ETHICS & LIABILITY ISSUES ARISING FROM REPRESENTING MULTIPLE PARTIES

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CHOICE AND ACQUISITION OF ENTITIES IN TEXAS COURSE

May 28, 2010

Houston

CHAPTER 4.2

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ETHICS & LIABILITY ISSUES ARISING FROM REPRESENTING MULTIPLE PARTIES

With Suggested Forms

DALLAS BAR ASSOCIATION
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Ethics & Liability Issues Arising From Representing Multiple Parties
By: William D. Elliott

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Perry Mason sat at his big desk. . . . [Della Street says] "But you insist on being loyal to your clients, no matter how rotten they are."

"Of course," he told her. "That's my duty."

"To your profession?"

"No," he said slowly, "to myself. I'm a paid gladiator. I fight for my clients. Most clients aren't square shooters. That's why they're clients. They've got themselves into trouble. It's up to me to get them out. I have to shoot square with them. I can't always expect them to shoot square with me."

"It isn't fair!" she blazed.

"Of course not," he smiled. "It's business."[1]

I. INTRODUCTION

A. This paper presents the issues of multiple party representation, or joint representation, in the following manner:

1. First, a discussion is presented on the liability implications of violations of ethic rules and representation of multiple persons.

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[1]Erle Stanley Gardner, The Case of the Velvet Claws (Morrow, 1933), p. 1.

2. Second, the major duties owed by lawyer to client are reviewed.

3. Third, common examples facing the lawyer involving joint representation are considered..

4. Fourth, practical strategies are offered to comply with these seemingly never-ending risks.

B. The body of law involved in ethical issues is diverse. A discussion of the source of law in this area is found at Exhibit "A".

1. Note: On October 20, 2009, the Texas Supreme Court published proposed amendments to the Texas Disciplinary Rules of Professional Conduct, in the first major reconsideration of the Rules since 1990.

2. The Fifth Circuit on October 30, 2009 decided *Kennedy v. Mindprint (In re Proeducation Int'l, Inc.)*, 2009 WL 3489401 (5th Cir. 2009) establish a new rule on ethical rules arising from lateral transfers.

a. Of interest is the expression by the Fifth Circuit of the source of law. Consider the following quote:

b. "When considering motions to disqualify, courts should first look to "the local rules promulgated by the local court itself." U.S. Fire Ins., 50 F.3d at 1312. The Local Rules of the Southern District of Texas provide that "the minimum standard of practice shall be the Texas Disciplinary Rules of Professional Conduct" (Texas Rules), and that violations of the Texas Rules "shall be grounds for disciplinary action, but the court is not limited by that code." S.D. TEX. LOCAL R.APP. A, R. 1A & 1B. Therefore, the Texas Rules "are not the sole authority governing a motion to disqualify." In re Am. Airlines, 972 F.2d at 610 (internal quotation marks omitted). A reviewing court also "consider[s] the motion governed by the ethical rules announced by the national profession in light of the public interest and the litigants' rights." Id. The Fifth Circuit has recognized the ABA Model Rules of Professional Conduct (Model Rules) as the national standards to consider in reviewing motions to disqualify. Id. Therefore, we shall consider both the Texas Rules and the Model Rules."[2]

[2]Kennedy v. Mindprint (In re Proeducation Int'l, Inc.), 2009 WL 3489401, *4 (5th Cir. 2009).

C. Practical strategies are offered to deal with the variety of risks.

D. Some suggested practice forms are attached to handle issues discussed in this paper.

II. BASIS OF LIABILITY

A. **Reality of Liability**. Lawyers are interested in ethics considerations to avoid grievances, but more importantly, to avoid liability. Liability risk is an important focus of joint representation.

B. **Violation of Disciplinary Rules as a Basis of Liability**

1. Current Texas ethics rules proscribe causes of action arising from ethics violations. Preamble, paragraph 15 states:

> These rules do not undertake to define standards of civil liability of lawyers for professional conduct. Violation of a rule does not give rise to private cause of action nor does it create a presumption that a legal duty to a client has been breached. . . . Accordingly, nothing in the rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.[3]

2. Case law and leading treatises support this Preamble.[4]

3. Whether courts follow this preamble, remain to be seen.[5]

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[3]Tex. Disc. R. Prof. Conduct, Preamble, ¶15.

[4]Leading case: Martin v. Trevino, 578 S.W.2d 763 (Tex. App. - Corpus Christi, 1978, writ ref'd n.r.e.). A defendent in a malpractice action, a doctor, sued plaintiff's attorney and who was denied a cause of action against the attorney on account of violation by the attorney of the ethics rules. See also, 1 J. Hadley Edgar, Jr. & James B. Sales, Texas Torts & Remedies § 12.02[1][a][ii][A] (2000)(The disciplinary rules set forth the proper conduct of lawyers solely for the purpose of discipline within the profession); Jones v. Blume, 196 S.W.3d 440, 449 (Tex.App.-Dallas 2006, pet. denied)(private cause of action does not exist for violation of the disciplinary rules).

[5]Medina & Coyle, "Texas Disciplinary Rules of Professional Conduct," 21 St. Mary's L. J. 733 (1990).

4. Older authority exists that violations of Texas Code of Professional Responsibility [i.e. prior ethics rules] does not provide basis for an attorney's civil liability.[6]

C. **Evidentiary Use of Ethics Lapse**.

1. While there is no direct authority for basing liability against an attorney on account of violation of disciplinary rules, such violations are apparently admissible as evidence in legal malpractice actions.[7]

D. **Negligent Misrepresentation**.

1. Plaintiffs are moving beyond traditional strategies of filing malpractice lawsuits to now making claims of negligent representation.

2. Texas Supreme Court has recognized a negligent representation cause of action in favor of third-party/non-clients against an attorney in special circumstances based upon Restatement (Second) of Torts § 552 (1977).[8]

   a. This negligent misrepresentation cause of action is separate and distinct from professional malpractice and does **not** depend on the existence of traditional attorney-client relationship between the claimant and the attorney.[9]

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[6]Nolan v. Foreman, 665 F.2d 738 (5th Cir. 1982), the court said that the ruling of Martin v. Trevnio was limited to third parties, thus implying that clients have a cause of action against his or her attorney for violations of the disciplinary rules. But see Neal v. Hamilton, 837 F.2d 210 (5rh Cir. 1988)(there is no cause of action for violation of the attorney-client privilege).

[7]See, Dillard v. Broyles, 633 S.W.2d 636 (Tex. App. - Corpus Christi, 1982, writ ref'd n.r.e.), cert. denied, 103 S.Ct. 3539 (1983)(admissibility of testimony of violatiouns of Canons of Ethics was discretionary with trial court). Similarly, C. Wolfram, Modern Legal Ethics, §2.6.1 at p. 52 (1986); Wolfram, "The Code of Professional Responsibility as a Measure of Attorney Liability in Civil Litigation," 30 S.C.L. Rev. 281, 286-95 (1979).

[8]McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests, 991 SW2d 787 (Tex. 1999); First Nat. Bank of Durant v. Trans Terra Corporation International, 142 F.3d 802 (5th Cir. 1999)(Under Texas law, lender could assert cause of action against borrower's attorney and attorney's law firm and partner for negligent misrepresentation based on attorney's preparation of inaccurate title opinion, which was completed at client and lender's request and for lender's exclusive benefit, notwithstanding absence of attorney-client relationship between lender and attorney).

[9]Id. at 408-409.

b. To establish a cause of action for negligent misrepresentation, the claimant must show:

(1) the attorney made a representation to the claimant specifically,

(2) such representation was made by the attorney to induce some action on the part of the claimant,

(3) the claimant relied on such representation,

(4) such reliance by the claimant was justifiable,

(5) the representation relied upon was false, and

(6) the claimant suffered damages as a result.

c. Under Restatement (Second) of Torts § 552 (1977):

(1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

(2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered

(a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and

(b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

3. Of particular interest in multi-party representation is when might third parties, not clients, rely on the lawyer's work with the attendant tort risk?

   a. In opinion legal work of the type practiced by lawyers who work in this field actively, the lawyer presumably controls to some degree the extent to which third parties can or will rely on the opinion. These are usually negotiated points in the run-up to the issuing of the opinion.

   b. But in common business or tax or estate planning practice, can the same be said? Are lawyers controlling the potential third party reliance on the legal work?

   c. In forming a business entity with the lawyer's important and long-term client as the principal constituent, has the lawyer consider whether other stakeholders in the business have a cause of action against the lawyer if there is lawyer error?

   d. Lawyers might feel that they can control the risk of lawyer error insofar as their important client is concerned, but what about third parties, such as other business owners? Can the lawyer be equally as sanguine about controlling this third party risk?

III. THE FIRST PRINCIPLES: MAJOR DUTIES OWED BY LAWYER TO CLIENT

A. **Introduction.** The basic duties of a lawyer in accepting representation are competence, commitment, and loyalty to client's interests.[10] There are several additional major duties that repeatedly arise in multiple party representation, but any ethics discussion should begin with the basic duties. Thus, a brief review of these major duties orients the focus for joint representation.

B. **Duty of Communication: Keep Client Informed:** Rule 1.03

1. **Elements of Rule 1.03**

   a. Keep client reasonably informed about status of representation

      (1) Lawyer is obliged to keep client reasonably informed[11] of

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[10]Rule 1.01. Lawyer shall carry out lawful objectives of client. Rule 1.02.

[11]Rule 1.03(a); ABA Rule 1.4. See also, Allstate Ins. Co. v. Kelly, 680 S.W.2d 595 (Tex. App. -

relevant considerations and explain their legal significance to permit client to make informed decisions.[12]

(2) The client decides whether to assert or decline legally available objectives.

b. Promptly comply with reasonable client requests for information regarding representation, and

c. Reasonably explain legal matter so that client can make informed decisions regarding representation; lawyer must give advice concerning all possible options - including the potential risks associated with each option.

(1) In litigation, the lawyer's duty to communicate does not end with a legal judgment, but also includes informing a client about appeal matters, including the client's right to appeal and the relative advantages and disadvantages of an appeal..

(2) The important step of informing a client about an appeal should be in writing, with the lawyer providing the client with a full explanation of risks.

d. Truthful communication required, obviously.

2. **Standard.** The standard in discharging the Duty of Communication is reasonableness. Is there reasonable behavior? Note, this presents a question of fact, which invites a jury determination.[13]

3. **Strategies.** Practical suggestions to copy with the Duty of Communication are the age-old practices that lawyers have been taught for years and years, and yet, there apparently remains the need to continue the teaching since ethical lapses almost always involve a failure to communicate.

Tyler, 1984, writ ref'd n.r.e.).

[12]Rule 1.03(b).

[13]R. Schuwerk & J. Sutton, A Guide to the Texas Disciplinary Rules of Professional Conduct 564 (1990).

a. Provide client with copies of all pertinent correspondence, documents and file materials.

b. Advise clients, in writing, of risks involved in transaction. The lawyer should confirm, in writing, the business decisions made by client. The business decisions form a back-drop to the legal advice.

c. In most instances when a client succeeds with a claim against a lawyer,, the lawyer's file is bereft of documentation.

C. **Duty of Confidentiality:** Rule 1.05

1. **Statement of Rule.** Lawyer shall not knowingly reveal a confidence or secret of a client, or former client, use a confidence or secret to his or her advantage or for a third person's advantage.[14]

a. Rule 1.05 provides that a lawyer shall not knowingly reveal confidential information of a client or a former client to anyone else, other than the client, the client's representatives, or the members, associates, or employees of the lawyer's law firm, except as permitted by paragraphs (c) and (d), or as required by paragraphs (e) and (h) of Rule 1.05.

b. In multi-party representation, this rule is a primary Rule in jeopardy.

2. **Privileged vs. Unprivileged Information.** Confidential information divided into privileged and unprivileged information.

a. Privileged Information means that information gained through attorney-client relationship, protected under Rule 503 of Tx. Rules of Evidence, Rule 503 of Tx. Rules of Criminal Evidence or Rule 501 of Fed. Rules of Evidence.

b. Unprivileged information means all other information furnished by or relating to client acquired by lawyer during course of or by reason of his representation.

[14]Rule 1.05(b); ABA Rule 1.6.

3. **Beyond Privilege.** This duty is broader than attorney-client evidentiary privilege.[15] The duty starts earlier and ends later than many appreciate.

   a. The duty to keep a confidence applies even when there is no attorney-client relationship (e.g. initial interview).[16]

   b. The duty to keep a confidence extends after termination of attorney's employment.[17]

   c. In multi-party representation, the elastic boundaries of the Rule 1.05 Duty of Confidentiality should occupy the mind of every lawyer.

4. **Exceptions.** The well-known exceptions to the Duty of Confidentiality permit disclosures of client confidential information in certain circumstances. Practically, these exceptions are not often encountered and are not a major focus in surveying the problem areas.

   a. Client consents, after consultation

   b. Lawyer reasonably believes disclosure is necessary to comply with court order or law

   c. To enforce lawyer's claim against client (for fees)

   d. Establish malpractice defense, or

   e. Prevent client from committing crime or fraud.

5. **Modern Technology and Duty of Confidentiality**

   a. **Cell Phones**. Cell phones are not secure. One leading expert said that with $1,000 and 30 minutes to an hour, he could intercept cell

[15] See Brennan's, Inc. v. Brennan's Restaurants, Inc., 590 F.2d 168 (5th Cir. 1979) for excellent discussion of the distinction between privilege and duty of confidentiality.

[16] Sherwood v. South, 20 S.W.2d 805 (Tex. App. - San Antonio, 1930, writ ref'd); Lott v. Ayres, 611 S.W.2d 473 (Tex. App. - Dallas, 1980, writ ref'd n.r.e.).

