firm to inform the client that the services of others were being billed. The court held that the firm could not recover under quantum meruit for the services of the other attorneys and the paralegal.

4. See the engagement letters attached as appendices for sample language regarding staffing.

D. Arbitration of Fee Disputes. Many attorneys, particularly those practicing outside of Montana, provide in their engagement letters for arbitration of fee disputes. Comment 9 to Rule 1.5 states that an attorney “should conscientiously consider submitting” to voluntary arbitration of fee disputes, and most courts have cited to this Comment in
enforcing fee arbitration clauses. See, for example, Conn. Informal Opinion Number 97-5 (1997) (fee dispute provisions generally enforceable); Haynes v. Kuder, 591 A.2d 1286, 1292 (D.C. Cir. 1991) (enforcing agreement). However, to be enforceable, informed consent must be given by the client. See Turian, Drafting Fee Arbitration Provisions, 40 The Practical Lawyer 23 (Dec. 1994); Note: Attorney-Client Arbitration: A Search for Appropriate Guidelines for Pre-Dispute Agreements, 80 Tex. L. Rev. 1213 (2002).

a. Courts may be less reluctant to enforce arbitration clauses for non-fee disputes, such as malpractice claims. See, for example, Mayhew v. Benninghoff, 53 Cal. App. 4th 1365 (the law does “not permit lawyers to create a presumption of arbitrability through all-purpose arbitration clauses in engagement agreements with their clients.”)

VI. Conflicts of Interest: Current Clients

A. Revised Rule 1.7. The Revised Rules significantly modified Rule 1.7. It now applies only to current clients. Former clients are governed by Rule 1.9, which we’ll discuss later. Revised Rule 1.7 is set forth in its entirety as follows, with certain key terms highlighted:

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

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<td>(1)</td>
<td>the representation of one client will be directly adverse to another client; or</td>
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<td>(2)</td>
<td>there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.</td>
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(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

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<td>(1)</td>
<td>the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;</td>
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<td>(2)</td>
<td>the representation is not prohibited by law;</td>
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<td>(3)</td>
<td>the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and</td>
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<td>(4)</td>
<td>each affected client gives informed consent, confirmed in writing.</td>
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B. Concurrent Conflicts of Interest. Paragraph (a) of Rule 1.7 identifies two types of concurrent conflicts:

1. A conflict in which a lawyer may be "directly adverse" to a current client; and
2. A conflict in which “there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.”

3. Rule 1.10 generally imputes a concurrent conflict of interest of one lawyer of the firm to all lawyers in the firm.

4. A directly adverse conflict involves any representation in which a current client is on the other side of any matter which could be characterized as adverse. For example, one attorney in a law firm has opened an estate planning file for Diane, and is in the process of preparing a will for her. Another attorney has been asked to represent a client who wants to bring a law suit against a corporation of which Diane is one of several shareholders. Even if Diane has engaged another law firm to represent her in the purchase of the property, because Diane is a current client of the firm, the representation of the seller of the property would be a directly adverse conflict. See Comment 7 to rule 1.7.

   a. See Wolfram, Corporate Family Conflicts, 2 J. Inst. Stud. Leg. Eth. 295 (1999) for a thorough discussion of when representation of one member of a corporate organization, such as the parent, prohibits representation adverse to an affiliate of that corporation, such as a subsidiary.

5. The significant risk of a material limitation conflict can arise in several situations.

   a. One attorney in a law firm has opened an estate planning file for Diane, and is in the process of preparing a will for her. Another attorney has been asked to represent a client who wants to bring a law suit against a corporation of which Diane is one of several shareholders. This is arguably not a directly adverse conflict,\(^5\) because the corporation in which she has an ownership interest in not a client of the firm. But the firm’s responsibilities to Diane may give rise to a significant risk that the firm would be materially limited in zealously pursuing the claim against a corporation in which Diane has an interest.

   b. Comment 8 gives, as an example of a “materially limited” conflict, a lawyer asked to represent several individuals seeking to form a joint

\(^5\)Under the line of cases which hold that representation of a closely-held corporation necessarily entails representation of its shareholders, it would be directly adverse. See III.B.3 and 4 above.
venture. The comment notes that the lawyer is likely to be materially limited in his or her ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. Comment 26 gives as relevant factors in determining whether there is significant potential for material limitation in a non-litigated matter (i) the duration and intimacy of the lawyer's relationship with the client or clients involved, (ii) the functions being performed by the lawyer, (iii) the likelihood that disagreements will arise and the likely prejudice to the client from the conflict.

c. Comment 9 notes that a lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director, may also constitute a “materially limited” conflict. For example, an attorney serving as a trustee of a trust has a fiduciary responsibility to trust beneficiaries which would likely materially limit the attorney in his or her ability to represent another client in a matter adverse to the beneficiary. If a lawyer serves as the director for a corporation, the law firm should not file litigation against the corporation.

d. As an example of a personal interest which may “materially limit” an attorney’s representation of a client, Comment 11 specifies a lawyer related to another lawyer, e.g., as parent, child, sibling or spouse, in a matter where that lawyer is representing another party. For example, a lawyer asked to represent the buyer in a transaction where the lawyer’s spouse is representing the seller has a personal interest which may materially limit his representation of the buyer. A personal interest conflict will ordinarily not be imputed to other members of a firm under the amendments to Rule 1.10.

C. Exceptions. Rule 1.7(b) provides that a lawyer may undertake a representation involving a concurrent conflict of interest if each of four elements are met. Let’s start with the easiest two, set forth at 1.7(b)(2) and (3). The representation may not be prohibited by law, and the representation may not involve adverse claims in litigation or other proceeding before a tribunal. If you’ve crossed these two hurdles, the next thing you need to do is come to the reasonable belief that you will be able to provide competent and diligent representation to each affected client. If you come to that conclusion, then you can represent both clients if each client gives informed consent, confirmed in writing.

1. It is your duty, as the attorney, to consider whether you can provide competent and diligent representation to each affected client. Comment 2 to rule 1.7. If you can’t reach that conclusion, you cannot represent a client or even ask for their informed consent.
a. Where the clients’ interests are “fundamentally antagonistic to each other,” you cannot conclude that you will be able to provide competent and diligent representation to each affected client. Comment 28 to Rule 1.7. For example, it would be very difficult to conclude that you can competently and diligently represent both the buyer and the seller in a single transaction. But see (and rely on at your own peril) Beal v. Mars Larsen Ranch Corp., 99 Idaho 662 (1978) (“if the parties have already agreed on the basic terms of the agreement and the attorney acts primarily as a "scrivener" he may normally represent both parties after obtaining their consent.”)

b. Are there any directly adverse situations where you can conclude that your competent and diligent representation to each client would not be comprised? Yes. For example, a law firm represents Diane in the preparation of a will. Diane has agreed to sell real estate to another client of the firm, and she has asked another law firm to represent her in that sale. Can your firm represent the purchaser of Diane’s property (i.e., directly adverse to Diane), while at the same time represent Diane in preparing her will? You may be able to reach the conclusion that your representation of Diane in preparing her will, and your representation of the purchaser of Diane’s property, does not prevent you from competently and diligently representing the interests of each client, especially if the parties have reached agreement on all of the important terms. However, if you anticipate contentious negotiations (see Comment 29) or are aware of certain confidential information obtained from Diane in the course of representing her in her estate planning (such as environmental contamination of the property which Diane has not disclosed to the purchaser)(see Comment 30), you could not come to the conclusion that you could represent each competently and diligently.

c. I encourage each of you to carefully read the comments to Rule 1.7, and the many factors pointed out in those comments which you should consider in determining whether you can undertake representation of directly adverse clients, or in situations which may not be directly adverse, but which rise a significant risk of material limitation. Important factors set forth in the comments include the following:

i. the effect on client-lawyer confidentiality and the attorney-client privilege (Comment 30);

ii. the likelihood that a difference in interests 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 (Comment 8);

iii. whether the interests of the clients are aligned (Comment 28);

iv. whether antagonism or contentions have appeared between the clients (Comment 29);

v. if one client asks the lawyer not to disclose to the other client information relevant to the common representation (Comment 31);

vi. whether the lawyer subsequently will represent both parties on a continuing basis (Comment 29); and

vii. whether one client has a longer standing relationship with the client, which may affect the lawyer’s ability to be impartial (Comment 29).

2. If you’ve come to the reasonable belief that you can provide competent and diligent representation to each affected client, you must then obtain from each affected client informed consent, confirmed in writing. What constitutes informed consent is discussed at Section IX below.

3. Although the disclosure does not have to be in writing, the client’s consent to the multiple representation must be confirmed in a writing. The client does not need to sign the writing.

D. Representing a Husband and Spouse in Estate Planning. When a husband and wife approach you, asking that you assist them with their estate plan, Rule 1.7 “requires the lawyer to ... determine whether a conflict of interest exists.” This generally would not be a directly adverse conflict (unless, for example, you have started preparing a petition for divorce at the request of one of the spouses, unbeknownst to the other). Absent a directly adverse relationship, you must determine whether “there is a significant risk that the representation of” the husband would “be materially limited by the lawyer's responsibilities” to the wife, and visa versa. This question has given rise to numerous law review articles and scholarly debates. See, for example, Bennett, "Don't Tell My Husband, But . . .": Ethics in Spousal Representation, 135 Trusts & Estates 40 (May 1996); Pearce, Family Values and Legal Ethics: Competing Approaches to Conflicts in Representing Spouses, 62 Fordham L. Rev. 1253 (1994); Hazard, Conflict of Interest in Estate Planning for Husband & Wife, 20 Prob. Law. 1, 13 (1994); Report of the ABA Special Study Committee on Professional Responsibility, Comments and Recommendations on the Lawyer’s Duties in Representing Husband and Wife, 28 Real Prop., Prob. & Trust J. 765 (1994).
1. Comment 31 to Rule 1.7 clearly identifies one situation where an attorney cannot undertake representation of both spouses in estate planning:

“Common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit.”

2. Another situation which may give rise to a “significant risk of material limitation” is where the attorney has established a relationship with one of the two spouses. See Comment 26 to Rule 1.7. In the Law of Lawyering, § 1.7:306, Professors Hazard and Hodes note two limitations which may result. While "self-disqualification" is not "automatic," the lawyer "should be particularly careful to explain his concerns, and to make certain that the established client authorizes him to reveal all confidences to the other spouse."

   a. First, "it is likely that [the lawyer] will have confidences of the established client that he cannot reveal to the other client, but which the other client has a need to know." For example, in January 2003, husband (a long-standing business client of Attorney Jim) asked Attorney Jim to refer the husband to a divorce attorney, because the husband was contemplating a divorce. One year later, husband and wife come in to see Jim to prepare wills for them. Does husband’s duty of confidentiality to husband give rise to a significant risk that the husband’s representation of the wife will be materially limited? Yes. See Opinion of the Allegheny County [New York] Bar Association, which ruled that “because of the contemplation of divorce, an acute possible conflict exists between the interests of the husband and wife as to estate planning matters.” 4 Lawyers J. 8 (2002).

   b. Second, the lawyer "may not trust his own ability to be fair to both by putting aside his prior relationship."

3. Another situation which may give rise to a “significant risk of material limitation” is where the spouses have differing desires regarding the disposition of their assets. This may most commonly arise when children from previous marriages are involved, but is certainly not limited to that situation.
**Application:** Harry and Sally, age 60ish, come to see you regarding their estate plan. Both have adult children from a previous marriage. Harry and Sally have been married twenty-five years. Sally has primarily been a homemaker. Most of their significant assets are titled in Harry’s name alone. In view of the length of their marriage and her contributions as a homemaker, mother and as a hostess of dinners and other events for many of her husband’s business clientele, Sally believes she is entitled to at least one-half of the assets. Sally desires to leave her one-half of the assets to her children from a previous marriage. Harry desires to leave all of the assets into a QTIP trust for the benefit of Sally during her lifetime, with the remainder to be distributed solely to his children.

--Is there a “substantial risk” that if you agree to represent both Harry and Sally, your representation of one or the other will be materially limited?

–If so, can you come to the reasonable belief that you “will be able to provide competent and diligent representation to each affected client.” Does it make a difference if Harry has been your long-standing client?

4. Section 128 of the Restatement provides these two illustrations regarding representation of both spouses in an estate planning context:

   a. Spouse A does most of the talking in the initial discussions with Lawyer. Spouse B, who owns significantly more property than Spouse A, appears to disagree with important positions of Spouse A but to be uncomfortable in expressing that disagreement and does not pursue them when Spouse A appears impatient and peremptory. Representation of both spouses would involve a conflict of interest. Lawyer may proceed to provide the requested legal assistance only with consent given....

   b. Lawyer has had professional dealings with the spouses, both separately and together, on several prior occasions. Lawyer knows them to be knowledgeable about their respective rights and interests, competent to make independent decisions if called for, and in accord on their common and individual objectives. Lawyer may represent both clients in the matter without obtaining consent.... While each spouse theoretically could make a distribution different from the other's, including a less generous bequest to each other, those possibilities do not create a conflict of interest, and none reasonably appears to exist in the circumstances.

5. The attorney’s inquiry must not stop at any possible material limitations arising as a result of representation of the two spouses. The attorney must also
ask whether her responsibilities to other existing clients, former clients, or other third parties to whom the attorney owes a responsibility may result in significant risk of a material limitation of her ability to represent the husband and wife in their estate planning.

a. Jack is the adult son of Phil and Peg, long-time clients of Attorney Bob. Phil and Peg own a ranch. Jack and his wife, Greta, come in to see Attorney Bob about a will. Jack wants to leave all of his property to Greta, including any interest in the ranch which he might inherit from his parents. Unbeknownst to Jack, Phil and Peg have expressed to Attorney Bob an extreme dislike for Greta, and have prepared an estate plan which leaves Jack’s interest in the ranch in a trust for Jack, with ultimate distribution to Jack’s other siblings. Do Attorney Bob’s responsibilities to Phil and Peg cause a significant risk of a material limitation upon his ability to represent Jack and Greta? If Attorney Bob concludes that he cannot represent Jack and Greta without revealing confidential information received from Phil and Peg, he cannot proceed without the informed consent of all four clients. If Phil and Peg refuse to consent to the disclosure of their estate plan, Attorney Bob cannot represent Jack and Greta if he believes disclosure of that confidential information is necessary to competently represent Jack and Greta.

b. In Formal Opinion 05-434, the ABA Ethics Committee was asked whether an attorney could represent a testator, if the testator intended to disinherit an heir who is also a client of the firm. The Committee concluded that there ordinarily is no conflict of interest when a lawyer is engaged by a testator to disinherit a beneficiary whom the lawyer represents on unrelated matters, unless doing so would violate a legal obligation of the testator to the beneficiary, or unless there is a significant risk that the lawyer’s representation of the testator will be materially limited by the lawyer’s responsibilities to the beneficiary. Accord, Matter of Koch, 849 P.2d 977 (Kan. App. 1993)(which, in your spare time, is a case definitely worth reading!).

E. Conflicts in Representing Fiduciaries. When asked to represent a fiduciary, such as a personal representative of an estate, a trustee of a trust, or a guardian of an incapacitated person, the attorney must determine whether such representation would be directly adverse to an existing client, or whether there is a significant risk that the representation of the fiduciary will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer. The same question must be asked when an attorney is asked to represent a beneficiary or other interested party in connection with an estate, trust or guardianship proceeding.
1. Perhaps one of the most common situations facing an attorney is the representation of a personal representative or trustee who is also one of several beneficiaries of the estate. In *McTaggart v. Lindsey*, 202 Mich. App. 612 (1993), the attorney who represented the child's mother as personal representative of the estate also represented the mother in the wrongful death claim arising from the child’s death. The personal representative proposed distributing all of the wrongful death claim proceeds to herself, to the exclusion of the deceased child’s father. The court found that the representation violated Rule 1.7, noting that the attorney could not advise the client of her duties as a personal representative, without affecting the attorney’s duties of loyalty and confidentiality owed to the client as claimant. The court relied on *Ethics Committee for the State of Michigan*, Opinion R-10, which advised that “if the interests of the personal representative as claimant and as fiduciary are the same, the lawyer is not prohibited from representing the personal representative in both capacities. However, under MRPC 1.7(a)(1) and 1.7(b)(2), dual representation is improper if representation of the claimant would adversely affect representation of the fiduciary.”

2. Another situation may involve the representation of a group of beneficiaries against a fiduciary. For example, if a decedent leaves her property to her second husband, and the children of her first marriage contest the will, can the attorney represent all of the children in a proceeding against the personal representative? The Comments to Rule 1.7 provide some guidance. If their interests are aligned, if they are not antagonistic towards one another as a group, if the attorney can maintain impartiality, there does not appear to be a significant risk of material limitation.

3. If the lawyer is acting as a fiduciary, such as serving as a trustee of a trust, his fiduciary duties towards the beneficiaries is a duty to a third person which must be considered when asked to represent someone adverse to those beneficiaries. Comment 9 to Rule 1.7.

4. Is it possible to represent the fiduciary client competently and diligently if the lawyer may be called as a witness in the litigation? In *Estate of Waters*, 647 A.2d 1091 (Del. 1994), a lawyer representing the estate in the active defense of a will contest was a witness testifying on the issues of undue influence and capacity. The Supreme Court of Delaware reversed the trial court's ruling that had allowed the lawyer to continue representing the estate. See also Rule 3.7, generally prohibiting an attorney from representing a client in litigation, when the attorney will serve as a witness in that litigation.

F. Conflicts in Representing Organizations. When asked to represent several individuals in the formation of a business entity, or both the corporation and an officer named in a
wrongful discharge suit, the attorney must determine whether such representation would be directly adverse to each other or another existing client, or whether there is a significant risk that the representation of all will be materially limited by the lawyer's responsibilities to each of them, another client, a former client or a third person or by a personal interest of the lawyer.