[17] Rule 1.09(a)(3).

phone conversations.[18]

(1) The ethics opinions from various states caution against conveying confidential information over cell phones, but do not universally recommend against cell phone usage.[19]

(2) Ethics guidelines are lagging technological developments. Knowing that interception of cell phones is easy and routine, lawyers might resist temptation to convey confidences over a cell phone.

b. **E-Mail**. E-mail is susceptible to interception by anyone who has

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[18]Steve Gibson, Security Now, Episode #213, Sept. 10, 2009 (http://www.grc.com/securitynow.htm)("within a couple months there was going to be publicly available, open source technology to allow anyone to decrypt cellphone conversations" "We're at the level where the hobbyist with a couple thousand dollars can - needs to know nothing about radio and even hardware. And even all of the preprocessing steps for demultiplexing the data and analyzing it and performing spectrum analysis and finding the channels and everything, all of that's been done." "The problem is, we're all still using, what is it, three billion people in 200 countries, 80 percent of the cellphone market is GSM, globally. And it's no longer safe. Yes, absolutely. I don't think anybody is going to be spying on their neighbors or caring what random conversations are. But if people depended upon it for real security, that becomes a problem. And we've only talked about voice stuff. But all this applies to SMS. So, for example, there are banks which are now, as we know, using cellphones and SMS tokens for security. And they're not safe.")

[19]See N.Y. City Formal Ethics Op. No. 1994-11 (1994) (lawyers engaging in confidential conversations by cellular or cordless telephones or other communication devices readily capable of interception should consider steps sufficient to ensure security of conversations); N.C. Ethics Op. No. RPC 215 (1995) (in using cellular or cordless telephone to communicate client information that is intended to be confidential lawyer must take care to use a mode of communication that, in light of the exigencies of the existing circumstances, will best maintain any confidential information that might be conveyed in the communication; if the communication is susceptible to interception, the lawyer must advice the other parties to the communication about the risks of interception and the potential for confidentiality to be lost). See also ABA Formal Ethics Op. No. 99-413 (1999) (nature of cellular and cordless phone technology exposes them to risks not present with e-mail and other communication modes); Minn. Ethics Op. No. 19 (1999) (a lawyer may use digital cordless and cellular phones to communicate confidential client information when used within a digital service area; analog cordless and cellular phones may be used only if the lawyer obtains consent after consultation with client about the confidentiality risks associated with inadvertent interception; and when the lawyer knows or reasonably should know that a client or other person is using an insecure means, such as an analog cordless or cellular phone, to communicate with the lawyer about confidential information, the lawyer shall consult with the client about the confidentiality risks associated with inadvertent disclosure and obtain the client's consent).

access to the computer network to which a lawyer "logs on" and such communications are rarely protected from interception by anything more than a simple password.

(1) State ethics opinions have concluded that a lawyer does not violate the ethics rules by using electronic mail services, including the Internet, without encryption and without client consent to communicate with clients unless unusual circumstances require enhanced security measures.[20]

(2) Unusual circumstances involving an extraordinarily sensitive matter might require enhanced security measures like encryption.

(3) Like cell phone usage, perhaps formal ethics guidance lags technological developments.

D. **Duty of Loyalty:** Rule 1.06

1. **General Rule.** Lawyer is prohibited from representing conflicting interests.[21] The Duty of Loyalty is the heart of all conflicts of interests.

a. **Litigation Rule**: Rule 1.06(a) prohibits representation by a lawyer of opposing parties in litigation.

(1) Rule 1.06(a) speaks clearly to litigation situations. Absolute bar.

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[20]See, e.g., ABA Formal Ethics Op. No. 99-413 (1999) (lawyers do not violate ethics rules by sending clients information in unencrypted e-mail, provided that they take reasonable precautions to guard against disclosure); Ariz. Ethics Op. No. 97-04 (1997) (lawyers may want to have e-mail encrypted with a password known only to the lawyer and client but lawyers may still communicate with existing clients via e-mail about confidential matters); N.Y. State Ethics Op. No. 709 (1998) (lawyers may in ordinary circumstances use unencrypted e-mail to transmit confidential information; however, in circumstances where lawyer on notice for a specific reason that a particular e-mail transmission is a heightened risk of interception or where information is of such extraordinary sensitive nature that it is reasonable to use only a means of communication that is completely under the lawyer's control, the lawyer must select a more secure means of communication than unencrypted email); N.Y. City Formal Ethics Op. No. 1998-2 (1998) (firm need not encrypt all e-mail containing confidential client information, but should advise clients and prospective clients that communication over the Internet is not as secure as other forms of communication);

[21]Rule 1.06.

(2) The greater concern is outside of litigation. The boundaries are not absolute, as in litigation. Outside of litigation, multi-party representation could present ethics issues, without the lawyers' careful attention.

b. **Non-Litigation Rule**. Multi-party representation is permitted by Rule 1.06(c) with consent. Even though a conflict is present, or potential conflict, may exist by representing co-plaintiffs or co-defendants, multiple representation is permissible if:

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

(2) after each affected or potentially affected client *consents* to such representation,

(3) *after full disclosure* of the existence, nature and implications of the conflict and of the possible adverse consequences of common representation and the advantages involved, if any.[22]

c. **ABA Rule.** Rule 1.7 of the ABA Model Rules of Professional Conduct provides that a lawyer shall not represent a client, if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer *reasonably believes* the representation will not *adversely affect* the relationship with the other client; and

(2) each client *consents* after consultation.

d. Apart from attorney-client privilege, which is only present in a proceeding, the duty of confidentiality is always present.

(1) The privilege rules in multi-party representations have been fairly well understood. If litigation erupts between the joint clients, the privilege will not apply as to information shared between them and with their lawyer.

[22] Rule 1.06(c).

(2) The privilege will continue to protect that information as to the outside world.

e. Potential conflicts can devolve into an actual conflict.

(1) As stated in Comment 3 of Rule 1.06: An impermissible conflict may exist or develop by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question.

(2) If such a situation should develop after accepting multi-party representation properly under Rule 1.06, the lawyer shall promptly withdraw from one or more representations to the extent necessary for any remaining representation not to be in violation of these Rules.[23]

2. **Common Situations**

a. **Opposing Parties in Litigation.** Lawyer undertakes to represent opposing parties to the same litigation.

(1) Never permissible.

b. **Two Client with Substantially Related Matters.**

(1) Conflict exists if the representation of a client (or prospective client) involves a substantially related matter in which that client's (or prospective client's) interests are materially and directly adverse to the interests of another client of the lawyer.

(2) The multi-party representation is permissible if

(a) the lawyer reasonably believes that the representation of each client (or prospective client) will not be materially affected, and

[23] Rule 1.06(e).

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

c. **Client Interests Adversely Limited by Lawyer Duty to Another Client (or Lawyer's Interest).**

(1) Conflict exists if the representation of a client (or prospective client) reasonably appears to be or become adversely limited by the lawyer's responsibilities to another client or to a third party, or by the lawyer's own interests.

(2) Permissible, using same requirements as above.

(3) Common definition of "adverse interests" is any interest not identical to that of a particular client, the general consensus has been to recognize that interests may be dissimilar without being adverse.

(a) Conflicts in estate planning goals between husband and wife do not per se create either a material potential for conflict or true adversity between them.

(b) Conflicts in rights or obligations will create a material potential for conflict or true adversity."[24]

(4) Rule 1.06, Comment 6 states that the representation of one client is "directly adverse" to the representation of another client if the lawyer's independent judgment on behalf of a client or the lawyer's ability or willingness to consider, recommend or carry out a course of action will be or is reasonably likely to be adversely affected by the lawyer's representation of, or responsibilities to, the other client.

[24] Report of the Special Study Committee on Professional Responsibility: Comments and Recommendations on the Lawyer's Duties in Representing Husband and Wife, 28 Real Prop., Prob., & Tr. J. 765, 772 (1994).

(a) Dual representation also is directly adverse if the lawyer reasonably appears to be called upon to espouse adverse positions in the same matter or a related matter.

(b) On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not constitute the representation of directly adverse interests.

(c) However, common sense may deem such dual representation inadvisable depending upon the extent of competition between the clients.

3. **Duty of Loyalty in Non-Litigation Representation.**

a. Conflicts of interest in a non-litigation context (i.e. family business or estate planning; real estate transaction) may be difficult to assess. Relevant factors to consider include:

(1) length and intimacy of the lawyer-client relationships involved,

(2) functions being performed by the lawyer,

(3) likelihood that a conflict will actually arise, and

(4) probable harm to the client or clients involved if the conflict actually arises.

(5) The question is often one of proximity and degree.[25]

b. The fact that there is a listing of factors, in itself, indicates the vagueness of the line marking a conflict of interest.

4. **Duty of Loyalty in Estate Planning.** In estate planning or estate administration, Rule 1.06, Comment 15, contemplates the existence of

[25] Comment 13 of Rule 1.06.

conflicts of interest:

> Conflict questions may also arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise. In estate administration it may be unclear whether the client is the fiduciary or is the estate or trust, including its beneficiaries. The lawyer should make clear the relationship to the parties involved.

5. **Signed Writing Essential.** Although not required by Rule 1.06, a prudent lawyer will make sure that a conflict disclosure and a client's consent to the representation are reduced to writing and signed by each of the clients (or prospective clients).[26] A written engagement letter is essential.

E. Conflict Of Interest: Former Client: Rule 1.09

1. **General Rule.** After termination of the attorney-client relationship, the lawyer continues to owe former client certain duties. Lawyer may not undertake a representation adverse to a former client without the prior consent of the former client if:

    a. Such representation questions the validity of the lawyer's services or work product for the former client;

    b. Such representation in reasonable probability will involve a violation of Rule 1.05 (i.e. Confidentiality of Information); or

    c. Such representation is the same or a substantially related matter.[27]

2. **Questioning Validity of Work for Former Client.** Lawyer prohibited from challenging the work which the lawyer previously performed on behalf of a former client.

    a. Example: lawyer seeking to overturn a will that the lawyer previously prepared for former client.

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[26]See Rule 1.06, Comment 8.

[27]Rule 1.09(a). Rule 1.9 of the ABA Model Rules is the ABA counterpart to Rule 1.09.

3. **Violation of Confidentiality Obligations**

   a. Lawyer prohibited from being adverse to a former client if, in carrying-out such representation, there is reasonable probability that

      (1) the lawyer would make an unauthorized disclosure of, or an improper use of,

      (2) confidential information of the former client

      (3) to the disadvantage of the former client-

   b. Such confidential information having been obtained by the lawyer in the course of the representation of the former client.

4. **Same Matter and Substantially Related Matters**

   a. Lawyer prohibited from switching sides in the middle of battle (i.e. lawyer initially representing the plaintiff in a legal dispute and then subsequently representing the defendant in the same legal dispute).

   b. Two aspects to rule: "same matter" and "substantially related matters".

      (1) **Definition of Substantially Related.** "Substantially related" matter not defined in Rule 1.09.

      (2) Comment 4A to Rule 1.09 states that “substantially related” involves a situation where a lawyer could have acquired confidential information concerning the former client that could be used by the lawyer to the disadvantage of the former client or the advantage of the current client or another person.

5. **Waiver of Conflict by Former Client**

   a. The protected party is the former client. Thus, former client can always consent to adverse representation.

b. To be effective, though, the consent must be informed.[28]

c. Lawyer must disclose all of the relevant circumstances to the former client, including the lawyer's past or intended role on behalf of each client.[29]

6. **Disqualification Imputed to other Attorneys At Firm**. If a lawyer is prohibited from undertaking a representation against a former client under Rule 1.09, then all of the other lawyers at that firm are also disqualified from undertaking such representation[30].

7. **When Does Client Become A "Former Client"**

a. The assessment of whether a person is current client or a former client is important; this assessment will ultimately determine which professional ethics rules govern the lawyer's conduct--the current client rules or the former client rules.

b. Not always easy to determine when a current client becomes a former client.

c. Factors to consider include:

(1) scope of the contemplated representation (ongoing and involving various legal matters or limited and involving a single legal matter),

(2) length of the lawyer-client relationship,

(3) period of time that has elapsed since the lawyer last performed work for the client,

[28]See Restatement Third of the Law Governing Lawyers §122, Comment c(i).("Informed consent requires that each affected client be aware of the material respects in which the representation could have adverse effects on the interests of that client. The information required depends on the nature of the conflict and the nature of the risks of the conflicted representation. The client must be aware of information reasonably adequate to make an informed decision."). See discussion of informed consent in this paper.

[29]See Rule 1.09, Comment 10.

[30]Rule 1.09(b)

(4) existence of a termination letter from either the client or the lawyer, and

(5) client's subsequent retention of another law firm for legal work.

d. Helpful strategies

(1) Clear engagement letter at beginning of relationship setting forth scope

(2) Termination letter ending relationship.

F. **Lawyer as Intermediary:** Rule 1.07

1. **Description of Concept of Lawyer as Intermediary.** Lawyer permitted to act as an intermediary by jointly representing multiple clients in the same matter.[31]

a. The intermediary form of representation (or joint representation) is possible when the joint clients have common goals and interests that outweigh potential conflicting interests.

b. The role of the lawyer is to develop these common goals and interests on a mutually advantageous basis-with the end result being that everybody "wins".

c. For a consent to be respected, then it must be informed consent.

d. Examples of this type of joint representation include: assisting multiple persons in the formation of a business enterprise, or performing estate planning for a husband and wife.

2. **Special Role Contemplated** As an intermediary, lawyer assumes a special role.

a. Rather than acting in partisan manner, advocating for the interests of a particular person to the detriment of others, the role of the

[31]Rule 1.07.

lawyer-intermediary is to promote the interests of all of the clients-with the goal of achieving a resolution that benefits everyone.

b. At the beginning of the intermediation (joint representation), each client should be advised of the lawyer's special role in the intermediation.

3. **Requirements of Lawyer as Intermediary**

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

(1) the lawyer consults with each client concerning the implications of the joint representation, including the advantages and risks involved, and the effect on the attorney-client privileges;

(2) the lawyer obtains each client's written consent to the joint representation; and

(3) the lawyer reasonably believes that:

(a) the matter can be resolved without the necessity of contested litigation on terms compatible with the clients' best interests,

(b) each client will be able to make adequately informed decisions in the matter,

(c) there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful, and

(d) the joint representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.[32]

[32]Rule 1.07(a).