1. Again, the Comments provide some guidance, such as whether one of the clients has asked you to maintain information confidential from the others (Comment 31), whether one of the clients is a long-standing client vis-a-vis the others (Comment 26), whether their interests are aligned (Comment 28), the effect on client-lawyer confidentiality and the attorney-client privilege (Comment 30), whether antagonisms have appeared (Comment 29) and the likelihood that a difference in interests will eventuate (Comment 8).

   a. One important fact in the context of corporate formation is whether one of the owners will own a majority interest in the entity, while the others will own a minority interest. A lawyer representing a minority owner would advise that person of all of the pitfalls of minority ownership, and advocate terms enhancing the protection of the minority owner, such as super-majority or unanimity voting requirements on certain matters. Would you be able to zealously do that while, at the same time, representing the majority owner?

   b. Another important fact would be the type of capital contributions to be made by each owner. If one owner is contributing cash, and the other is contributing property or services, you are faced with the difficulty of valuing the property or services. An advocate for the cash contributor would advocate for lower values for the property or services, and protection if the services are not forthcoming, whereas an advocate for the property and services contributor would advocate differing positions.

   c. If preparation of a shareholder agreement is requested as part of the representation, the circumstances of one shareholder, such as a pending divorce, or even age differences may cause potential conflicts in the positions of the parties.

VII. Former Clients

A. Substantially Related; Materially Adverse. Rule 1.9 provides a different standard in determining whether an attorney can undertake a matter which may be adverse to a former client:

   A lawyer who has formerly represented a client in a matter shall not thereafter
represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing. ¹

1. First, the representation must be in connection with the same or a substantially related matter. There is no prohibition against representing a new client adverse to an old client in a matter that is not related to the representation of the previous client.

   a. Comment 3 explains that matters will be deemed "substantially related" for purposes of the rule "if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter." The Comment continues: “For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce.”

   b. In the case of an organizational client, "general knowledge of the client’s policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation.” Comment 3.

   c. Comment 1 states “nor could a lawyer who has represented multiple clients in a matter represent one of the clients against the others in the same or a substantially related matter after a dispute arose among the clients in that matter, unless all affected clients give informed consent.” Thus, if you represent three owners in the preparation of a partnership agreement, in a dispute among them regarding the partnership agreement several years later, you may not represent any of the three, without informed consent of all three.

   d. An attorney prepares wills for a married couple, and closes the file. Years later, the attorney is asked to represent one of the spouses against

¹Special rules apply in “transfer” situations, where the representation of a “former client” occurred while the attorney was employed by another law firm. See Rule 1.9(b) and (c). If a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joins another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict.
the other in a dissolution proceeding. Are the matters “substantially related?” Courts have reached differing conclusions, depending upon the facts of each case. See Rompre v. Rompre, 1995 Conn. Super. LEXIS 582, Superior Court, judicial district of Waterbury, Docket No. 116536 (Feb. 27, 1995) (Pellegrino, J.) (motion to disqualify granted because “both matters involve detailed investigation of the current assets, future assets, and the evaluation and ownership of same”); Riccitelli v. Riccitelli, 1992 Conn. Super. LEXIS 3698, Superior Court, judicial district of New Haven, Docket No. 317852 (March 10, 1992) (Bassick, J.) (wife’s motion for disqualification denied because no unusual or confidential information was conveyed to the attorney by the wife when he represented both her and her husband in the drafting and execution of their wills).

2. Second, even if the representation involves the same or a substantially related matter in which you represented a former client, the interests of the new client must be materially adverse to the interests of the former client.

   a. The Comments do not define “materially adverse.” In Simpson Performance Prods., Inc. v. Horn, 92 P.3d 283 (Wyo. 2004), the Wyoming Supreme Court faced the “paucity of authority” interpreting this component of Rule 1.9. The court stated:

   "We must make a case-specific inquiry to determine the degree to which the current representation may actually be harmful to the former client....This fact-intensive analysis focuses on whether the current representation may cause legal, financial, or other identifiable detriment to the former client.... Additionally, we must determine "whether the attorney’s exercise of individual loyalty to one client might harm the other client or whether his zealous representation will induce him to use confidential information that could adversely affect the former client."

In that case, Simpson Performance Products, Inc. hired Attorney Horn to conduct an investigation and to provide legal counsel regarding a possible lawsuit by SPP against the National Association of Stock Car Auto Racing (NASCAR) for slander. After Dale Earnhardt died in a racing accident at the Daytona 500, NASCAR had suggested that the seatbelt worn by Mr. Earnhardt and manufactured by SPP was the cause of Mr. Earnhardt’s death. SPP subsequently decided not to sue NASCAR for slander. The founder, Mr. Simpson, (who was a personal friend of Mr. Earnhardt) felt strongly about clearing the name of the company he founded (but no longer controlled), so two months later he retained Mr. Horn to pursue a lawsuit against NASCAR individually. The court found that the
representation of Simpson was not “materially adverse” to the former client, SPP. The court noted that SPP had not demonstrated any harm it had suffered or would suffer as a result of the representation.

b. In the disciplinary proceeding of In re Robak, 654 N.E.2d 731 (Ind. 1995), the attorney had represented a husband and wife in the preparation of a marital property agreement, under which they agreed to maintain their separate property and provided that any will executed by the clients did not have to contain provisions in the other's favor. The attorney then represented them in the preparation of their wills. Upon the husband's death, the attorney represented the personal representative of his estate. The wife then filed a claim against the estate for her spousal share, disputing the validity of the pre-marital agreement which the attorney had prepared. The court ruled that the attorney's representation of the personal representative of the estate was materially adverse to his prior representation of the wife and violated Rule 1.9. Further, the attorney used confidential information that he obtained during his representation of the wife and used it to impeach her. Thus, the attorney violated her attorney-client privilege.

B. Former Client. As long as the representation of a new client against a former client is not substantially related nor materially adverse, you can proceed without obtaining the informed consent of the former client. The important question: when does a current client become a “former client?” Following are the views of various scholars:

1. "Determining continuity of representation starts with analyzing the attorney's engagement. The usual starting point is a written engagement agreement. . . . If there was no written agreement, a preliminary issue may be to resolve a factual dispute of what were the terms of the oral agreement." (3 Mallen & Smith, Legal Malpractice (5th ed. 2000) Statutes of Limitations, §§ 22.13, p. 440.) "Unlike litigation, which usually involves a specific subject matter of limited duration, advice is more likely to occur in a continuing attorney-client relationship that may make it difficult to ascertain exactly when the attorney's representation is complete." (Ibid.) "The issue of when representation ended can present a question of fact." (Id. at pp. 440-441)

2. "Unlike services rendered in the litigation context, estate planning services are often performed over many years, and it may be difficult to identify when they begin or end. The relationship between the estate planning attorney and client is usually open-ended, and, unless the engagement letter or some other document makes it clear when the relationship will end, the question of ongoing representation can continue until the client's death (and sometimes beyond)." (Emphasis supplied) 1 Cal. Estate Planning: Ethical Considerations (Cont.Ed.
3. Comment c to Section 132 of the Restatement provides:

Withdrawal is effective to render a representation "former" for the purposes of this Section if it occurs at a point that the client and lawyer had contemplated as the end of the representation. The representation will also be at an end for purposes of this Section if the existing client discharges the lawyer (other than for cause arising from the improper representation) or if other grounds for mandatory or permissive withdrawal by the lawyer exist (see § 32), and the lawyer is not motivated primarily by a desire to represent the new client.

4. In his article, *Former Client Conflicts*, 10 Geo. J. Legal Ethics 677 (1997), Professor Wolfram (the chief reporter for the Restatement of the Law Governing Lawyers) notes that relevant criteria as to the termination of the attorney-client relationship include resolution of open legal matters (such as an appeal), the client's decision to retain new counsel, and, most important, the reasonable expectations of the lawyer and client.

5. Professor Painter notes:

A wise lawyer will either specify in the retainer letter when a representation ends, or send a termination letter at its conclusion. A lawyer, however, rarely wants to send a letter telling a client that the representation is over unless a conflict with another client actually arises. Even then, the lawyer may simply assume that the representation of the first client is over without sending a termination letter, a situation ripe for disqualification litigation if the first client finds out about the lawyer's representation of an adverse interest and objects. Failure to deal with this issue at the outset of a representation can thus lead to a costly misunderstanding later on. (Emphasis supplied.)