4. **Evaluating the Propriety of Intermediation**

a. Considerations

(1) Lawyer may never represent opposing parties to the same litigation.[33]

(2) Lawyer cannot undertake a joint representation if contested litigation between the parties is reasonably expected or if contentious negotiations are contemplated.[34]

(3) If definite antagonism present between parties, lawyer should strongly consider declining intermediation because the possibility that the parties' interests can be adjusted by the joint representation is not likey.[35]

(4) Lawyer needs to consider the impact the joint representation will have on confidentiality of information and the attorney client privilege.[36]

b. If the lawyer concludes that Rule 1.07 prohibits him from acting as an intermediary in a legal matter, then all of the lawyers in the same firm would also be disqualified.[37]

5. **Confidentiality/Attorney-Client Privilege**

a. In a joint representation, there are no secrets.

(1) All information obtained by the lawyer from whatever source (third parties, one of the clients, the lawyer's own investigations, etc.) that would help the clients make

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[33] Rule 1.06(a).

[34] See Rule 1.07, Comment 4.

[35] See Rule 1.07/Comment 4.

[36] See Rule 1.07, Comment 5.

[37] Rule 1.07(e).

informed decisions regarding the common legal matter should be disclosed to each of the clients.

(2) Moreover, in the event litigation subsequently arises between the clients concerning the common legal matter, the attorney-client privilege will likely not protect any of the communications between the lawyer and any of the clients concerning such legal matter.

b. As a prerequisite to joint representation, each client should be advised of the effect that the joint representation will have concerning confidentiality and the attorney-privilege.

6. **Ongoing Consultation**

a. Lawyer should regularly consult with each client regarding decisions and considerations relevant in making the decision so that each client can make adequately informed decisions.[38]

b. To avoid the lawyer becoming an advocate for a particular client, each clients will need to be more active in decision making

7. **Termination of Intermediation**

a. A lawyer must withdraw as an intermediary if any of the clients requests or if any of the requirements for serving as an intermediary cease to exist. The withdrawal must be a complete withdrawal, meaning that the lawyer cannot represent any of the clients in the legal matter subject to the joint representation.[39]

b. Lawyer's continued representation of some of the clients would be improper even with the consent of all of the clients involved in the joint representation.

c. The failure of joint representation is especially harmful because each client will need separate legal counsel; intermediary lawyer may face complaints from a former joint clients.

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[38] Rule 1.07(b).

[39] Rule 1.07(c).

G. **Informed Consent**

1. The conflict of waiver rules are subject to waiver through informed consent by a client who elects less than full protection afforded by the Rules. There might be practical situations when a waiver of a conflict of interest is advisable.

   a. E.g. client in a multiple representation might wish to avoid the added costs that separate representation often entails.

   b. E.g. client might consent to a conflict where that is necessary in order to obtain the services of a particular law firm.

   c. If consent not obtained, then the lawyer must withdraw.

2. Comments to Texas Rules observe that:

   a. Disclosure and consents are not formalities.

   b. Sophistication of client affects nature of consent. Less sophisticated clients require greater information for them to have an informed consent.[40]

3. There are limitations on the scope of a client's power to consent to a conflicted representation.

   a. Consent based on an inadequate understanding of the nature and severity of the lawyer's conflict.
   b. Consent violates law.

   c. Client lacks capacity.

   d. Client free of coercion.

   e. It is not reasonably likely that the lawyer will be able to provide adequate representation to the affected clients

[40]Rule 1.06, Comment 8.

f. When a lawyer undertakes to represent clients who oppose each other in the same litigation.[41]

4. What is Informed Consent?

a. The Restatement (Third) of the Law Governing Lawyers is offers the best commentary on the nature of informed consent and the steps required to be taken by the lawyer in order to provide sufficient information, both quantitatively and qualitatively, to the client.

b. Informed consent requires that

(1) Each affected client be aware of the material respects in which the representation could have adverse effects on the interests of that client.

(2) Information required depends on the nature of the conflict and the nature of the risks of the conflicted representation.

(3) The client must be aware of information reasonably adequate to make an informed decision.

c. Requisite information forming basis of an informed consent normally

(1) should address the interests of the lawyer and other client giving rise to the conflict; contingent, optional, and
(2) tactical considerations and alternative courses of action that would be foreclosed or made less readily available by the conflict;

(3) the effect of the representation or the process of obtaining other clients' informed consent upon confidential information of the client;

(4) any material reservations that a disinterested lawyer might

[41] Restatement (Third) of the Law Governing Lawyers §122, Comment c(i). The list of the elements of a full disclosure is taken from C. Wolfram, Modern Legal Ethics § 7.2.4, at 345-46 (1986). See Restatement, Reporters notes to Comment c(i).

reasonably harbor about the arrangement if such a lawyer were representing only the client being advised; and

(5) consequences and effects of a future withdrawal of consent by any client, including, if relevant, the fact that the lawyer would withdraw from representing all clients.[42]

d. Circumstances of the conflict will affect the nature of information to be supplied.

(1) Conflict arises solely because a proposed representation will be adverse to an existing client in an unrelated matter: knowledge of the general nature and scope of the work being performed for each client normally suffices to enable the clients to decide whether or not to consent.

(2) Consent relates to a former-client conflict: former client must be aware that the consent will allow the former lawyer to proceed adversely to the former client.

e. The lawyer is responsible for providing sufficient information.

(1) But the client might already know the information or learns it from other sources.

(2) If the client is independently represented, then less information will be required.

f. Provide information in writing, though not technically required by Texas Rules.[43]

(1) Difficult to prove oral consent.

[42]Restatement (Third) of the Law Governing Lawyers §122, Comment c(i). See, Conoco, Inc. v. Baskin, 803 S.W.2d 416, 419 (Tex.App. - El Paso, 1991, no writ) (full disclosure of existence, nature, implications, and possible adverse consequences of multiple representations).

[43]Rule 1.06, Comment 8 ("While it is not required that the disclosure and consent be in writing, it would be prudent for the lawyer to provide potential dual clients with at least a written summary of the considerations disclosed.")

g. Affirmative response needed from client. Silence does not equate to acquiescence. Consent may be inferred, however.

IV. Common Examples of Multi-Party Representation

A. A Non Client in the Meeting

1. **Common Example:** Existing client brings his or her parent to lawyer for lawyer to advise parent on matters, often government benefits or estate planning. Only one child present.

2. **Identifying Who is and Who is Not the Client**

   a. The first question is who is the client - the parent or the existing client?

   b. If the client is the parent and all children, then address the fact that only one child present.

3. **Will There Be Confidential Information?**

   a. Will the parent want or need to confide in the lawyer? If so, then the only client should be the parent.

   b. Does the parent have the opportunity to discuss these issues in private with the lawyer, or is the child always present?

   c. If so, then the issue of prior or current representation of the child must be addressed.

4. **Importance of Declination Letter**

   a. If a child (or other person) in the room is not to be a client, then a declination letter is called for.
   b. A declination letter might also need to go to others not present, but whose status might called in to question.

5. **Will there be continued work for first client - who brought in their parent?**

   a. If the client who brought in his or her parent will continue to use

the lawyer, then some important boundaries need to be established by the lawyer, to everyone involved.

b. Conflict waivers will be needed.

B. **Family Attorney**

1. **Example.** Family lawyer is called upon to represent multiple family members with varying plans, goals and interests. The multiplicity of individuals and goals inherent in family representation gives rise to ethical problems and legal problems in two main areas-confidentiality and conflicting interests.

2. **Issues**

a. Confidentiality of Information

b. Loyalty

c. Disclaiming non-clients

3. **Basic Models.** Three basic models of representation have been proposed by commentators and practitioners for addressing confidentiality and conflicting interests concerns

a. joint representation (i.e. the open relationship),

b. separate representation (i.e. the closed relationship), and

c. independent representation.

4. **Confidential Communication**

a. Consider the Comments [31] to Model Rule 1.7 dealing with joint representation in non-litigation contexts

> [31] As to the duty of confidentiality, continued 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. See Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

b. Key points in above quote

(1) Requests by one to keep information confidential will not work in common representation - or at least will not work easily.

(2) Duty of loyalty runs to all clients.

(3) Clearly advise everyone that information will be shared.

c. Issues & Problems

(1) Client contact is rarely equal. Communications are likewise often unequal, in practice.

(2) How to keep the quiet family member informed?

5. **Joint Representation.**

   a. In a joint representation or open relationship, the same lawyer represents the family members jointly.

   b. The family members, and lawyer work together as a team to implement a coordinated estate plan.

   c. There are no secrets in a joint representation. Any information and communications relevant to the joint representation disclosed to the lawyer by one family member should be disclosed by the lawyer to the other family members.

   d. Furthermore, if litigation subsequently arises between the family involving estate planning matters, the attorney-client evidentiary privilege would not apply. See Rule 503(d) of the Texas Rules of Evidence for exceptions to the attorney-client privilege including fraud, claimants through the same deceased client, documents attested to by the lawyer, and joint clients.

      (1) The attorney-client evidentiary privilege would continue to apply, however, to litigation between the family members, on the one hand, and outside third parties on the other hand.
      (2) A joint representation letter may discourage the family members from fully confiding in the lawyer because they know that anything disclosed that is relevant to the joint representation may be disclosed to the other family members.

   e. Nevertheless, the joint representation model is probably the most common form of representation of family members.

6. **Separate Representation.**

   a. Like the joint representation model, in a separate representation or closed relationship, the same lawyer represents all family members

   b. However, in a separate representation, each family member are each regarded as separate and distinct clients of the lawyer.

(1) Because the lawyer regards the family members as separate clients, the lawyer must not disclose the confidences of one to the any other.

(2) This puts the lawyer at risk of being caught in the unenviable position of learning information from one that would be important to anther family member.

c. The lawyer would not be permitted to disclose such information to the other family member because of the duty of confidentiality owing to the disclosing family member and consequently the attorney-client privilege should apply to such information.

d. There is disagreement about the propriety of the separate representation model.

7. **Independent Representation.**

a. In an independent representation, the family members are each represented by different legal counsel.

b. This form of representation protects the confidentiality and attorney-client privilege of communications between a family member and his or her lawyer.

c. From the lawyer's perspective, independent representation is the safest form of representation in terms of avoiding conflict and confidentiality issues.

d. A major drawback of this form of representation, however, is that it is more costly and less efficient than the other forms of representation in which only one lawyer is retained. If a lawyer does not believe that adequate representation can be provided to a family members through either joint or separate representation, the lawyer should have family members retain separate legal counsel.

8. **Client’s Choice.** Lawyer should discuss each of the forms of representation described above with the family at the very beginning, along with the advantages and disadvantages of each form, and let the family members select the form of representation that will best suit their

needs. If the family selects either the joint representation (i.e. open relationship) or separate representation (i.e. closed relationship), the lawyer should obtain their agreement to such representation in writing.

C. Representing the Organization

1. Introductory Thoughts About Representing Organization

a. Among the most difficult of representations.

b. Ethics rules permit entity representation.[44]

(1) Rule 1.12(a) states that

> A lawyer employed or retained by an organization represents the entity.

(2) "as distinct from its directors, officers, employees, members, shareholders or other constituents."[45]

(3) Rule applies whatever the form of the organization.

c. The lawyer's duty is to serve the best interests of the entity, rather than that of the constituent partners or shareholders individually.

(1) Rule 1.12(a): "the lawyer shall proceed as reasonably necessary in the best interest of the organization without involving unreasonable risks of disrupting the organization and of revealing information relating to the representation to persons outside the organization."

d. The lawyer must deal and communicate with the entity through its constituents.

(1) Rule 1.12(e) requires lawyers to explain that the entity, and not the constituents, is the client "when it is apparent that

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[44]Discussion here taken from www.tlie.org/newsletter/adv0807/0807-1.htm (Iast viewed May 22, 2009).

[45]Id.

the organization's interests are adverse to those of the constituents with whom the lawyer is dealing or when explanation appears reasonably necessary to avoid misunderstanding on their part."

(2) Comment 4 to Rule 1.12 indicates that whether such warnings are necessary "may turn on the facts of each case." When such a warning is necessary, the best practice is to put the warning in writing to avoid later disputes as to whether adequate warning was given.

(3) Engagement letters should identify the point of contact in the organization.

2. **Formation of Entity**

a. **Available Options.** When a lawyer is involved in forming an entity, a number of options for explaining the nature of the representation have been used.

(1) Lawyer represents one of the constituents of the contemplated entity, and then may represent the entity later.

(2) Lawyer represents all of the constituents during formation, and may involve representation of the entity later.

(3) Lawyer may disclaim representation of individual constituents completely, and only represent the entity both at the formation and later stages.

b. **Representing One Constituent**

(1) Commonly, a lawyer represents one constituent in the formation of an entity. Often, this is a long-time client who is putting the transaction together.

(2) Engagement letters and contracts should importantly reflect who the client is.

(3) As to unrepresented constituents, the lawyer "should not

give advice to an unrepresented person."[46]

(a) An attorney client relationship can be implied by the act of giving legal advice.[47]

(b) Thus, if legal advice is given to unrepresented constituents, the lawyer may have an affirmative duty to avoid conflicts.

(c) Lawyers should document, preferably by a signed acknowledgment, that unrepresented constituents are not the client and have not been given individual legal advice.

(4) If long-time client forming organization and the lawyer for the long-time client is to represent the organization, there is a potential for conflicts of interest between the long-term client and the entity.

(a) Conflicts require disclosure and consent "when there is a substantial risk that the lawyer's representation of the client would be materially and adversely affected . . . by the lawyer's duties to another current client . . . ."[48]

(b) Given the duties of the lawyer to the organization noted earlier, it is clear that representing a constituent and the entity poses a risk of affecting the representation.

i) In such a situation, when the conflict is subject to consent, written informed consent

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[46]Comment to Rule 4.03.

[47]See, e.g. Bituminus Casualty Corp. v. Texas Window Specialties, 2006 WL 864277 (W.D. Tex. 2006)(issue of fact as to whether there was an attorney client relationship when lawyer provided both corporate and personal legal services to a constituent).

[48]Restatement of Law (Third) Governing Lawyers § 121. See Rule 1.06(a)-(c).

should be obtained from the affected clients.[49]

ii) The disciplinary rules generally do not require written consent, but it should be noted that a new comment to the ABA Model Rules adopted in 2002 requires "written confirmation" of consent.[50]

c. **Informed Consent Required.** Informed consent requires that the lawyer disclose both the risks and advantages of continuing to represent the parties involved.[51]

(1) In entity formation, there are several risks.