6. Estate planning attorneys often send out letters to all clients for whom they have prepared wills if an important development has occurred which may require a review of existing wills. Query: does correspondence of this kind cause what may have been a "former client" to morph back into an "existing client," particularly if you refer to the addressee as a client in the salutation or body of the letter?
VIII. Prospective Clients

A. Montana Revised Rule 1.20. Montana Revised Rule 1.20 is new (and is numbered as Rule 1.18 under the ABA version of the revised rules). Under 1.20(a), “a person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter” is a prospective client. Under 1.20(b), “even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.” Furthermore, if the attorney does not take the case, under Rule 1.20(c), unless an exception under Rule 1.20(d), the attorney or her firm may not subsequently represent an adverse party in that matter or a substantially related matter, if the prospective client disclosed information which, if revealed, would substantially harm the prospective client.

1. Not everyone who communicates with an attorney is a “prospective client” entitled to the protection of Rule 1.20. Comment 2 to the ABA counterpart Rule 1.18 states:

A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a "prospective client" within the meaning of paragraph (a). (Emphasis supplied).

2. Rule 1.20(d) provides two important exceptions. If representation is declined, the attorney may represent an adverse party even where harmful information has been received if the prospective client gives informed consent, confirmed in writing. Rule 1.20(d)(1).

3. The second exception does not require the client’s informed consent. If representation is declined, the attorney’s firm may represent an adverse party to the prospective client even where harmful information has been received if the firm timely screens the attorney who received information from participation in the case, and that attorney receives no part of the fee, and written notice of the firm’s participation is timely given to the prospective client. Rule 1.20(d)(2).

4. Comment 5 to the ABA counterpart Rule 1.18 provides:

A lawyer may condition conversations with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter.... If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client. (Emphasis supplied.)
5. In Pro-Hand Services Trust v. Monthei, 310 Mont. 165 (2002), the court provided some guidance as to what information, if disclosed, may be harmful to the prospective client. Although this decision interpreted pre-revision Rules, their focus was on the same criteria as set forth in Revised Rule 1.20, and should remain relevant.

a. The court indicated that merely providing the attorney with "basic" information, such as the prospective client’s name, telephone number, and that she wished to file a claim, would not cause harm, if disclosed.

b. The court indicated that if the prospective client had informed the prospective counsel of the nature of the transaction, her position regarding the claim or defense, witnesses who support or oppose her claim, the nature and amount of any damages suffered and other relevant personal information, such disclosures would alert the court of the possibility that harmful confidential information had been disclosed.

B. Practice Pointers. In view of the new Rule 1.20 regarding prospective clients, your firm should establish a procedure for interviewing prospective clients which limits the type of information received by the law firm in the initial consultation to basic information, such as the name of the prospective client, the adverse party, and a brief description of the nature of the matter. This practice is designed to avoid inadvertent disqualification, such as occurred in the case of Gilmore v. Goedecke, 954 F. Supp. 187 (E. D. Mo. 1996), where a firm was disqualified from representing its client of more than 50 years standing because the opposing party had contacted one of the firm's lawyers by phone and had disclosed confidences during that single telephone call which could be used against that prospective client.

1. Many firms send “non-engagement letters” to clearly explain to a “prospective client” that he or she has not become an “actual” client. An example of a non-engagement letter is attached as Appendix E.

2. A relatively new area of concern is the use of law firm Websites and e-mail to receive communications of information from prospective clients, who may tell you much more than you want to know in their initial inquiries as to whether you are interested in representing them in a particular matter. This may be an appropriate instance, as noted in Comment 5, to condition communications from a prospective client on the person's informed consent that no information disclosed in the e-mail or other communication will prohibit the lawyer from representing a different client in the matter.

a. In its interim opinion No. 03-0001, the Professional Responsibility of
the State Bar of California has stated:

A lawyer who provides to website visitors who are seeking legal services and advice a means for communicating with him, whether by e-mail or some other form of electronic communication on his website, may effectively disclaim owing a duty of confidentiality to website visitors only if the disclaimer is in sufficiently plain terms to defeat the visitors’ reasonable belief that the lawyer is consulting confidentially with the visitor. Simply having a visitor agree that an “attorney-client relationship” or “confidential relationship” is not formed would not defeat a visitor’s reasonable understanding that the information submitted to the lawyer is subject to confidentiality. In this context, if the lawyer has received confidential information from the visitor that is relevant to a matter in which the lawyer represents a person with interests adverse to the visitor, acquisition of confidential information may result in the lawyer being disqualified form representing either. (Emphasis supplied.)

b. In Formal Opinion No. 32 issued March 25, 2005, the Professional Responsibility Committee of the State Bar of Nevada was asked whether an attorney-client relationship can be established by the unilateral act of a prospective client who sends confidential information by e-mail to the attorney's web-site. The Committee responded:

Yes. An attorney who advertises or maintains a web-site may be deemed to have solicited the information from the prospective client, thereby creating a reasonable expectation on the part of the prospective client that the attorney desires to create an attorney-client relationship.

i. However, the Committee went on to clarify that if an attorney makes appropriate disclaimers on the website, to the effect that nothing contained on the web-site or communicated through it by the prospective client will create an attorney-client relationship, should be effective, since no one responding to the web-site could - in the face of such an express disclaimer - reasonably believe that an attorney-client relationship had been created.

ii. In contrast to the interim opinion of the California Professional Responsibility Committee, the Nevada Committee determined that an unsolicited communication to an attorney from a person having no reasonable expectation that the attorney is willing to form an
attorney-client relationship does not give rise to the duty of confidentiality; however, such a duty may be implied where the communication is in response to an advertisement or web-site. The Committee cautions attorneys who advertise or maintain websites to “take appropriate precautions such as warnings and disclaimers.”

c. In State Bar of Arizona Ethics Opinion No. 02-04 (Sept. 2002), the bar association ruled that “unless the prospective client is specifically and conspicuously warned not to send such information, the information should not be turned against her.” (Emphasis supplied.) Thus, unilateral disclosure of confidential information by a prospective client via e-mail or a website would disqualify an attorney from representing an adverse party.

d. Although the three foregoing State Bar opinions agree in most respects as to how to protect against inadvertent formation of an attorney-client relationship, they vary regarding the confidentiality issue.

Example of website disclaimer reprinted with permission of Jeff Kuester, who maintains the following technology website:  http://www.kuesterlaw.com

The KuesterLaw website was founded in March of 1995 and continues to be purely a public resource of general information which is intended, but not promised or guaranteed, to be correct, complete, and up-to-date. However, this website is not intended be a source of advertising, solicitation, or legal advice, thus the reader should not consider this information to be an invitation for an attorney-client relationship, should not rely on information provided herein, and should always seek the advice of competent counsel in the reader's state. The owner of this website is an attorney licensed only in Georgia and with the United States Patent and Trademark Office. The owner of this website will be happy to provide links to all websites for lawyers, law firms, and other law resources related to technology law; however, the owner does not intend such links to be referrals or endorsements of the linked entities, and the owner of this website will not accept referrals for employment from unregistered referral services. Furthermore, the owner of this website does not wish to represent anyone desiring representation based upon viewing this website in a state where this website fails to comply with all laws and ethical rules of that state. In addition, the use of Internet e-mail for confidential or sensitive information is discouraged.
3. In Barton v. United States District Court, 410 F.3d 1104 (9th Cir. 2005), a law firm posted a questionnaire on its website, seeking information about potential members of a class action lawsuit against GlaxoSmithKline involving the drug Paxil. In order to send the information, the person responding had to check a box acknowledging that the questionnaire "does not constitute a request for legal advice and that I am not forming an attorney client relationship by submitting this information." Needless to say, GlaxoSmithKline sought to discover the information provided in these questionnaires, arguing that the information was not subject to the attorney-client privilege because, as clearly stated in the questionnaire, no attorney-client relationship had been formed yet. The district court concluded that the attorney-client privilege did not apply because the disclaimer established that the communications were not "confidential" and that checking the "yes" box waived the privilege. The Ninth Circuit reversed, stating “prospective clients' communications with a view to obtaining legal services are plainly covered by the attorney-client privilege under California law, regardless of whether they have retained the lawyer, and regardless of whether they ever retain the lawyer.”

4. There is a website dealing with legal ethics on the Internet. The site contains links to each state's ethical rules and other information. It includes links to academic and bar journal articles about Internet ethics. The address of this site is http://www.legalethics.com. See also Westermeier, Ethics and the Internet, 17 Geo. J. Legal Ethics 267 (2004); E-Ethics Vol. III, No. I (May 2004), by Professor David Hiricik at www.Hricik.com.

IX. Informed Consent
A. Adequate Disclosure  To summarize, without informed consent, you are prohibited from representing clients if the following conflicts exist:

• Between current clients, if (1) the representation of one client in a matter directly against another client, even if your representation of the other client is in an unrelated matter or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

• Between a current and former client in the same or a substantially related matter in which the current client's interests are materially adverse to the interests of the former client.

• Between a current and prospective client in the same or a substantially related matter in which the current client’s interests are materially adverse to the interests of the former client if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, unless the disqualified lawyer is timely screened, does not participate in the fee, and the client is notified of such fact.

1. Informed consent can only arise after the lawyer has communicated “adequate information” and explained about the “material risks of and reasonably available alternatives” to the concurrent representation. Rule 1.0(g). Comment 18 to Rule 1.7 adds: “the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved.” (Emphasis supplied.)

2. Comment 1 to Article 60 of the Restatement requires an attorney to explain to joint clients “that all material information will be shared with each co-client during the course of the representation and that a communicating co-client will be unable to assert the attorney-client privilege against the other in the event of later adverse proceedings between them.”

Re: Introductory Explanation of Multiple Representation:

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

Re: Effect on loyalty; advantage of multiple representation; reasonably available alternative to multiple representation:

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

Re: Prior Representation

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

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

**Re: Attorney-Client Privilege**

We believe that any information disclosed to our firm by any of you during this joint representation and relating to the Company Formation will not be protected by the attorney-client privilege in the event of a subsequent legal dispute between any of the Parties relating to the Company Formation.

**Re: Risk of Future Conflict; Withdrawal of Representation**

Additionally, we would not be able to represent any of you in connection with any such legal dispute and each of you would be required to obtain separate legal counsel.

**See also** the relevant disclosure paragraphs of the sample engagement letters attached as appendices.

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**B. Waivers of Future Conflicts.** Many law firms include in their engagement letters a waiver of future conflicts. In ABA Formal Opinion 93-372, the ABA Ethics Committee stated "consistent with the mandate of Model Rule 1.7, a lawyer may ask for, and a client may give, a waiver of objection to a possible future representation presenting a conflict of interest that in the absence of the waiver the lawyer would be disqualified from undertaking." The informed consent of the client "is as necessary for effectiveness of a prospective waiver as for a contemporaneous waiver, but in the nature of things the consent is much less likely to be fully informed." In concluding, Opinion 93-372 states: "one principle seems certain: no lawyer can rely with ethical certainty on a prospective waiver of objection to future adverse representations simply because the client has executed a written document to that effect." (Emphasis supplied).
We also reserve the right to continue to represent or to undertake to represent existing or new clients in any matter that is not substantially related to our work on your matter, even if the interests of such clients in other matters are directly adverse to you. We agree, however, that the prospective consent to conflicting representation reflected in this paragraph shall not apply in any instance where as a result of our representation of you we have obtained sensitive, proprietary, or otherwise confidential information that if known to any other client of ours, could be used in any matter by said client to the material disadvantage of you.

1. Comment 22 to Rule 1.7 provides:

Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph 1.7(b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding.... If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).

2. Comment d to Section 122 of the Restatement provides:

*Consent to future conflicts.* Client consent to conflicts that might arise in the future is subject to special scrutiny, particularly if the consent is general. A client's open-ended agreement to consent to all conflicts normally should be ineffective unless the client possesses sophistication in the matter in question and has had the opportunity to
receive independent legal advice about the consent.

3. In General Cigar Holdings v. Altadis, 144 F. Supp. 2d 1334 (SD Fla. 2001), a law firm had represented General Cigar and its affiliates for years. A group of tobacco companies, including General Cigar and Altadis, asked the law firm to represent them in a matter challenging proposed Massachusetts’ regulations regarding tobacco advertising and labeling. The companies were all aware of the law firm’s long-standing representation of General Cigar. The law firm included the following language in their engagement letter:

Our firm has in the past and will continue to represent [General Cigar and its affiliates] in matters not substantially related to this engagement. Accordingly, each Client agrees to waive any objection, based upon this engagement, to any current or future representation by the firm of [General Cigar and its affiliates] in any matter not substantially related to this representation. Of course, we will not accept any representation that is adverse to you in this matter.

Unbeknownst to Altadis, General Cigar was planning an antitrust and unfair competition action against it at the time it entered into the agreement with the law firm regarding the Massachusetts matter. The law firm, while still representing General Cigar and Altadis in the Massachusetts action, filed on behalf of General Cigar the antitrust and unfair competition action against Altadis. Altadis sought to disqualify the law firm under Rule 1.7, but the law firm argued that Altadis had knowingly waived its objections to future representation on the part of General Cigars against it.

a. The court noted that “to avoid disqualification when attorneys represent adverse interests, attorneys are required to fully disclose the adverse effects of the representation and obtain the consent of the parties.... The burden of proving full disclosure and consent is on the attorney seeking to represent adverse interests. (Emphasis supplied.)

b. Altadis argued that the disclosure was inadequate, because at the time it signed the waiver, the law firm was aware of the potential antitrust claim of General Cigar against Altadis (which in fact was filed a month later), and the law firm should have specifically disclosed the probability
of a conflict arising.

c. Noting that the engagement letter was reviewed by outside counsel for Altadis, the fact that Altadis was a “knowledgeable and sophisticated party,” and its awareness that the law firm had a long-standing relationship with General Cigar, the court ruled that adequate disclosure and informed consent had been given, stating:

Allowing for advance, informed consent has significant advantages to both clients and lawyers alike, especially where large firms and sophisticated clients are involved. While the engagement letter could have been more explicit, under the circumstances, it represents informed consent for potential adverse actions.

4. In contrast, the court in Worldspan L.P., et al. v. The Sabre Group Holdings, 5 F. Supp. 2d 1356 (N.D. Ga. 1998) applied a more restrictive approach to advance waivers. Alston & Bird, a large Atlanta law firm, represented Worldspan, the operator of a computerized travel reservation system, in several state tax matters. When Worldspan sued Sabre, another operator of computerized reservation systems, alleging theft of trade secrets, Alston & Bird, appeared for Sabre (while it continued to represent Worldspan in the state tax matters). In response to Worldspan’s motion to disqualify, Alston & Bird relied upon the waiver Worldspan had signed six years earlier, which read:

As we have discussed, because of the relatively large size of our firm and our representation of many other clients, it is possible that there may arise in the future a dispute between another client and WORLDSPAN, or a transaction in which WORLDSPAN's interests do not coincide with those of another client. In order to distinguish those instances in which WORLDSPAN consents to our representing such other clients from those instances in which such consent is not given, you have agreed, as a condition to our undertaking this engagement, that during the period of this engagement we will not be precluded from representing clients who may have interests adverse to WORLDSPAN so long as (1) such adverse matter is not substantially related to our work for WORLDSPAN, and (2) our representation of the other client does not involve the use, to the disadvantage of WORLDSPAN, of confidential information of
WORLDSPAN we have obtained as a result of representing WORLDSPAN.

a. This court ruled that regardless of the sophistication of the client, “it is the lawyer's duty to insure that each client has all the necessary information to make consent truly informed.” The court found that Worldspan’s consent was not informed because the letter was ambiguous in that it did not clearly explain that future litigation could have been directly adverse to Worldspan. The court stated:

   any document intended to grant standing consent for the lawyer to litigate against his own client must identify that possibility, if not in plain language, at least by irresistible inference including reference to specific parties, the circumstances under which such adverse representation would be undertaken, and all relevant like information. (Emphasis supplied.)

5. In Visa U.S.A., Inc. v. First Data Corp., 241 F. Supp. 2d 1100 (ND Cal 2003), the court enunciated the following factors in determining whether full disclosure was made when a consent to future conflicts was signed, noting that an informed waiver "is obviously a fact-specific inquiry."

Factors that may be examined include the breadth of the waiver, the temporal scope of the waiver (whether it waived a current conflict or whether it was intended to waive all conflicts in the future), the quality of the conflicts discussion between the attorney and the client, the specificity of the waiver, the nature of the actual conflict (whether the attorney sought to represent both clients in the same dispute or in unrelated disputes), the sophistication of the client, and the interests of justice.

C. Consent to Future Withdrawal. Montana Revised Rule 1.16(a) provides that an attorney shall withdraw from the representation of a client if the representation will result in violation of the rules of professional conduct or other law (subject to any court rules regarding notice or unless ordered by a tribunal to continue). Rule 1.16(b) sets forth when withdrawal is permissive, rather than mandatory. In addition to these rules, termination of the attorney-client relationship is subject to common law principles outside of the Rules, including the contractual principle of mutual consent. See, for example, comment i to Section 32 of the Restatement, which states “the client-lawyer
relationship can be ended by mutual consent,” but such consent must be informed.

1. The lawyer can use the engagement letter to obtain the client’s informed consent to withdraw if, in the attorney’s opinion, a conflict develops.