(a) Lawyer may receive confidential information from the constituent that the constituent does not want to share with other constituents who deal with the lawyer on behalf of the partnership.

(b) The attorney-client privilege does not generally apply between the parties to a multiple representation.

(c) The lawyer may be a witness in the event of a later dispute between the constituents, and may be unable to represent either the original constituent client or the entity.

(d) If the entity were ever to have a claim against the represented constituent, the lawyer may be prohibited from representing either the entity or the constituent.[52]

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[49]Restatement § 122. See Rule 1.06(c)(2).

[50]ABA Model Rules of Professional Conduct Rule 1.7 (b)(4)

[51]See Rule 1.06(c).

[52]See Rule 1.06(d).

(2) There is a significant advantage to the representation, however. The use of only one lawyer for formation and representation may significantly reduce attorneys fees.

(3) Detailing both the advantages and disadvantages of the joint representation in a written, acknowledged form will help avoid misunderstandings and claims.

d. **Representation of All Constituents**

(1) A common situation is for a lawyer to represent all constituents in an entity formation.

(a) The ethical issues noted in the representation of a single constituent apply to representation of multiple constituents.

(b) The possibility of differences between the constituents adds to the risks of representation.

(c) The Restatement provides discussion of a scenario involving partnership formation under Illustrations 4 and 5 of Section 130 which notes conflicts requiring informed consent arising from different contributions to the partnership by the partners.

(d) It is also common for there to be unresolved differences that are subject to negotiation when a partnership is formed.

(2) When there are unresolved differences, lawyers must consider Rule 1.07, the intermediary rule, before deciding to take on the representation.

(a) Mediating disputes between clients is permitted with informed consent if neither "contested litigation" or "contentious negotiations" are anticipated.[53]

[53] Rule 1.07, Comment 4.

(b) Lawyer may have a hard time objectively analyzing whether potential negotiations will be contentious.

(3) A variation on the multiple constituent representation model can arise when a lawyer has a long time client who is involved in the entity formation.

(a) Comment i to Section 132 of the Restatement analyzes whether a lawyer can represent a long time client in a matter as well as a new client on a one time basis, and retain the ability to represent the long time client in the event of a dispute among the parties.

(b) The new client is called an **accommodation client**.

(c) The Restatement allows for this type of arrangement, if the new client is aware of the long time representation and does not expect the lawyer to keep confidences.

(d) The Texas Rules arguably allow for accommodation clients if "prior consent is obtained."[54] This suggests that for accommodation client status to work, a lawyer needs to get such consent in writing before beginning representation.

(4) The difficulty in relying on accommodation client status is that nothing changes the basic conflict rule that the lawyer must able to adequately represent all of the clients. When a lawyer relies on accommodation client status to represent a long time client, in a malpractice claim the new client may argue that the lawyer had only the long term client's interests at heart during the time that the lawyer represented both clients.

[54] Rule 1.06(d).

e. **Representation of Only the Entity**

(1) A few cases and commentators have suggested that a lawyer can represent only the entity from the start. The author has found in discussions with law firms that this is a model commonly used by lawyers in entity formation. The best exposition of this model of representation is found in Arizona Ethics Opinion 02-06 (2002).

(a) To date, no Texas case law or ethics opinion addresses the "entity only" model of representation.

(b) The Arizona opinion analyzes rules very close to Texas Rules 1.05 (Confidentialty), 1.06(General Conflict Rule) and 1.12(Organization as Client).

i) Because partnership and incorporation statutes permit ratification of actions prior to formalization of the entity, the opinion reasons that a lawyer may represent the entity only if the forming constituents are notified and they ratify pre-formation actions of the entity after formation of the entity.

ii) Interestingly, the opinion does not address who the client is in the event that the entity is not ultimately formed.

(c) Arizona opinion details how the lawyer should deal with constituents.

i) Besides the requirements of notifying the constituents that they are not the client and subsequent ratification of pre-formation actions, the opinion notes that all of the constituents should be warned that confidential information must be shared with other constituents, though not with others outside the organization.

ii) The opinion also indicates that the lawyer

should regularly remind the constituents that the organization is the client, rather than each of the constituents individually.

(2) As one would expect with an ethics opinion, the details of potential liability with regard to this model are not discussed.

(a) Missing from the opinion is any discussion of how the lawyer may be subject to liability for an implied attorney client relationship despite the existence of the documentation regarding the organization as client.

(b) In Manion v. Nagin,[55] the court acknowledged that it was possible for a lawyer to represent only the entity, but noted that giving legal advice to a constituent as to their individual situation created an attorney client relationship.

f. The practical issue in many situations is how the lawyer can avoid giving legal advice to constituents when forming an entity. Consider whether answering the following questions, which may be raised in the course of working with constituents in forming an entity, could constitute individual legal advice:

(1) What is my potential liability under the entity alternatives?

(2) What are the tax implications?

(3) What are my options if I want to withdraw from the entity?

g. It may be difficult for a lawyer to repeat at all times necessary that she or he represents only the entity. Lawyers who rely on this model should understand the follow through necessary to make certain that they represent only the entity.

h. The disciplinary rules expressly dealing with representation of entities fail to address the issue of who is represented when the

[55] 394 F.3d 1062 (8th Cir. 2005).

entity is in the formation process. At the time formation is in progress, the entity usually does not yet exist. The nature of this representation has been the subject of conflicting analysis by ethics commentators.

D. **Estate Planning**

1. **Example.** The most common example of joint representation in estate planning is husband and wife. Entering the picture in modern times are non-married couples and domestic partners.

2. **Basic Models of Representation.** Three basic models of representation have been proposed by commentators and practitioners for addressing confidentiality and conflicting interests concerns

   a. joint representation (i.e. the open relationship),

   b. separate representation (i.e. the closed relationship), and

   c. independent representation.

3. **Joint Representation.**

   a. In a joint representation or open relationship, the same lawyer represents the husband and wife (or domestic partners) jointly. This paper short-hands all of these situations when using husband and wife nomenclature.

   b. Under the joint representation model, husband, wife, and lawyer work together as a team to implement a coordinated estate plan.

   c. There are no secrets in a joint representation. Any information and communications relevant to the joint representation disclosed to the lawyer by one spouse should be disclosed by the lawyer to the other spouse.

   d. If litigation subsequently arises between the husband and wife involving estate planning matters, the attorney-client evidentiary privilege would not apply.

(1) See Rule 503(d) of the Texas Rules of Evidence for exceptions to the attorney-client privilege including fraud, claimants through the same deceased client, documents attested to by the lawyer, and joint clients.

(2) The attorney-client evidentiary privilege would continue to apply, however, to litigation between the husband/wife, on the one hand, and outside third parties on the other hand.

(3) A joint representation may discourage both the husband and wife from fully confiding in the lawyer because they know that anything disclosed that is relevant to the joint representation may be disclosed to the other spouse.

e. Nevertheless, the joint representation model is probably the most common form of representation for estate planning purposes.

4. **Separate Representation.**

a. Like the joint representation model, in a separate representation or closed relationship, the same lawyer represents both the husband and the wife in the estate planning process.

b. However, in a separate representation, the husband and wife are each regarded as separate and distinct clients of the lawyer.

(1) Because the lawyer regards the husband and wife as separate clients, the lawyer must not disclose the confidences of one spouse to the other spouse.

(2) This puts the lawyer at risk of being caught in the unenviable position of learning information from one spouse that would be important to the other spouse in formulating his or her estate plan.

c. However, the lawyer would not be permitted to disclose such information to the other spouse because of the duty of confidentiality owing to the disclosing spouse and consequently the attorney-client privilege should apply to such information.

d. It is important to note that there is disagreement among commentators about the propriety of the separate representation

model. The practitioner should carefully review applicable rules and regulations before undertaking such representation.

5. **Independent Representation.**

   a. In an independent representation, the husband and wife are each represented by different legal counsel.

   b. This form of representation ensures that each spouse has his or her own counsel "looking-out" solely for the interests of that spouse.

   c. It further protects the confidentiality and attorney-client privilege of communications between a spouse and his or her lawyer.

   d. From the lawyer's perspective, independent representation is the safest form of representation in terms of avoiding conflict and confidentiality issues.

   e. A major drawback of this form of representation, however, is that it is more costly and less efficient than the other forms of representation in which only one lawyer is retained. If a lawyer does not believe that adequate representation can be provided to a husband and wife through either joint or separate representation, the lawyer should have one or both of the spouses retain separate legal counsel.

6. Texas Supreme Court has held that a claim for malpractice against an estate planning lawyer for negligent estate planning cannot be brought by the estate beneficiaries, but may be by an estate's personal representative.[56]

7. The key concept underlying the rule is that estate planning lawyer does not owe a legal duty to the beneficiaries of an estate when the drafting lawyer has an attorney-client relationship only with the testator.[57]

   a. Texas Supreme Court in *Barcelo* affirms previous Texas court of appeals' decisions holding that a lawyer does not owe a duty to

[56]Most notable cases are: Barcelo v. Elliot, 923 S.W.2d 575 (Tex. 1996), and Belt v. Oppenheimer, Blend, Harrison and Tate, 192 S.W.3d 780 (Tex. 2006).

[57]Barcelo v. Elliot, 923 S.W.2d 575 (Tex. 1996).

intended beneficiaries of a will who are not in privity of contract with the lawyer.[58]

8. In *Barcelo,* a lawyer prepared a pourover will and an inter vivos trust for a client as part of an estate plan for the client. After the death of the client, the probate court declared the trust to be invalid and unenforceable. As a result, the deceased client's residuary estate passed by intestacy to persons other than the intended beneficiaries of the inter vivos trust.

   a. The beneficiaries of the trust brought a malpractice action against the lawyer who prepared the estate planning documents.
   b. At the trial court level, the lawyer moved for summary judgment on the sole ground that he did not owe a duty to the beneficiaries of the trust because he never represented them. The trial court granted the lawyer's summary judgment motion and the court of appeals affirmed.

   c. On appeal to the Texas Supreme Court, the sole question presented was:

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

   d. Texas Supreme Court adhered to the common law privity rule that a lawyer owes a duty of care only to his or her client, not to third parties who may have been harmed by the lawyer's negligent representation of the client.

      (1) Texas Supreme Court rejected a cause of action based on a third-party-beneficiary contract theory on the ground that a legal malpractice action in Texas is an action in tort, not in contract, and is therefore governed by negligence

[58] Dickey v. Jansen, 731 S.W.2d 581, 582 (Tex. App.-Houston [1st Dist.] 1987, writ ref'd n.r.e.) (lawyer who allegedly was negligent in drafting a testamentary trust owes no duty to intended beneficiaries); Berry v. Dodson, Nunley & Taylor, 717 S.W.2d 716, 718 (Tex. App.-San Antonio 1986) (lawyer who allegedly was negligent in failing to diligently prepare a will for execution before testator's death owed no duty to intended beneficiaries), judgm't vacated by agr., 729 S.W.2d 690 (Tex. 1987).

principles.

(2) Three dissenters declared that it was time for Texas to join the majority of states which have relaxed the privity barrier in the estate planning context in order to provide intended beneficiaries a cause of action against a lawyer who negligently prepares estate planning documents.

(a) The dissent complained that the majority, by denying a cause of action in favor of the intended beneficiaries, created a situation where a lawyer who is negligent in the preparation of estate planning documents is accountable to no one because the client (testator/grantor) is dead; although the personal representative would succeed to the cause of action of the deceased client, the estate itself may not suffer any harm or diminution of funds as a result of the lawyer's negligence (except perhaps attorney's fees paid).

(b) All three dissenting justices agreed that intended beneficiaries of an estate plan should have a right of action against a negligent lawyer, they differed as to the class of persons who could qualify as intended beneficiaries and therefore maintain an action. Two dissenting justices favored a broad class of beneficiaries composed of any person claiming to be an intended beneficiary of the deceased client's estate. The third dissenting justice, on the other hand, advocated limiting the class of intended beneficiaries only to those persons specifically named or identified on the face of the estate planning documents.

e. As mentioned above, the decision by the Texas Supreme Court in Barcelo places Texas among the minority of states holding on to the privity requirement and denying beneficiaries a cause of action against a lawyer who negligently prepares estate planning documents.

(1) Overwhelming majority of states have provided beneficiaries with a cause of action against a lawyer who

negligently prepares estate planning documents despite the lack of privity between the lawyer and beneficiaries. The "majority states" have afforded beneficiaries this right of action on one of two theories.

(a) Cause of action of an intended beneficiary against the negligent estate planning lawyer sounding in tort/negligence in that the lawyer owes a duty of care directly to the beneficiary.[59]

(b) Cause of action of the intended beneficiary sounds in contract in that the beneficiary is a third-party-beneficiary of the estate planning contract between the lawyer and the deceased client.[60]

(2) The nature of the cause of action may be important because the statute of limitations may differ for a tort action and a contract action.

f. Although a beneficiary is precluded from asserting a claim against an estate planner under *Barcelo*, there is no legal bar, i.e., Barcelo, preventing an estate's personal representative from maintaining a legal malpractice claim on behalf of the estate against the decedent's estate planners.[61]

g. As a result, an estate's personal representative, on behalf of the estate of a decedent, may assert a malpractice claim against the decedent's estate planners for negligent tax planning that results in depletion of the estate.

(1) What about a beneficiary, acting as Executor, bringing the suit and bypass the Barcelo rule?

(2) Recovery would go to Estate, not beneficiary.

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[59]Needham v. Hamilton, 459 A.2d 1060, 1061 (D.C. Ct. App. 1983).

[60]Guy v. Liederbach, 459 A.2d 744, 752-753 (Pa. 1983).

[61]Belt v. Oppenheimer, Blend, Harrison and Tate, 192 S.W.3d 780 (Tex. 2006).

h. Texas Supreme Court opinion in *Belt* was one of first impression.

(1) In *Belt*, a law firm prepared a will for a client as part of an engagement for estate planning. After the death of the client, the client's estate incurred over $1,500,000 in estate tax liability.

(2) Co-Executors of the estate brought a malpractice action against the law firm and its attorneys claiming

(a) negligent drafting of the will, and

(b) negligent advice in asset management, which both were claimed to result in tax liability that could have been avoided by competent estate planning.