2. Generally, if a conflict develops between jointly represented clients, the attorney must withdraw from representation of each of the joint clients in that or a substantially related matter. Is it possible to obtain the informed consent of one of the joint clients to continue to represent the other in the matter if a conflict develops? Rarely. Comment 1 to Rule 1.9 states “nor could a lawyer who has represented multiple clients in a matter represent one of the clients against the others in the same or a substantially related matter after a dispute arose among the clients in that matter, unless all affected clients give informed consent.” But comment i to Section 132 of the Restatement would allow continued representation where an “accommodation client” is involved.

a. In In re Rite Aid Corporation Securities Litigation, 139 F. Supp. 2d 649 (E.D. Pa. 2001), after disappointing earnings and a subsequent decline in its stock price, shareholders brought a class action suit against Rite Aid and one of its senior officers. In-house general counsel retained a law firm to represent both the corporation and the officer, because at the time their interests appeared to be aligned and the lawsuit non-meritorious. When it became apparent that the officer had used corporate funds for his personal benefit, the law firm withdrew from representing the officer, but continued to represent the corporation. The officer later sought to disqualify the law firm from representing the corporation because of the adversity that had developed between the corporation and the officer. Citing comment i to Restatement Section 132, the court found Grass to be an "accommodation client," and inferred that he had consented to Ballard Spahr's subsequent continued representation of Rite Aid after it had ceased representing him because of potential conflicts. See also D. Richmond, *Accommodation Client*, 35 Akron L. Rev. 59 (2001).

3. At the request of one of its long-standing clients, a law firm undertook representation of his girlfriend in various personal and business matters. When the client died, the personal representative of the decedent’s estate informed the law firm that he wanted to engage the law firm to represent the estate if the estate
faced any litigation. When the law firm became aware that the girlfriend intended to file a palimony claim against the estate, it sent her a letter notifying her of their withdrawal of representation of her in other matters, and it subsequently entered an appearance on behalf of the estate in relation to her palimony claim. The girlfriend sought to disqualify her prior law firm. The court characterized the situation as follows:

When Jaffe & Asher found out that the firm's two clients, Santacroce and the Estate, were at odds, it dropped Santacroce like a "hot potato." The firm dropped Santacroce even before suit was filed in a transparent attempt to represent the extraordinarily more remunerative client, the Estate of multimillionaire Goldberg.

The court noted that “the "Hot Potato Doctrine" has evolved to prevent attorneys from dropping one client like a "hot potato" to avoid a conflict with another, more remunerative client.” It disqualified the law firm from representing the estate. Santacroce v. Neff, 134 F. Supp. 2d 366 (D.N.J. 2001). See also Comment c to Restatement Section 132, which states that a lawyer is not allowed to withdraw from representing an existing client if the lawyer is “motivated primarily by a desire to represent” a new client.


Relative to conflict matters, we are performing or have performed a formal conflicts check within our office. As you understand, we represent numerous clients on numerous matters. Based upon our initial conversations, we have found no apparent conflicts relative to representation of your interests. However, if we become aware of a conflict, we will discuss it with you. We specifically reserve the right to withdraw from representation if we feel that we cannot properly represent your interests. Likewise, should we at any time during the representation, even after the conflicts check, determine that representation of your interests would conflict with our previous representation, and/or previous relationship with other clients relative to your matter, we do reserve the right, after discussion with you, and at our sole discretion, to withdraw from representation of your interests.
Appendix A

ACTEC Sample Engagement Letter:
Joint Spousal Representation in Estate Planning
(reprinted with the permission of the American College of Trust and Estate Counsel Foundation)

Dear (clients):

You have asked me to [describe scope of representation]. I have agreed to do this work and will bill for it on the following basis: [Describe arrangements pertaining to fees, billing, etc.]. If I am asked to perform tasks not described in this letter, an additional engagement letter may be required for that work.

It is common for a husband and wife to employ the same lawyer to assist them in planning their estates. You have taken this approach by asking me to represent both of you in your planning. It is important that you understand that because I will be representing both of you, you are considered my client, collectively. Accordingly, matters that one of you might discuss with me may be disclosed to the other of you. Ethical considerations prohibit me from agreeing with either of you to withhold information from the other. In this representation, I will not give legal advice to either of you or make any changes in any of your estate planning documents without your mutual knowledge and consent. Of course, anything either of you discusses with me is privileged from disclosure to third parties.

[CHOOSE ONE OF THE FOLLOWING]

#1 If a conflict of interest arises between you during the course of your planning or if the two of you have a difference of opinion, I can point out the pros and cons of your respective positions or differing opinions. However, ethical considerations prohibit me, as the lawyer for both of you, from advocating one of your positions over the other. Furthermore, I would not be able to advocate one of your positions versus the other if there is a dispute at any time as to your respective property rights or interests or as to other legal issues between you. If actual conflicts of interest do arise between you of such a nature that in my judgment it is impossible for me to perform my ethical obligations to both of you, it would become necessary for me to withdraw as your joint lawyer.

#2 If a conflict of interest arises between you during the course of your planning or if the two of you...
you have a difference of opinion concerning the proposed plan for disposition of your property or on any other subject, I can point out the pros and cons of your respective positions or differing opinions. However, ethical considerations prohibit me, as the lawyer for both of you, from advocating one of your positions over the other. Furthermore, I would not be able to advocate one of your positions versus the other if there is a dispute at any time as to your respective property rights or interests or as to other legal issues between you.

If actual conflicts of interest do arise between you of such a nature that in my judgment it is impossible for me to perform my ethical obligations to both of you, it would become necessary for me to cease acting as your joint attorney. Since [Bob] is a client of long standing, I may elect to/would continue to represent him and in that event [Mary] would have to retain another lawyer to represent her. However, I would not be able to continue to represent [Bob] if prior to my undertaking separate representation I learn that [Bob] has breached any understanding with [Mary] or has advised me that he intends to do so (such as changing his estate plan to her detriment) unless [Mary] is fully informed of the breach or the intended breach and fully understands your current circumstances. By signing her consent to this letter, [Mary] agrees to my continued representation of [Bob] should a conflict arise between you, subject to the conditions set forth in this letter.

[OPTIONAL]
Once documentation is executed to put into place the planning that you have hired me to implement, my engagement will be concluded and our attorney-client relationship will terminate. If you need my services in the future, please feel free to contact me and renew our relationship. In the meantime, I will not take any further action with reference to your affairs unless and until I hear otherwise from you.

After considering the foregoing, if you consent to my representing both of you jointly, I request that you sign and return the enclosed copy of this letter. If you have any questions about anything discussed in this letter, please let me know. In addition, you should feel free to consult with another lawyer about the effect of signing this letter.

Very truly yours,

CONSENT
We have read the foregoing letter and understand its contents. We consent to having you represent both of us on the terms and conditions set forth. We agree that you may, in your

Appendix A 2 Spouse Engagement Letter
discretion, share with both of us any information regarding the representation that you receive from either of us or any other source.

Dated: __________________________

[Spouse]

Dated: __________________________

[Spouse]
Appendix B

ACTEC Sample Engagement Letter:

Estate Administration

(reprinted with the permission of the American College of Trust and Estate Counsel Foundation)

Dear (Client):

The purpose of this letter is to confirm my representation of you as Executor of the Estate of _________________ and to set forth the terms of engagement.

I appreciate your confidence and trust in engaging me as your lawyer. I will be primarily responsible for this representation [but other lawyers or paralegals in my firm will assist me. In any event, all questions should be directed to me to provide for continuity of communication].

1. Summary of Services to be Performed For You as Executor. I will provide those services that are necessary and appropriate to administer the estate under the law of _______, commencing with the petition to probate the will and have you qualified as Executor. The normal services that will then be involved are the following [Optional language: The following list includes the types of services that may be provided]:

   (a) Prepare and complete all notices of appointment of you as Executor and other notices with respect to creditors as are required by the laws of the State of ___________ and rules of court having jurisdiction of the estate.

   (b) Assist you in preparing a complete inventory of all assets of any kind or nature which are subject to probate, and any nonprobate assets such as life insurance, retirement benefits, and other assets.

   (c) Help you make a thorough 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 other action which must be taken by you to secure, reinvest, or protect the assets and provide for the discharge of liabilities, including death taxes of the estate.

   (d) Prepare and complete all interim reports to the Probate Court and the beneficiaries as required during the course of administration of the estate.
(e) Prepare all tax returns for the estate, including federal estate tax and generation-skipping tax returns, state inheritance tax, or any local or state property tax returns, as well as federal and state fiduciary income tax returns.

(f) Review and consider with you any post-death planning, such as alternative asset valuation options, use of disclaimers, funding of trusts as provided for in the estate plan, timing the distribution of assets that are beneficial to the estate and any beneficiaries, and election of income tax benefits to the estate and beneficiaries.

(g) Plan for the payment of all death taxes and the source of funds to be used in payment of any tax obligations, along with any elections for installment payment of taxes if available.

(h) Prepare a plan of distribution of assets held in the estate, either outright or to separate continuing trusts, for the beneficiaries.

(i) Prepare all reports, notices, consents, receipts, and accountings for closing the estate and your discharge as Executor.

(j) Counsel and advise on any related questions or matters arising out of the administration of the estate.

If there are other legal services that you wish me to perform for you as Executor, we should first consult together and supplement this letter agreement before commencing those tasks.

In that connection, you should understand that I represent you as Executor. I do not represent the beneficiaries of the estate, even though I will, from time to time, provide them with information about the administration of the estate. In appropriate circumstances, I may advise beneficiaries to obtain independent counsel as I do not represent them.

2. Charges for Legal Services and Out-of-Pocket Costs. I charge for services on the basis of the time devoted by me [and other professionals in my firm]. Current hourly billing rates are as follows [NOTE: In many jurisdictions, fees are set statutorily by the probate court]:

<table>
<thead>
<tr>
<th>Description</th>
<th>Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Partners</td>
<td>$______ to $________</td>
</tr>
<tr>
<td>Associates</td>
<td>$______ to $________</td>
</tr>
<tr>
<td>Paralegals/Estate Administrators</td>
<td>$______ to $________</td>
</tr>
</tbody>
</table>

Appendix B 2 Fiduciary Engagement Letter
I will bill the estate on a periodic basis. Because income tax considerations and cash requirements often dictate the timing of fee payments, I will request payments when they will best serve the interests of the estate and its beneficiaries.

It is to be understood that my fees will be payable whether or not approved by the inheritance and estate tax authorities or by the Probate Court. Although it is usual and customary to look to estate assets as the source of funds with which to pay our charges, the responsibility for payment ultimately is yours [NOTE: This arrangement would be prohibited in certain states which have statutory fee legislation].

I will also bill the estate for out-of-pocket expenses, such as probate and filing fees, travel expenses, delivery charges, duplicating, express mail, faxing and toll telephone calls. I will expect reimbursement of such costs upon presentation of periodic disbursement bills.

3. Conflicts of Interest and Confidentiality. Any relationship between a lawyer and client is subject to Rules of Professional Conduct. In estates, ethical rules applicable to conflicts of interests and confidentiality are of primary concern because of the close relationship of the parties. I cannot overemphasize the need for complete and full disclosure to me at all times of all your acts and doings to avoid problems that may arise in these areas.

Apart from any applicable legal requirement to notify the beneficiaries that the will has been probated and the estate administration commenced, I consider it good practice to do so and to provide each beneficiary with a copy of the will. In doing so, I will make it clear that you, alone, are my client. Furthermore, I usually keep the beneficiaries advised as the administration of the estate progresses, for example by furnishing copies of the formal inventory of estate assets as soon as that has been formalized.

As a condition of this representation, I require that, notwithstanding normal rules of confidentiality, you authorize me to notify the probate court and creditors and beneficiaries of the estate, as the case may be, of any actions or omissions on your part that have a material effect on their interests in the estate, including acts or omissions that may constitute negligence, bad faith, or breach of your fiduciary duties [In many jurisdictions the attorney-client communications privilege might preclude this type of disclosure without the personal representative's informed waiver. Reference should be made to the law of the jurisdiction in which the estate proceeding is pending].

[IF THERE ARE MULTIPLE EXECUTORS]

While there is nothing at this point to suggest that any differences of opinion will develop between you, during the course of administration of the estate it is possible that
issues may arise on which you do not agree. Ordinarily, under such circumstances, one lawyer could not represent all of the co-executors without being involved in a serious conflict of interest problem.

Conflicts of interest may arise in a number of different contexts, including whether and to what extent discretionary distributions should be made from the estate, the investment policy to be followed by the co-executors, and the payment of compensation to the co-executors. In the event that the co-executors should reach different conclusions concerning the management and administration of the estate, it might be best for each of you to have the benefit of independent counsel to avoid the possibility that my advice to one of you would be influenced in any way by my representation of one of the other co-executors. For now, I will represent all of you in the administration of the estate, with the understanding that each of you retains the right to obtain independent legal counsel at any time that it appears to you to be advantageous.

Although I do not anticipate that it will be necessary, if a conflict does arise between the co-executors, and it is impossible in my judgment to perform my obligations to each of you in accordance with the standards that I would maintain in representing any individual client, I will withdraw from all further representation of the co-executors and advise one or all of you to obtain independent counsel. In such event, I would submit a statement for legal services rendered up to the date of such withdrawal. [In some states, this will not be appropriate, and application would have to be made to the probate court for an award of a portion of the single statutory attorney's fee that will be awarded for ordinary legal services to the estate].

As a part of my representation, there will be complete and free disclosure to each of you of all information concerning the estate that I may receive from either of you in your capacity as co-executor. Such information will not be confidential between you, collectively, and me as your lawyer, irrespective of whether the information is obtained in conferences at which all of you are present, or private conferences with one of you, including conferences that may have taken place before the date of this letter.

[IF EXECUTOR IS ONE OF THE BENEFICIARIES]

Because you are a beneficiary of the estate, I must advise you that I only represent you in your capacity as Executor, and can only represent you as a beneficiary if there is no conflict of interest by reason of such relationship. For example, a conflict could 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 which you may claim. In the event of such a conflict, consideration may have to be given by you to the employment of independent counsel to represent your personal interests.
4. **Termination of Engagement.**

(a) You may terminate this engagement at any time by notice in writing to me. Upon receipt of such notice, subject to such court approval as may be necessary in the context of the situation, I will promptly cease providing any service to you. You will be responsible for paying for my services rendered up to the time I receive such notice and for such reasonable services that I provide thereafter in connection with the transfer of responsibility for the matters I am then handling to your new counsel [See notes above about applicability of this type of arrangement in statutory fee states].

(b) I may terminate this engagement by giving you written notice. Upon termination of my representation, you will be responsible for paying for my services rendered up to the time I terminate our engagement and for such reasonable services that I provide thereafter in connection with the transfer of responsibility for the matters I am then handling to your new counsel [See note above about applicability of this type of arrangement in statutory fee states].

If you have any questions about anything discussed in this letter, please let me know. In addition, you should feel free to consult with another lawyer about the effect of signing this letter.

If this letter meets with your approval, please sign the approval copy of this letter and return it in the envelope provided.

I welcome and look forward to the opportunity to be of service.

Yours very truly,

Date Approved ______________________

__________________________________
Executor
Appendix C
Sample Engagement Letter Identifying Incorporators and Corporation as Clients in Corporate Formation


Dear [names of incorporators and corporation]:

I am very pleased to represent you with respect to your proposed professional service corporation legal needs.

1. Scope of Engagement. This is to confirm the terms of my firm's representation of you in connection with the preparation of your articles of incorporation of a professional service organization, bylaws, minutes of an organizational meeting, issuance of corporate stock, preparation of employment agreements, a buy-sell agreement between the corporation and its stockholders and acting as legal counsel and statutory agent to the corporation on a continuing basis.

2. Fees. Our fees are calculated and are consistent with the guidelines contained in the American Bar Association Rules of Professional Conduct and are primarily based upon the time expended by each of the attorneys or legal assistants involved. However, other factors, such as the novelty and difficulty of the question involved, and the magnitude of the transaction are also taken into consideration in determining the fee. A standard hourly rate has been established for each of our lawyers and legal assistants. Our current hourly rates range from $ ___ per hour to $ ___ per hour, depending on the level of experience of the individual performing the services. These rates are adjusted from time to time to reflect improved professional skills and changing economic conditions. Depending upon the nature and complexity of the matter, we will attempt to use associates or legal assistants of the firm in order to perform the work as economically and efficiently as possible.

I estimate that our fee for preparation of the above referenced documents will be between $ ___ and $ ___. If, however, the scope of our representation is materially expanded beyond that originally contemplated because of unanticipated additional issues or complications, or additional revisions to the documentation are occasioned by significant or repeated changes in the proposed transaction, or otherwise, requiring us to expend additional time not considered in arriving at the fee estimate set forth above, we will bill you
on an hourly basis for the additional work outside the initial scope of our engagement.

3. Billing Procedure. Our legal services will be billed to you on a monthly basis, except in those instances when it is more appropriate to bill you upon completion of a project.

Unless otherwise specifically requested by you, the billing will contain a brief summary of the nature of the work, the fees and the costs advanced.

In addition, you will be billed monthly for any cash disbursements we incur on your behalf, such as filing fees, court costs, publication fees, long distance telephone calls, printing and photocopying charges, extraordinary postage and delivery charges. Occasionally, we will send you third-party bills we receive for costs associated with your matter. Please pay these bills directly to the provider and notify us of such payments.

I would appreciate receiving a retainer in the amount of $___, and upon receipt of the retainer and this signed engagement letter, I will commence working on this project. We will bill our fees and costs against this retainer as our work progresses, and by acceptance of this letter, you authorize our firm to charge such fees and costs against such retainer.

4. Terms of Payment. Our statements for legal services are due and payable upon receipt and considered to be past due if not paid by the 10th of the following month. We reserve the right to impose a service charge of one and a half percent (1-1/2%) per month on all past due balances. If there are special circumstances which would prevent you from complying with these terms of payment, please contact us immediately in order that we may discuss other arrangements.

5. Communication. We will make every effort to return your telephone calls as soon as possible. If, however, I am not available, please do not hesitate to discuss your inquiry with my administrative assistant, Vivian Supra, or my legal assistant, Ellie Legal, as they may be able to answer your question or handle your request.

As there may be times that I will be unavailable when you may need legal advice, please feel free to call either of my associates, Cameron Barrister or Sean Esquire, who can assist you with corporate, real estate or general tax matters. If you need advice concerning contracts or potential litigation matters, please feel free to call my associate, Jeffrey Ibid.