(c) At the trial court level, relying on the Barcelo decision, the law firm moved for summary judgment on the ground that estate planners owe no duty to the personal representatives of a deceased client's estate.

(3) The trial court granted such motion and the court of appeals affirmed. On appeal to the Texas Supreme Court, the sole question presented was:

(a) "Whether the Barcelo rule bars suits brought on behalf of the decedent client by his estate's personal representatives."

(4) Texas Supreme Court held that the Barcelo rule does not bar suits brought on behalf of the decedent client by his estate's personal representatives.

(a) The court adhered to the long-standing, common-law principle that actions for damage to property survive the death of the injured party.

(b) Court held that a claim for legal malpractice accrues before the decedent's death.[62] While the primary

[62]Id. at 785.

damages at issue, i.e., increased tax liability, do not occur until after the decedent's death, the lawyer's alleged negligence occurred while the decedent was alive and, thus, the injury accrues during the client's lifetime and the claim survives the client's death.

(5) The court said that precluding both beneficiaries and personal representatives from bringing suit for estate-planning malpractice would essentially immunize estate-planning attorneys from liability for breaching their duty to their clients, and allowing estate-planning malpractice suits may help provide accountability and thus an incentive for lawyers to use greater care in estate planning.[63]

i. *Belt* allows for second guessing with input from the deceased client. If the client indicated to the lawyer that the client did not want the complexity of a family partnership, for example, then the lawyer's file had be well documented to carry the burden of proof on the lawyer.

9. **Practical Pointers.** Professor Gerry W. Beyer suggests the following tips to avoid risks:

a. Use detailed client interview forms and checklists

b. Ask for documentation supporting client's answers to questions.

c. Practice good client communication: promptly answer questions and quickly return phone calls.

d. Avoid procrastination.

e. Document all unusual requests by the client, and document that the client has been informed of more conventional methods and the potential adverse effect of unusual provisions in a will.[64]

V. PRACTICAL STRATEGIES FOR MULTIPLE PARTY REPRESENTATION

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[63]Id. at 789.

[64]www.tlie.org/newslet/adv0612/061201.htm (Last accessed May 22, 2009).

A. **Documentation.** The key lesson of the ages in avoiding malpractice issues is documentation, communication and then more documentation.

1. **Before commencement of representation**

a. Use client intake forms

(1) Identify client.

(2) Identify conflicts of interest

(a) Prior representation of one of the joint clients.

(3) Identify who controls client.

(4) Client intake forms should not ask for every bit of information needed to carry out representation, but should instead be focused on gathering information sufficient to decide if the lawyer is willing to receive confidential information.

(5) Modern law practice more frequently involves matters concern foreign business activities. Consider dealing with the Foreign Corrupt Practices Act issues in initial client set up documentation.

(6) Once confidential information has been received, a potential client is entitled to protection of the confidence, even if the lawyer subsequently rejects the matter.

b. If representation is declined, then document it. Use a declination letter.

2. **Commence of representation**

a. Important documentation: engagement letter.

b. Heart of engagement letter[65]

[65] Taken from Texas Lawyers Insurance Exchange Newsletter, No. 3 (2005), reprinted at http://www.tlie.org/newslet/adv0512/0512-2.htm (last accessed May 11, 2009).

(1) The heart of an engagement letter or client contract should focus on:

(a) Client identity

i) Accept or reject
ii) Declination letters to non-clients

(b) Scope of the engagement

(c) Fee arrangement

(d) Disclosure and consent to potential conflicts

(e) Exit from relationship

(2) Client Identity. Establishing client identity in engagement letter forces lawyer to analyze confusing client situations up front.

(a) Example: Group of persons seeks to form a corporation. Lawyer needs to determine whether one or more of the individuals should be the client and determine if individual needs may conflict with the corporate interest.
(b) Example: When a third party is paying for the legal services. A letter to the third party disclaiming any attorney client relationship can avoid claims that the lawyer failed to act in the interest of the third party.

(3) Scope. The scope of the engagement should be established early, and may need to be altered as a matter progresses.

(a) The scope of engagement includes a definition of the tasks to be undertaken by the lawyer, the client, and by third parties.

i) If the client has been warned in the engagement letter about the work they will have to do in connection with discovery, the

chances that the lawyer will be sanctioned for the client's lapses diminishes.

ii) When the services of an accountant or other professionals are necessary to obtain the benefit of a tax reduction strategy, including this in the scope of engagement documentation can avoid lawyer liability for the accountant's errors.

(4) Fee Agreements

(a) Written fee agreement are recommended, and often required by the disciplinary rules.

(b) Contingent fee agreements must be in writing. Rules prefer written fee arrangements.

(c) Fee issues often precede client dissatisfaction and malpractice claims.

(d) Best practice is affording clients with multiple opportunities to understand the basis of fees. This leads to reduced dissatisfaction and fewer malpractice claims.

(5) Disclosures.

(a) Documenting disclosure and consent to potential conflicts is not required by Rules, except for certain situations.

(b) Oral discussion of potential conflicts with client is unsatisfactory; flawed memory.

c. Lawyer should act consistently with engagement letter. Departing from scope of engagement letter is ill-advised, without supplementing the engagement letter.

(1) Subsequent events can moot terms of engagement letter.

(2) Example: Addition of new parties to litigation should force a re-examination of conflict issues, for example.

3. **During Representation.**

a. Strong likelihood that engagement letter should be changed during engagement. Think of it as a "change order" in a construction context. A short letter will suffice, if clients signs an agreement to the change.

b. If unrepresented parties encountered during representation, representation disclaimer letters will need to be provided them.

c. The balancing act: To what degree should a lawyer document advice given during representation.

(1) Clients have better understanding if advice is in writing.

(2) Written record for file is improved with confirming advice letters.

(3) Giving pros and cons to advice forecloses client complaint that lawyers failed to recommend a course of action.

(4) What amount of the legal time on a matter is spent documenting the lawyer's file?

d. When clients appear to not follow advice, then lawyer should be concerned; an optimum time to give written confirmation of advice given is when lawyer realizes or senses that advice will not be followed.

4. **At Conclusion of Representation**

a. When representation concludes, among the most important documents from the lawyer is a a letter clearly stating that no further services will be provided in connection with the matter.

(1) This concluding letter is strongly recommended whether the matter has come to a natural conclusion or amounts to a

withdrawal.

(2) The lawyer is telling the client in this writing that the client must seek to engage the lawyer on any subsequent matter. Further, it avoids the impression of continuous responsibility.

b. Upon withdrawal, the lawyer should provide client with detailed description of the status of the matter and urge client to seek other counsel.

c. Lawyer should also notify client in a conclusion letter of the file retention policy and timing for destruction of client file.[66]
Records retention issues are a separate subject. Considerations:

(1) Different matters call for a different period of records retention. Each file should be evaluated separately.

(2) Consider statute of limitations on malpractice claim arising from file.

(3) File should contain research, briefs, forms.

(4) Clients get originals at end of representation.
(5) Electronic scanning is a viable option for retaining file, or parts of it, while reducing pressure on physical space requirements.

B. **Example**: Two persons come to a lawyer and ask her to represent them both in a business transaction. Most of the time,, the lawyer may legally and ethically represent both persons.

1. Documentation is critical.

2. An important and troublesome issue in joints representation concerns

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[66]See excellent article on record retention at Lee Nemcheck, Records Retention in the Private Legal Environment: Annotated Bibliography and Program Implementation Tools, 93 Law Library Journal 7 (2001), reprinted at www.aallnet.org/products/pub_llj_v93n01/2001_01.pdf (last accessed at May 11, 2009).

confidences. The lawyer is torn between his or her duty of confidentiality under Rule 1.09 and his or her duty to keep all her clients informed under Rule 1.03.

a. Keep the distinction between privilege and confidentiality in mind. An excellent discussion of this distinction appears in Brennan's, Inc. v. Brennan's Restaurants, Inc.[67]

(1) The attorney-client privilege deals with when a client's communication with a lawyer can be discovered in litigation or revealed at trial. Without a proceeding, the privilege plays no role.

(2) A lawyer's duty of confidentiality under Model Rule 1.09 is always present.

VI. CONCLUDING REMARKS

A. Representation of multiple persons is a complex matter, involving ethical admonitions, duties, suggestions, and discretion. But most of all, there is lawyer risk. The risk is significant to the lawyer, but in conflict is the practical reality of engaging clients and representing at a reasonable cost.

B. These issues seem to arise commonly and frequently. In the haste of daily life, facing the busy lawyer, how many corners are being cut, in the interest of saving time, or perhaps lapses. The evaluation of the risk should be ever-present.

C. These concepts, ideals and suggestions seem abstract, until one takes a moment to examine the cases. When one becomes sanguine about risks involved in multiple party representation, then take a moment to look at www.http://www.freivogelonconflicts.com/ last accessed May 11, 2009) and the litigation described there.

[67] 590 F.2d 168 (5th Cir. 1979).

Exhibit A

Source of Law on Conflicts of Interest

Researching conflicts of interest issues can be difficult. Useful sources are unfamiliar. Even when pertinent information is found, the context of that information may mislead.[68] Rules of ethics are a critical component of conflicts research.

Texas Disciplinary Rules of Professional Conduct

Texas Disciplinary Rules of Professional Conduct can be commonly found.

1. In Vernon's, the rules appear following Chapter 81 of the Government Code, with annotations to cases and Texas ethical opinions.

2. West's Texas Rules of Court also have the rules.

3. Online, the State Bar has a copy of the rules at http://www.txethics.org/reference_rules.asp?view=conduct (Last visited May 11, 2009).[69]

Federal Courts

Federal courts do not always rely solely on state rules in coming to ethics conclusions.[70] The Fifth Circuit on October 30, 2009 decided *Kennedy v. Mindprint (In re Proeducation Int'l, Inc.)*, 2009 WL 3489401 (5th Cir. 2009) establish a new rule on ethical rules arising from lateral transfers.

Of interest is the expression by the Fifth Circuit of the source of law. Consider the following quote:

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[68]This discussion taken from Texas Lawyers' Insurance Exchange, Legal Research on Conflict of Interest, reprinted at http://www.tlie.org/newslet/adv0807/0807-2.htm (Last visited May 11, 2009).

[69]On October 20, 2009, the Texas Supreme Court published proposed amendments to the Texas Rules. These appear to be the first major reconsideration of the Rules since 1990. Tex. Supreme Court, Misc. Docket 09-9175 (Oct. 20, 2009).

[70]This portion of the discussion taken from D. Garland, Ethical Conflicts and Professional Considerations -- Selected Issues, Employment Discrimination and Civil Rights Actions in Federal and State Courts, SD52 ALI-ABA 547 (July 3, 1999).

> "When considering motions to disqualify, courts should first look to "the local rules promulgated by the local court itself." U.S. Fire Ins., 50 F.3d at 1312. The Local Rules of the Southern District of Texas provide that "the minimum standard of practice shall be the Texas Disciplinary Rules of Professional Conduct" (Texas Rules), and that violations of the Texas Rules "shall be grounds for disciplinary action, but the court is not limited by that code." S.D. TEX. LOCAL R.APP. A, R. 1A & 1B. Therefore, the Texas Rules "are not the sole authority governing a motion to disqualify." In re Am. Airlines, 972 F.2d at 610 (internal quotation marks omitted). A reviewing court also "consider[s] the motion governed by the ethical rules announced by the national profession in light of the public interest and the litigants' rights." Id. The Fifth Circuit has recognized the ABA Model Rules of Professional Conduct (Model Rules) as the national standards to consider in reviewing motions to disqualify. Id. Therefore, we shall consider both the Texas Rules and the Model Rules."[71]

See *Rand v. Monsanto Co.*,[72] which contains a comprehensive survey of the ethical rules adopted by the federal district courts. In federal courts, the ethical standards that govern the conduct of attorneys are determined by federal law.[73] Where a federal court has adopted by local rule a state's ethical rules, the rules are applicable because the court "has chosen to require attorneys to follow its guidelines, and federal interpretation . . . must therefore prevail."[74] Thus, even where a federal district court has adopted the ethical rules followed by the state in which it sits, the federal court is not bound by the state court's interpretation of the rules.[75]

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[71]Kennedy v. Mindspring (In re Proeducation Int'l, Inc.), 2009 WL 3489401, *4 (5th Cir. 2009).

[72]926 F.2d 596, 601-03 (7th Cir. 1991).

[73]In re Snyder, 472 U.S. 634, 645 n.6 (1985); See also Schlumberger Technologies, Inc. v. Wiley, 113 F.3d 1153, 1158 (11th Cir. 1997); United Transportation Local Unions 385 and 77 v. Metro North Commuter Railroad Co., 1995 U.S. Dist. LEXIS 15989, *17 (S.D.N.Y. Oct. 30, 1995); Application of Mosher, 25 F.3d 397, 400 (6th Cir. 1994); Resolution Trust Corp. v. Bright, 6 F.3d 336, 341 (5th Cir. 1993); Miano v. AC&R Advertising, Inc., 148 F.R.D. 68, 74 (S.D.N.Y. 1993); In re Finkelstein, 901 F.2d 1560, 1564 (11th Cir. 1990); University Pa-tents, Inc. v. Kligman, 737 F. Supp. 325, 327 (E.D. Pa. 1990).

[74]Polycast Technology Corp. v. Uniroyal, Inc., 129 F.R.D. 621, 625 (S.D.N.Y. 1990).

[75]Bell Atlantic Corp. vs. Bolger, 2 F.3d 1304, 1316 (3d Cir. 1993); Blasena v. Conrail, 898 F. Supp. 282, 283 n. 1 (D.N.J. 1995); Suggs v. Capital Cities/ABC, Inc., 54 Empl. Prac. Dec. 40,195 (S.D.N.Y. April 24, 1990); County of Suffolk v. Long Island Lighting Co., 710 F. Supp. 1407, 1413

(E.D.N.Y. 1989) aff'd., 907 F.2d 1295 (2d Cir. 1990); Figueroa-Olmo v. Westinghouse Elec. Corp., 616 F. Supp. 1445, 1449- 50 (D.P.R. 1985); Black v. State of Missouri, 492 F. Supp. 848, 874-75 (W.D. Mo. 1980); J.P. Foley & Co. v. Vanderbilt, 523 F.2d 1357, 1359-1360 (2d Cir. 1975) (concurring opinion) ("[A] court need not treat the Canons of Professional Responsibility as it would a statute that we have no right to amend. We should not abdicate our constitutional function of regulating the Bar to that extent.").