We will notify you promptly of any significant developments and will provide you with copies of pertinent documents and correspondence sent or received by our office. Also, we will consult with you in advance of any important decisions we make regarding these matters.

Appendix C 2 Corporate Engagement Letter
matters. Correspondingly, we will need your cooperation in furnishing information and in taking all actions required of you. On some occasions, we may make a written record of a conversation with you by sending a letter memorializing our discussion. Our intent is to add clarity to situations that may require a precise understanding.

6. Termination. The new professional corporation may terminate the firm's engagement for any reason. Similarly, the firm may terminate this engagement at will. In the event of such termination, the professional corporation will remain responsible for all fees incurred in the course of the firm's representation and in the winding up of such representation, including the preparation and photocopying of the file for purposes of transfer. Arrangements for the payment of all such expenses must be made prior to any file transfer.

7. Conflict of Interest. Although we will be creating a new professional corporation and will be its attorneys, we are, in the creation phase, representing all of you jointly. Thus, to some extent, each one of you is our client and enjoys all the rights attendant thereto. We cannot represent any of you in a manner which is adverse to the interest of the other. We also cannot hold in confidence from any of you any information which would be considered material to this matter. If any of you desires advice which could be potentially adverse to the interests of the other or which is to be confidential as to the other, you should employ separate, independent counsel. If we find ourselves in a situation where we cannot properly serve one of you because of our representation of another and/or the professional corporation, we will have to disclose to both of you that which creates the conflict of interest, and we will withdraw from further representation of each of you and the professional corporation with respect to this matter.

Withdrawal of counsel oftentimes can be a troublesome event, particularly when the matter involves time-sensitive performances. We strongly encourage open communications between you about your venture in order to minimize the prospect of misunderstandings. We also encourage each of you to always keep in mind the sensitive position the firm and I occupy with respect to this matter. It is important that we are not inadvertently placed into a situation in which we face conflicting loyalties. With a little effort, we all can help you avoid the stress and expense that results when an irreconcilable conflict of interest arises.

8. Dispute Resolution. All disputes arising under this agreement, except for disputes involving the amount of legal fees charged, shall be subject to binding arbitration before a single arbitrator pursuant to the Arizona Uniform Arbitration Act. All disputes involving the amount of legal fees charged shall be submitted to arbitration at the State Bar of Arizona pursuant to its fee dispute resolution procedure. The decision or award of
the arbitrator or the State Bar, as may be the case, shall be final and binding. No party shall have the right to seek judicial resolution of a dispute under this agreement except to enforce the decision or award of the arbitrator or State Bar.

If the above is consistent with your understanding of the arrangements for this and any future engagements to perform legal services, please sign the enclosed copy of this letter and return it to me at your earliest convenience in the enclosed self-addressed return envelope. Should you have any questions, please do not hesitate to contact me.

We appreciate the opportunity to represent you and intend to use our best efforts on your behalf.

Sincerely,

Iam A. Lawyer

IAL:csb
Enclosure

We have read the foregoing letter and understand its contents. We consent to have you represent both of us, jointly, on the terms and conditions set forth. We agree that you may share with both of us any information regarding the representation that you receive from either one of us, i.e, that there will be no confidences between us.

APPROVED, UNDERSTOOD AND AGREED:

By: ___

Date: ___

By: ___

Date: ___
Appendix D

Sample Engagement Letter Representing Shareholders Jointly in Preparing a Shareholder Buy-Sell Agreement


Dear Shareholders of Big Dog Equipment Sales and Rental Company:

You have asked us to perform certain services for you relating to your proposed Buy & Sell Agreement. We are pleased to do so; however, it is in your best interest, and our own ethical obligation to each of you requires, that you fully understand the considerations involved in "dual representation" of your corporation and its respective shareholders.

The different shareholders can have differing, and sometimes conflicting, interests and objectives regarding their corporate planning. For example, they may have different views on how to value the corporate stock upon the death or retirement of a stockholder. There may be a conflict in whether the selling shareholder should be subject to a covenant not to compete. There may be a conflict in how an installment payout is secured. These are just a few general examples. Each 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 fellow shareholders without your consent.

That may not be the case here where we are advising the entire family, but the opportunity for conflict does exist. We cannot be advocates for one of you against the other. Information that any of you gives us relating to your thoughts and special needs cannot be kept from the other shareholders. If you ask us to continue to serve you jointly and the corporation, our effort will be to assist in developing a coordinated overall buyout plan and to encourage the resolution of differing interests in an equitable manner and in the best interests of your mutual business affairs. We will attempt to represent your corporation without a bias in favor of any of you.

If you do, please review the statement that follows, sign it as indicated, and return this letter to us. An extra copy is enclosed for your records. If at any time any of you wishes to have the advice of separate counsel, you are completely free to do so. We hope that the information provided will assist you in using our services effectively. Again, we
appreciate the opportunity to be of service. We look forward to a long and successful professional relationship with each of you and your corporation.

Very truly yours,

THE SILDON & EVANS LAW GROUP, P.C.

By

Myron E. Sildon

We have each reviewed the foregoing letter. Each of us realizes that there are 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 that each of us may retain separate, independent counsel in connection with these matters at any time. After careful consideration, each of us requests that you represent us and our corporation jointly in connection with our corporation succession planning and related matters. Each of us also understands and agrees that communications and information which you receive from any of us relating to these matters may be shared with the others.

BERNARD HOUT

NORMA HOUT

BARRY SMART

BIG DOG EQUIPMENT SALES AND SERVICE CO.

By

BERNARD HOUT, PRESIDENT

Note: Mr. Sildon also recommends including the following paragraph in the final shareholder buy-sell agreement:

Sample Contract Provision Regarding Conflicts

The parties to this Agreement acknowledge that this Agreement has been prepared by The Sildon and Evans Law Group, P.C. (the "Law Firm") on behalf of the parties hereto.
There is an inherent potential for conflicts of interest among the parties to this Agreement because this agreement establishes the rights and obligations of each of the parties to this Agreement. Due to such potential conflicts of interest, the Law Firm has advised and hereby advises each of the parties that it would be in their best interest to obtain the services of their own independent legal counsel to review this document. Notwithstanding the fact that the Law Firm has prepared this Agreement and has provided legal advice to one or more of the parties in preparation of this Agreement and in related matters, the parties hereby waive, as evidenced by the execution of the Agreement, any potential conflicts of interest that may arise as a result of the above actions by the Law Firm, whether or not one or more of the parties to this Agreement may have consulted with separate legal counsel concerning this Agreement.
January 16, 2003

Ms. Jane Doe  
123 Easy Street  
Anywhere, WY

Re: Potential Claim - Property Contract Dispute  

Dear Ms. Doe:

I enjoyed meeting with you yesterday regarding your potential breach of contract claim against Alice Broke, who sold you real property with which you are dissatisfied.

As we discussed, our office is unable to take your case. We have not investigated the facts or law regarding your case and have formed no opinion about the merits of your potential claims. Since you may have meritorious claims, we urge you to immediately seek another attorney to represent you.

It is important that you consult another attorney immediately because there is a statute of limitations which will ultimately prevent you from bringing any possible claims.

Thank you for contacting us. We hope you will think of us again should you require legal assistance in the future.

Very sincerely,

CAREFUL ATTORNEY
Appendix F
Sample Closing Letter
Provided by Professor John Burman of the University of Wyoming School of Law, and re-printed with his permission.

Closing Letter

January 16, 2003

Mr. John Smith
123 Easy Street
Anywhere, WY

Re: Jones vs Smith
Our File Number 02-25

Dear Mr. Smith:

As you know, this breach of contract matter was successfully resolved through a settlement agreement between you and Ms. Jones. All the provisions of the settlement agreement have now been implemented. In particular, the funds to which you were entitled as part of the agreement have already been paid to you, and your bill to us is paid in full. We are, therefore, closing your file.

Enclosed you will find the original documents which you previously furnished to us for use in the case. We will, of course, retain our file, but we no longer have any original documents.

This office will retain your file for ten years\(^7\) from the date of this letter. At that time, it will be destroyed. If you would like to have the file returned to you at that time, instead of being destroyed, please notify me in writing within the next thirty days.

Since your case is being closed, this office no longer represents you in this or any other matters. If issues relating to this lawsuit or anything else arise and you wish for us

\(^7\) Some files need to be retained longer. For example, files involving marriage dissolutions in which there are children should be kept until all children have reached the age of majority. Similarly, estate planning files need to be kept until the instruments are no longer necessary. This may be many years for instruments such as wills and trusts. Ten years should be the minimum period for which files are retained.
to represent you, please feel free to contact us. Until that occurs, we will not undertake any further action on your behalf.

It has been our pleasure to represent you. We wish you well in the future. Please feel free to contact us should you require legal assistance in the future.

Very sincerely,

Careful Attorney