In view of this inherent power to govern the conduct of attorneys, federal courts may choose to disregard a provision of a state code of ethics (even as adopted by local rule) when it conflicts with a federal rule of procedure.[76]

Some specialized federal courts have their own rules. For example patent law presents unique issues.[77]

ABA Model Rules

Texas lawyers often work with clients in other jurisdictions where another state's ethics rules may affect liability. For these reasons, it is important to consider the ABA Model Rules as well as any state rules that might affect a particular situation.

The ABA Model Rules also may shed light on ethical issues not directly addressed by the Texas rules.

Also, comparison of Texas and ABA language often sheds light on the intent of the Texas rules. The ABA Model Rules, along with the history of changes in those rules, is online at http://www.abanet.org/cpr/mrpc/model_rules.html. (Last accessed May 11, 2009).

The ethics rules are primarily law in disciplinary matters. In legal malpractice cases, ethics rules are evidence of the standard of care, presented by the testimony of expert witnesses.

Ethics opinions are an important source of information on conflicts that may be used by experts. While ethics opinions are advisory only, they are frequently cited in court opinions.

ABA opinions are available individually from the ABA. Information on those opinions

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[76]See Rand, 926 F.2d at 600-01 (held that DR 5-103(B) of the Model Code of Professional Responsibility, which had been adopted by local rule of the Northern District of Illinois, conflicted with Fed. R. Civ. P. 23 and could not be applied to class actions); County of Suffolk v. Long Island Lighting Co., 710 F. Supp. 1407, 1413-1415 (E.D.N.Y. 1989) aff'd., 907 F.2d 1295 (2d Cir. 1990); See also Gulf Oil Co. v. Bernard, 452 U.S. 89 (1981) (Supreme Court expressed a willingness to allow counsel to contact potential class members notwithstanding possible ethical problems arising from such communication). See Judith A. McMorrow, The (F)utility of Rules: Regulating Attorney Conduct in Federal Court Practice, SF 13 ALJ-ABA 317 (2000).

[77]See D. Hricik, How Things Snowball: the Ethical Responsibilities and Liability Risks Arising from Representing a Single Client in Multiple Patent-related Representations, 18 Geo. J. Legal Ethics 1 (2005). See generally Pamela Phillips & John Steele, Ethics Issues in IP Practice: Trends and Practical Strategies, SH085 ALI-ABA 411 (2003)

is at http://www.abanet.org/cpr/mrpc/model_rules.html (Last accessed May 11, 2009).

Opinions can sometimes be found online on other websites.

Other states' opinions are often available online on dedicated sites.

The ABA/BNA Lawyers' Manual on Professional Conduct is a subscription service providing ABA ethics opinions and rules as well as digests of new cases and ethical opinions from every state.

Texas Ethics Opinions

Texas ethics opinions now appear in the Texas Bar Journal, but without an accompanying consolidated index.

Older opinions were published in the Baylor Law Review.

The Texas Center for Legal Ethics and Professionalism has posted most Texas ethics opinions on their website at http://www.txethics.org/reference_opinions.asp.

The most recent opinions are not yet posted, so reference to the Bar Journal may be necessary for Opinion 577 and higher.

Conflict of Interest Cases

Cases on conflicts of interest can be divided into three general categories:

1. discipline,
2. malpractice, and
3. disqualification.

Each of these types of cases has certain pitfalls when applied in a different context, particularly since lawyers want to avoid problems in all three areas.

Discipline cases often fail to address common situations faced in a liability or disqualification context, and may focus on one particular rule to the exclusion of other considerations.

Malpractice cases require damages for a finding of liability, which may not be required in disqualification or disciplinary contexts.

Disqualification cases often turn upon issues such as when the motion for disqualification is raised, rather than the merits of the ethical issues involved.

A number of sources have compiled legal malpractice cases.

1. Ronald E. Mallen and Jeffrey W. Smith, Legal Malpractice 2008 ed. (Thomson West 2008), is a thorough hornbook of legal malpractice cases in the US which includes some loss prevention forms and suggestions.

2. A conflicts specific website maintained by William Freivogel, http://www.freivogelonconflicts.com/, is very useful for getting a quick survey of US cases on particular conflict of interest issues.

Two Texas specific publications providing information and analysis of Texas ethics and malpractice issues are:

1. Charles F. Herring, 2008 Texas Legal Malpractice and Lawyer Discipline (American Lawyer Media 2008)

2. Robert P. Schuwerk and Lillian B. Hardwick.Handbook of Texas Lawyer and Judicial Ethics: Attorney Tort Standards, Attorney Ethics Standards, Judicial Ethics Standards, Recusal and Disqualification of Judges, 2007-2008 ed. (Vol. 48 & 48A, Texas Practice Series).

Restatement of the Law Governing Lawyers

The Restatement (Third) of the Law Governing Lawyers (American Law Institute, 2000), is an attempt to synthesize a US law of lawyering in all contexts. Despite the name, this is the first restatement of the law of lawyering by ALI.

The Restatement is not primary law in any jurisdiction, but is cited with increasing frequency by courts.

Cases citing or illustrating the Restatement are updated annually in a pocket part.

Having the juxtaposition of disqualification, malpractice and disciplinary considerations is of some help in making decisions regarding ethical and malpractice prevention problems.

Unlike the ABA Model Rules, the Restatement includes a number of hypotheticals that help to flesh out the nuances of conflict issues.

Still, in some cases additional practical analysis is needed to avoid ethical and malpractice problems.

Web-based resources[78]

The Texas Center for Legal Ethics and Professionalism

TCLEP is a non-profit center funded in large part by the Texas Bar Foundation. Resources on this site include the Texas Disciplinary Rules, Ethics Opinions, A Guide to the Basics of Law Practice, the Ethics Course, and other Texas specific materials. This a thorough collection of relevant Texas ethics materials, though some recent opinions are not yet posted.[79]

University of Houston Texas Ethics Reporter

This site includes Texas Disciplinary Rules of Conduct and Procedure, as well as Ethics Opinions, and includes prior versions of the rules.

Judges Ethics Information

The Code of Judicial Conduct and Judicial Ethics Opinions are available online at http://www.courts.state.tx.us/Judethics/judethics-home.asp. Information on laws affecting judicial candidates are available at http://www.courts.state.tx.us/Judethics/candidacy.asp (Last visited May 11, 2009).

Cornell Legal Information Institute, Legal Ethics

This site includes information regarding ethical and malpractice rules relating to Texas. Of particular note is the American Legal Ethics Library Narrative for Texas, which was prepared by the Houston law firm of Vinson & Elkins.[80] This is a searchable discussion of the law of BOTH malpractice and ethics in the state of Texas.

The law of malpractice is included in the Narrative. Links from this page enable search of

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[78] **Taken from Texas Lawyers' Insurance Exchange, Online Legal Malpractice and Ethics Research, reprinted at http://www.tlie.org/riskmgmt/links.htm (Last accessed May 11, 2009).**

[79] http://www.txethics.org/reference.asp (Last accessed May 11, 2009).

[80] http://www.law.cornell.edu/ethics/ (Last accessed May 11, 2009).

other states' law on legal malpractice and ethics.

Law Practice Management Program of the State Bar of Texas

The Law Practice Management Program, part of texasbarcle.com, has as its goal facilitating law firm management-the details not taught in law school. The program includes both seminars and office consultations. Books and videos available are described on the site. The resources section of the site includes a number of pamphlets on various law firm administration topics. Many of these pamphlets, such as How to Document Client Expenses and Attorney's Fees, are directly relevant to malpractice prevention. A links page connects to a number of sites that focus on law firm management.

ABA Standing Committee on Lawyers' Professional Liability

The ABA Standing Committee offers a number of important resources for attorneys interested in lawyers professional liability and insurance. A number of materials can be purchased online, including The Lawyer's Desk Guide to Legal Malpractice.

ABA Center for Professional Responsibility

The Center for Professional Responsibility coordinates most of the ABA's activities regarding legal ethics. There are usually a couple of commissions or subcommittee working on hot topics, and they will have links on this page. There are some free and some paid resources available from the site. Summaries of relatively recent ABA Formal Opinions are included on the site. http://www.abanet.org/cpr/home.html (Last visited May 11, 2009).

Legalethics.com

This website focuses on ethical aspects of the use of technology by lawyers.

Legal Ethics Forum

This is a blog by law professors who specialize in legal ethics, and provides a good source for current news on ethics.

http://www.legalethicsforum.com/blog/2009/04/legal-ethics-and-facebook.html (last accessed May 11, 2009)

William Freivogel's Conflicts Website

This website collects cases on conflicts issues in an easy to use format.

Cite: http://www.freivogelonconflicts.com/ last accessed May 11, 2009).

Nabrico Sites

TLIE is a member of the National Association of Bar Related Insurance Companies. The websites for the companies often provide valuable loss prevention advice and forms. http://www.nabrico.org/ (Last accessed May 11, 2009).

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M. Bourland, Ethics Issues in Dealing with the Family Business Owner Client Presentation Outline, Planning for the Family Business Owner, SP001 ALI-ABA 929 (July 9, 2008)(excellent paper and useful for business lawyers).

D. Garland, Ethical Conflicts and Professional Considerations -- Selected Issues, Employment Discrimination and Civil Rights Actions in Federal and State Courts, SD52 ALI-ABA 547 (July 3, 1999).

A. Rollock, Professional Responsibility and Organization of the Family Business: the Lawyer as Intermediary, 73 Ind. L.J. 567 (1998).

J. Pittman, Conflict of Interest and Waiver Thereof in the Context of Joint Representation of Multiple Clients, 22 J. Legal Profession 341 (1998).

M. Abernathy, Client or Adverse Party--who Shall an Attorney Represent?: Duties Toward an Unrepresented Party in Transactions, 19 J. Legal Profession 337 (1994).

T. Morgan, Lawyer Law (ABA 2007).

G. Karisch, Protecting the Surviving Spouse and Protecting Yourself After Belt v. Oppehheimer (2006) located at http://www.texasprobate.com.

LIST OF FORMS

1. Basic engagement letter

2. ABA Model Form Transactional Engagement Letter

3. ABA Model Form Litigation Engagement Letter

4. Supplement Paragraphs Concerning Representing Multiple Persons (Not Husband & Wife)

5. Supplement Paragraphs Concerning Representing Husband and Wife (Estate Planning)

6. ABA Model Agreement for Incorporation

7. ABA Model Termination Letter (Matter Continuing)

8. ABA Model Termination Letter (Matter Concluding)

9. ABA Model Declination Letter

10. ABA Model Waiver Of Confidentiality

Form 1: Basic Engagement Letter (My form)

Dear [name]:

This letter confirms that you have asked me to act as you lawyer and to represent and advise you with respect to certain legal matters. My representation of you, at least at this time, will include the scope of services outlined below. You are my client.

You and I benefit from a written explanation of my fees, billing practices, and other policies since a clear understanding of my engagement helps us avoid future misunderstandings. This engagement letter is thus designed to benefit us both.

The scope of my work for you is described in this letter. By defining my work, I will not undertake obligations to you that I did not intend to assume

1. **Scope of Services**. The specific services I am to provide are as follows:

[insert detail scope of services]

From time to time, you and I might change the scope of my services. This change in the scope of my work might based on a discussion, a confirmation from me, or possibly a written amendment to this engagement letter.

2. **Billing**.

Paragraph (a) is based on hourly billing

(a) ***General Discussion of My Fees.*** As compensation for my services to be rendered (or that have been already provided you), you agree to pay me reasonable attorneys' fees predicated upon the standards set forth in the State Bar Act of the State of Texas. The principal factor I will utilize to determine the amount of your fee is the amount of time I spend in connection with our representation of you. My current rate is $390.00 per hour.

My hourly rates will be charged in computing a reasonable fee, which include, but are not limited to, telephone conversations, including calls to and from you. All time will be recorded in 6 minute units.

I have estimated me fees to be a range of $____ to $____. My minimum fee for these services will be $_____.

Paragraph (a) is based on turnkey billing

(a) ***General Discussion of My Fees.*** As compensation for my services to be rendered (or that have been already provided you), you agree to pay me reasonable attorneys' fees predicated upon the standards set forth in the State Bar Act of the State of Texas.

I have provided you with my fee, which is $_____.

(b) ***Payment of My Fees.*** The amount prescribed as my fee is payable as follows:

Upon acceptance of this agreement $

______________, 200__ $

(c) ***Charges Exceeding My Fees.*** The circumstance might arise when I will charge you more than my estimate of fee, as described above. Some of these circumstances would included the following:

_ Delivery of incomplete information, instructions, and late delivery of information.

_ "Change of mind" redrafts of one or more of the documents. Changes made due to my misinterpretation of your instructions or a drafting error will be made at no additional charge.

_ Out-of-town meetings or other work requiring travel to another location that exceeds the time estimate indicated in the schedule of services.

_ The addition of work which is not identified in the attached schedule of services.

_ Any service, including a scheduled service, which continues beyond the term of this contract.

My estimated fee does not include the following:

_ Services provided by persons or organizations other than me.

_ Out-of-pocket expenses, detailed below, such as filing and recording costs, special delivery.

_ The preparation of legal documents concerning in any state other than Texas.

_ Travel costs.

(d) ***Out-of-Pocket Expenses.*** In addition to legal fees, you will be responsible for all out-of-pocket expenses incurred by me in connection with my representation of you. Such expenses may include charges for courier or messenger services, recording documents, long distance telephone calls and other forms of communication, copying materials, overtime clerical assistance, postage, and other expenses. I may elect to forward statements I receive from suppliers on to you for payment directly to the suppliers, particularly with respect to large expenditures, and our policy requires that I submit a separate statement to you for expenses I have paid or incurred on your behalf when those expenses exceed $300.

If it becomes necessary or advisable to secure the services of others in connection with our representation of you, such as appraisers, investigators, accountants, or attorneys to represent you in other localities, I will discuss these needs with you prior to engaging such other persons. These persons determine their own fees, and if you approve the engagement of any such persons, they will bill you directly and you will be solely responsible for paying the amounts billed.

Alternative (d) is based upon my carrying all costs

I will pay all out of pocket expenses, unless you and I agree otherwise for certain specific costs.

(e) ***Timing***. I will ordinarily send you a statement each calendar month for services rendered and expenses incurred during the previous calendar month. I understand that we should send our statements to you at your [home/business] address. I will be happy to answer any questions you may have about any statement I send you. My statements are payable on receipt. If my invoices are not paid promptly, I may choose to suspend or discontinue our representation of you.

3. **Retainer.** As we discussed, I will initially require that you deposit a retainer of $___ in connection with this matter. The amount of the retainer was determined in light of the amount of work I currently estimate I will be performing for you. You hereby authorize me, in my discretion, to withdraw from time to time up to the full amount of this retainer and apply it toward the payment of all or any part of our fees and expenses incurred on your behalf. In the event I make any such withdrawal, or based upon the progress of our relationship and the volume of work, I may from time to time require you to make additional advances to restore or increase the amount of the retainer, and you agree to promptly pay any such additional advances as may be requested. When my representation of you has been completed, I will apply the retainer balance against the final statement and refund any excess to you.

4. **File Retention.** All of my work product will be owned by me. Subject to my obligations in the event of its withdrawal, and further subject to casualties beyond my control, I will endeavor to retain the significant components of my files relative to my legal representation (as determined by me) for a period of 3 years following the conclusion of such legal representation, and during such time will afford you reasonable access to such files. Thereafter, such files may, at my discretion and without notice to you, be destroyed.

5. **Notice To Clients Regarding Grievance Process.** The State Bar of Texas investigates and prosecutes professional misconduct by Texas attorneys. Although not every complaint against or dispute with a lawyer involves professional misconduct, the Office of the General Counsel of the State Bar of Texas will provide you with information about how to file a complaint. For more information, please call 1-800-932-1900, toll free.

6. **Before You Sign This Contract.** Any question or doubt you may have about this contract should be resolved before you sign. This contract is the only time when the interest of our law firm may be in conflict with your own. It is always a prudent practice to seek the advice and counsel of another attorney as to your rights under this contract.

Both you and I will have the right to terminate this representation upon written notification to the other; provided that in the event of a termination, you will remain liable for my fees and any expenses incurred by me on your behalf prior to such termination, plus any fees and expenses incurred at your request in connection with the transition to substitute counsel.

If you have any questions about the proposed engagement, please do not hesitate to call me. If the foregoing correctly reflects our agreements and your understandings, please acknowledge this agreement in the space provided below. I have enclosed two copies of this agreement, one for your files and one to be signed and returned to us and return it to me, along with your [retainer/payment] check in the amount of $___ in the enclosed envelope. Thank you for giving me this opportunity to provide these professional services for you. I look forward to working with you.

Very truly yours,

ACCEPTED AND APPROVED:

____

____

Form 2: ABA Suggested Form Transactional Engagement Letter

[Date]

[Client Name and Address]
____
____
____

Dear _______________:

We are pleased to have the opportunity to be of service to [you] [name of client]. We look forward to working with you and will do our best to provide the highest quality legal services in a responsive, efficient manner.

Fundamental to a sound relationship is a clear understanding of the terms and conditions upon which we will be providing legal services. Accordingly, the purpose of this letter is to clarify and confirm these terms and conditions.

Scope of Services. You asked us to represent you in connection with . . . .

[Option - Exclusions] You advised us that our services are not to include . . . .

[Option - Limitations on Obligation] You acknowledge that we are not your general counsel and that our acceptance of this engagement does not involve an undertaking to represent you or your interests in any matter other than that described above. Furthermore, you acknowledge that our representation does not entail a continuing obligation to advise you concerning subsequent legal developments that might have a bearing on your affairs generally or, after the completion of the matter as to which we are representing you, subsequent legal developments related to or that might have a bearing on that matter.

[Option - Additional Services] While this letter is intended to deal with the specific legal services described above, these terms and conditions will also apply to any additional legal services that we may agree to provide that are outside the initial scope of our representation.

Staffing

I will be the attorney primarily responsible for the representation [, with the assistance of ____________, an attorney (paralegal) in our _____________ practice group and others as appropriate from time to time]. When questions or comments arise about our services, staffing, billings, or other aspects of our representation, please contact me. My direct telephone

number is ______________. It is important that you are satisfied with our services and responsiveness at all times.

We intend to provide quality legal services in an efficient, economical manner. This necessitates involving other firm attorneys with the requisite expertise, and paralegals, who are not attorneys but are experienced in the preparation of documents and the completion of various tasks.

[Option - Attorney Conferences/Meetings] From time to time, internal conferences will take place among our personnel, and two or more may attend meetings or proceedings on your behalf. Although this approach might seem to result in duplication of effort, it is our belief that this practice facilitates communication, improves the quality of the work, and ultimately is more economical.

Responsibilities

In reliance upon information and guidance provided by you, we will provide legal counsel and assistance to you in accordance with this letter, keep you reasonably informed of progress and developments, and respond to your inquiries.

To enable us effectively to render these services, you agree to fully and accurately disclose to us all facts that may be relevant to the matter or that we may otherwise request, and to keep us apprised of developments relating to the matter. You also will assist and cooperate with us as appropriate in dealing with the matter.

[Option - Opinions and Beliefs] Either at the beginning or during the course of our representation, we may express our opinions or beliefs concerning the matter or various courses of action and the results that might be anticipated. Any such statement made by any [partner] [member] [shareholder] or employee of our firm is intended to be an expression of opinion only, based on information available to us at the time, and must not be construed by you as a promise or guarantee of any particular result.

Fees, Disbursements, and Other Charges

Our fees will be based [primarily] on the amount of time spent by attorneys and paralegals on your matter. Each lawyer and paralegal has an hourly billing rate based generally on his or her experience and any special expertise. The rate multiplied by the time spent on your behalf, measured in tenths of an hour, will be evaluated by the billing attorney as the [initial] basis for determining the fee.

Our billing rates currently range from $______ an hour for new associates to $______ an hour for senior [partners] [members] [shareholders]. My billing rate is currently

$______ an hour. Time devoted by paralegals is charged at billing rates currently ranging from $______ to $______ an hour. These rates are adjusted from time to time generally to reflect increased experience and special expertise of the attorneys and paralegals and inflationary cost increases affecting our practice, and the adjusted rates will apply to all services performed thereafter.

Other factors may be considered in determining our fees, including the novelty and difficulty of the questions involved; the skill requisite to perform the services properly; the experience, reputation, and ability of those performing the services; the time limitations imposed by you or the circumstances; the amount involved and results obtained; and any other factors that may be relevant under applicable rules of professional conduct. [However, these factors will not result in our fees exceeding the indicated amounts based on our hourly rates without prior discussion with you.]

[Option -- Estimate of Fees] We estimate that our fees (excluding disbursements and other charges) for these services will be $______. However, the actual fees may be more or less than that amount depending upon the amount of time expended on the matter and the other factors described above. The amount of time expended on the matter can vary considerably based on. . . . If at any time during our representation, the scope of our services is materially expanded because of unanticipated issues or complications, additional revisions to the documentation are occasioned by significant or repeated changes in the proposed transaction, or for other reasons we determine that our estimate will be exceeded, we will so notify and consult with you.

In addition to our fees, we will expect payment for disbursements and other charges as described in the General Provisions enclosed with this letter.

Each month we will furnish you with a statement describing our services and separately showing disbursements and other charges in a format and with such detail as you and we may agree. There often is an unavoidable delay in reporting disbursements and other charges, and therefore not all disbursements and charges may be billed at the same time as the related legal services.

[Option - Fixed Fee] Our fees for this matter will be $______. In addition to our fees, we will be entitled to payment for disbursements and other charges as described in the General Provisions enclosed with this letter. It is estimated that these will not exceed $______.

[Option - Advance for Fees] You [agree to deposit] [deposited] $______ with us as an advance toward our fees in connection with our representation. No part of this advance will be used for disbursements or charges or shall represent security for payment of our fees. Accordingly, the advance will be deposited in our [general funds] [general trust account] and we will charge our fees against the advance and credit them on our billing statements. In the event

our fees exceed the advance deposited with us, we will bill you for the excess. Any unused portion of the advance will be returned to you at the conclusion of our services. You agree that we will have the right to request additional deposits from time to time based on our estimates of future work to be undertaken. If you fail to timely pay any additional deposit requested, we will have the right to cease performing further work and to withdraw from the representation.

[Option - Security for Fees and Charges] You [agree to deposit] [deposited] $______ with us as security for the fees and the disbursements and other charges in connection with our representation. This amount will be held in our general trust account and may be applied by us to any amount that has been billed and is not promptly paid. If it appears that the matter is not likely to be resolved and our fees and charges will exceed $______, we have the right to request a further deposit. If the amount requested is not promptly paid, we will have the right to cease performing work and to withdraw from the representation.

[Option - Advance for Charges] You [agree to deposit] [deposited] $______ with us as an advance against disbursements and other charges. It is our understanding that we may apply the advance to disbursements and charges as incurred without any further authorization from you.

General Provisions

Enclosed is a statement entitled General Provisions setting forth additional terms and conditions, which are incorporated into this letter and apply to our representation to the extent not expressly inconsistent with this letter.

[Option - Arbitration] Any controversy, dispute, or claim arising out of or relating to our fees, charges, performance of legal services, obligations reflected in this letter, or other aspects of our representation shall be resolved through binding arbitration in [location] in accordance with the rules then in effect of [administered by] the [arbitration body], and judgment on the award rendered may be entered in any court having jurisdiction thereof. [YOU ACKNOWLEDGE THAT BY AGREEING TO ARBITRATION, YOU ARE RELINQUISHING YOUR RIGHT TO BRING AN ACTION IN COURT AND TO A JURY TRIAL.]

[Option - Attorneys' Fees] If any controversy, dispute, or claim arises between us concerning our fees, charges, performance of legal services, or other aspects of our representation, the prevailing party will be entitled to recover from the losing party all costs and expenses it incurs in bringing and prosecuting or defending any litigation or arbitration, including reasonable attorneys' fees and costs at trial and on appeal.

[Option - Conflicts of Interest] Concurrently with this letter, we are delivering another letter to you which discusses potential or actual conflicts of interest related to this

representation. Our agreement to undertake this representation is conditioned on our receipt of a signed copy of the conflicts waiver letter.

* * * *

If this letter correctly reflects your understanding of the terms and conditions of our representation, please confirm your acceptance by signing the enclosed copy in the space provided below and return it [and the deposit of $______] to me. Upon your acceptance, these terms and conditions will apply retroactively to the date we first performed services on your behalf. If this letter is not signed and returned, you will be obligated to pay us the reasonable value of any services we may have performed on your behalf.

[Option - Deferral of Work] This letter will not become effective and we will have no obligation to provide legal services until you sign and return the copy of this letter [and the deposit].

We are pleased to have this opportunity to be of service and to work with you.

Very truly yours,

Enclosure

I/we read and understand the terms and conditions set forth in this letter (including the attached General Provisions) and agree to them.

[Option - Joint and Several] If more than one party signs below, we each agree to be liable, jointly and severally, for all obligations under this letter (including the attached General Provisions).

____

____

Date:____________________

Form 4 ABA Model Litigation Engagement Letter

[Date]

[Client Name and Address]
____
____
____

Dear ________________:

We are pleased to have the opportunity to be of service to [you] [name of client]. We look forward to working with you and will do our best to provide the highest quality legal services in a responsive, efficient manner.

Fundamental to a sound relationship is a clear understanding of the terms and conditions upon which we will be providing legal services. Accordingly, the purpose of this letter is to clarify and confirm these terms and conditions.

Scope of Services. You asked us to represent you in connection with . . . [and possible litigation and settlement negotiations relating thereto].

[Option - Exclusions] You advised us that our services are not to include . . . .

[Option - Limitations on Obligation] You acknowledge that we are not your general counsel and that our acceptance of this engagement does not involve an undertaking to represent you or your interests in any matter other than that described above. Furthermore, you acknowledge that our representation does not entail a continuing obligation to advise you concerning subsequent legal developments that might have a bearing on your affairs generally or, after the completion of the matter as to which we are representing you, subsequent legal developments related to or that might have a bearing on that matter.

[Option - Additional Services] While this letter is intended to deal with the specific legal services described above, these terms and conditions will also apply to any additional legal services that we may agree to provide that are outside the initial scope of our representation.

Staffing

I will be the attorney primarily responsible for the representation [, with the assistance of _____________, an attorney (paralegal) in our ______________ practice group and others as appropriate from time to time]. When questions or comments arise about our services,

staffing, billings, or other aspects of our representation, please contact me. My direct telephone number is ____________. It is important that you are satisfied with our services and responsiveness at all times.

We intend to provide quality legal services in an efficient, economical manner. This necessitates involving other firm attorneys with the requisite expertise, and paralegals, who are not attorneys but are experienced in the preparation of documents and the completion of various tasks.

[Option - Attorney Conferences/Meetings] From time to time, internal conferences will take place among our personnel and two or more may attend meetings or proceedings on your behalf. Although this approach might seem to result in duplication of effort, it is our belief that this practice facilitates communication, improves the quality of the work, and ultimately is more economical.

Responsibilities

In reliance upon information and guidance provided by you, we will provide legal counsel and assistance to you in accordance with this letter, keep you reasonably informed of progress and developments, and respond to your inquiries.

To enable us effectively to render these services, you agree to cooperate fully with us in all matters relating to the preparation and presentation of your case, to fully and accurately disclose to us all facts that may be relevant to the matter or that we may otherwise request, and to keep us apprised of developments relating to the matter. You also will make yourself reasonably available to attend meetings, discovery proceedings and conferences, hearings, and other proceedings. Your responsibilities will also include approving negotiation, discovery and litigation strategy; approving causes of action and parties to any litigation; and determining acceptable terms of any compromise, settlement, or agreement.

In addition, you will be responsible for advising us whether any document we have prepared or received and sent to you for your approval or review reflects the principal terms of your proposed agreement, general litigation strategy, or other expectations, as the case may be.

Either at the beginning or during the course of our representation, we may express our opinions or beliefs concerning the matter or various courses of action and the results that might be anticipated. Any such statement made by any [partner] [member] [shareholder] or employee of our firm is intended to be an expression of opinion only, based on information available to us at the time, and must not be construed by you as a promise or guarantee of any particular result. No guarantees are possible in matters such as this.

Fees, Disbursements, and Other Charges

Our fees will be based [primarily] on the amount of time spent by attorneys and paralegals on your matter. Each lawyer and paralegal has an hourly billing rate based generally on his or her experience and any special expertise. The rate multiplied by the time spent on your behalf, measured in tenths of an hour, will be evaluated by the billing attorney as the [initial] basis for determining the fee.

Our billing rates currently range from $______ an hour for new associates to $______ an hour for senior [partners] [members] [shareholders]. My billing rate is currently $______ an hour. Time devoted by paralegals is charged at billing rates currently ranging from $______ to $______ an hour. These rates are adjusted from time to time generally to reflect increased experience and special expertise of the attorneys and paralegals and inflationary cost increases affecting our practice, and the adjusted rates will apply to all services performed thereafter.

Other factors may be considered in determining our fees, including the novelty and difficulty of the questions involved; the skill requisite to perform the services properly; the experience, reputation, and ability of those performing the services; the time limitations imposed by you or the circumstances; the amount involved and results obtained; and any other factors that may be relevant under applicable rules of professional conduct. [However, these factors will not result in our fees exceeding the indicated amounts based on our hourly rates without prior discussion with you.]

In addition to our fees, we will expect payment for disbursements and other charges as described in the General Provisions enclosed with this letter. You authorize us to incur all reasonable costs and to retain any investigators, consultants, or experts necessary in our judgment to pursue your claims.

Each month we will furnish you with a statement describing our services rendered and separately showing disbursements and other charges in a format and with such detail as you and we may agree. There often is an unavoidable delay in reporting disbursements and other charges, and therefore not all disbursements and charges may be billed at the same time as the related legal services.

[Option - Advance for Fees] You [agree to deposit] [deposited] $______ with us as an advance toward our fees in connection with our representation. No part of this advance will be used for disbursements or charges or shall represent security for payment of our fees. Accordingly, the advance will be deposited in our [general funds] [general trust account] and we will charge our fees against the advance and credit them on our billing statements. In the event our fees exceed the advance deposited with us, we will bill you for the excess. Any unused portion of the deposit will be returned to you at the conclusion of our services. You agree that we will have the right to request additional deposits from time to time based on our estimates of future work to be undertaken. Once a trial or hearing date is set, we will require you to pay all

amounts then owing to us and to deposit with us the fees we estimate will be incurred in preparing for and completing the trial or arbitration, as well as jury fees and arbitration fees likely to be assessed. If you fail to timely pay any additional deposit requested, we will have the right to cease performing further work and to withdraw from the representation.

[Option - Security for Fees and Charges] You [agree to deposit] [deposited] $______ with us as security for the fees and the disbursements and other charges in connection with our representation. This amount will be held in our general trust account and may be applied by us to any amount that has been billed and is not promptly paid. If it appears that the matter is not likely to be resolved and our fees and charges will exceed $______, we have the right to request a further deposit. If the amount requested is not promptly paid, we will have the right to cease performing work and to withdraw from the representation.

[Option - Advance for Charges] You [agree to deposit] [deposited] $______ with us as an advance against disbursements and other charges. It is our understanding that we may apply the advance to disbursements and charges as incurred without any further authorization from you.

[Options - Award or Agreement on Fees and Charges] The fees and charges billed to you are your responsibility whether or not a court awards attorneys' fees against an opposing party. Courts may award attorneys' fees which they consider reasonable under the applicable statutes, but which are less than the amounts billed to you. In such cases, you continue to be obligated to pay us for our actual fees and charges even though the court awards less.

The parties to a dispute may agree, or a court may order, that another party is to pay some or all of our fees or charges. This will not affect your obligation to pay our fees and charges, and we will not be obligated to enforce any such agreement or order. Any amounts actually received by us from another party will, of course, be credited against the fees and charges for which you are otherwise obligated to us.

[Option - Lien] If a monetary judgment or award is made in your favor, we shall have a lien on the proceeds to the extent of any unpaid fees, disbursements, or other charges.

General Provisions

Enclosed is a statement entitled General Provisions setting forth additional terms and conditions, which are incorporated into this letter and apply to our representation to the extent not expressly inconsistent with this letter.

[Option - Arbitration] Any controversy, dispute, or claim arising out of or relating to our fees, charges, performance of legal services, obligations reflected in this letter, or other aspects of our representation shall be resolved through binding arbitration in [location] in

accordance with the rules then in effect of [administered by] the [arbitration body], and judgment on the award rendered may be entered in any court having jurisdiction thereof. [YOU ACKNOWLEDGE THAT BY AGREEING TO ARBITRATION, YOU ARE RELINQUISHING YOUR RIGHT TO BRING AN ACTION IN COURT AND TO A JURY TRIAL.]

[Option - Attorneys' Fees] If any controversy, dispute or claim arises between us concerning our fees, charges, performance of legal services, or other aspects of our representation, the prevailing party will be entitled to recover from the losing party all costs and expenses it incurs in bringing and prosecuting or defending any litigation or arbitration, including reasonable attorneys' fees and costs at trial and on appeal.

[Option - Conflicts of Interest] Concurrently with this letter, we are delivering another letter to you which discusses potential or actual conflicts of interest related to this representation. Our agreement to undertake your representation is conditioned on our receipt of a signed copy of the conflicts waiver letter.

* * * *

If this letter correctly reflects your understanding of the terms and conditions of our representation, please confirm your acceptance by signing the enclosed copy in the space provided below and return it [and the deposit of $______] to me. Upon your acceptance, these terms and conditions will apply retroactively to the date we first performed services on your behalf. If this letter is not signed and returned, you will be obligated to pay us the reasonable value of any services we may have performed on your behalf.

[Option - Deferral of Work] This letter will not become effective and we will have no obligation to provide legal services until you sign and return the copy of this letter [and the deposit].

We are pleased to have this opportunity to be of service and to work with you.

Very truly yours,

Enclosure

I/we read and understand the terms and conditions set forth in this letter (including the attached General Provisions) and agree to them.

[Option - Joint and Several] If more than one party signs below, we each agree to be liable, jointly and severally, for all obligations under this letter (including the attached General Provisions).

____

____

Date:_________________

Form 4: Supplement Paragraphs Concerning Representing Multiple Persons (Not Husband & Wife)

Rule 1.06(b) of the Texas Disciplinary Rules of Professional Conduct provides that as a general rule "a lawyer shall not represent a person if the representation of that person (1) involves a substantially related matter in which that person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer's firm; or (2) reasonably appears to be or become adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person or by the lawyer's or law firm's own interests."

When asked to represent multiple persons, this rule poses a nagging problem for the attorney, and experts have been agonizing for years over the resolution to the issue.

An argument can be made that in today's litigious society —where lawsuits are frequent and where it is assumed that if anything in life goes wrong someone must be sued— that every representation of multiple parties presents inherent conflict of interest situations. This argument strikes some (including me) as extremely cynical; but you must remember that court cases are argued by litigation attorneys, and their perspective of as well as their monetary interest in our system of justice is different from those of us with an office practice. We deal with real people in day to day situations where, unlike the litigation attorney, the exception is not the rule.

Are your interests materially and directly adverse to one another? They could be; it depends on your circumstances and your attitudes, as much or more than on the law. You must help me make this determination, and in many ways you are in a better position than I am to decide this issue. The question of whether the interests of you two are materially adverse to one another is primarily one of common sense for which you, in many respects, are perhaps better qualified than I to evaluate. If you feel that your interests are "materially and directly adverse" to one another then you must disclose this to me and only one of you should sign this letter, because in that case, I will decline to undertake the joint representation of you both.

By both of agreeing to my engagement letter with you, you will be representing to me that your interests are not "materially and directly adverse." If you are wrong in your conclusion regarding this issue, then by signing this letter you will be consenting to my joint representation of you both even if your interests are in fact materially and directly adverse.

Rule 1.06(c) reads: "A lawyer may represent a client in the circumstances described in (b) if: (1) the lawyer reasonably believes the representation of each client will not be materially affected; and (2) each affected or potentially affected client consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any."

If I undertake to represent you jointly it is because I reasonably believe my representation of each of you will not be materially affected by the conflict, if any. But I want you both, in any event, to be fully aware of the existence, nature, implication, and possible adverse consequences of the common representation and the advantages involved, if any.

The advantages of joint representation include economy and the ability to coordinate that obviously will affect you both, but will also presumably be disclosed to each other as well as to me as your joint counsel. The disadvantages include the fact that by planning your estate jointly, one or both of you may feel compelled to adopt a plan that is different from what you might otherwise implement in the privacy that separate representation affords; and further, if either of you owns separate property, an attorney that represents only you will be in a better position to further your interests in the event of a dispute over the proper characterization of the property as community or separate. Moreover, if you have children by a prior marriage, your interests in benefiting them may not be identical and could be affected by the estate plan of your spouse.

I am enclosing along with this letter a separate memorandum (entitled "Community Property Law in a Nutshell") that briefly describes some of the more important rules of community and separate property law in Texas to help you to understand some of the issues and potential conflicts that could affect your decision as to whether you feel joint representation is appropriate. I hope you will find it interesting and informative.

Note that either of you may ordinarily revoke or amend your Will or sign a new Will, without penalty or obligation. Occasionally clients execute what are known as election Wills or put provisions in a Will or trust for the benefit of a spouse contingent upon what the other spouse has done in his or her Will. If that is the case in the estate planning documents I prepare for you, I will take pains to make you aware of it. Each of you must assume the risk that the other may secretly revoke his or her Will or trust through the assistance of another lawyer, or that the surviving spouse will alter his or her estate plan after your death.

By both of you signing this letter each of you assumes the duty to report to me any fact or circumstance which may affect my impartial representation of you both, and any fact or circumstance that indicates that your interests are in conflict with one another.

Each of you are advised of the hazards of multi-party representation by one attorney. I cannot represent you both and be an advocate for one of you to the exclusion of the other. An attorney is required to be impartial, loyal, and to exercise independent judgment with regard to the client group as a whole. If I represent you jointly I may not promote the interest of one of you to the disadvantage of the other.

Confidences.

If I undertake to represent you jointly, both of you will have free access to any documents I prepare for either of you, and it must be understood that any communication that one of you makes to me will not be confidential with respect to your spouse. This is a condition of my undertaking joint representation.

It is theoretically possible for a lawyer to undertake the separate (as opposed to joint) representation of a husband and wife after full disclosure and if consent is obtained, but I have found that this is not only awkward but that it lacks some of the principal advantages that joint representation offers, such as the advantage offered by full disclosure of a commonly understood plan.

Each member of a family may serve as the spokesman for all. I will assume in the absence of clear evidence to the contrary that each of you is communicating to the other respecting any conversations of a material nature that may occur between me and only one of you.

Form 5 Supplement Paragraphs Concerning Representing of Husband and Wife

Rule 1.06(b) of the Texas Disciplinary Rules of Professional Conduct provides that as a general rule "a lawyer shall not represent a person if the representation of that person (1) involves a substantially related matter in which that person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer's firm; or (2) reasonably appears to be or become adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person or by the lawyer's or law firm's own interests." This rule poses a nagging problem for the attorney, and experts have been agonizing for years over the resolution to the issue.

An argument can be made that in today's litigious society —where lawsuits are frequent and where it is assumed that if anything in life goes wrong someone must be sued— that every husband and wife have an inherent conflict of interest in estate planning for their family. This argument strikes some (including me) as extremely cynical; but you must remember that court cases are argued by litigation attorneys, and their perspective of as well as their monetary interest in our system of justice is different from those of us with an office practice. We deal with real people in day to day situations where, unlike the litigation attorney, the exception is not the rule.

Are your interests materially and directly adverse to one another? They could be; it depends on your circumstances and your attitudes, as much or more than on the law. You must help me make this determination, and in many ways you are in a better position than I am to decide this issue. The question of whether the interests of a husband and wife are materially adverse to one another is primarily one of common sense for which you, in many respects, are perhaps better qualified than I to evaluate. If you feel that your interests are "materially and directly adverse" to one another then you must disclose this to me and only one of you should sign this letter, because in that case, I will decline to undertake the joint representation of you both.

By both of you signing this letter you will be representing to me that your interests are not "materially and directly adverse." If you are wrong in your conclusion regarding this issue, then by signing this letter you will be consenting to my joint representation of you both even if your interests are in fact materially and directly adverse.

Rule 1.06(c) reads: "A lawyer may represent a client in the circumstances described in (b) if: (1) the lawyer reasonably believes the representation of each client will not be materially affected; and (2) each affected or potentially affected client consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any."

If I undertake to represent you jointly it is because I reasonably believe my representation of each of you will not be materially affected by the conflict, if any. But I want you both, in any

event, to be fully aware of the existence, nature, implication, and possible adverse consequences of the common representation and the advantages involved, if any. In this regard, I will send you, at the time I send the first draft of the estate planning documents, a diagram and memo that explains how property in Texas passes if a person does not have a Will.

The advantages of joint representation include economy and the ability to coordinate a plan that obviously will affect you both but will also presumably be disclosed to each other as well as to me as your joint counsel. The disadvantages include the fact that by planning your estate jointly, one or both of you may feel compelled to adopt a plan that is different from what you might otherwise implement in the privacy that separate representation affords; and further, if either of you owns separate property, an attorney that represents only you will be in a better position to further your interests in the event of a dispute over the proper characterization of the property as community or separate. Moreover, if you have children by a prior marriage, your interests in benefiting them may not be identical and could be affected by the estate plan of your spouse.

I am enclosing along with this letter a separate memorandum (entitled "Community Property Law in a Nutshell") that briefly describes some of the more important rules of community and separate property law in Texas to help you to understand some of the issues and potential conflicts that could affect your decision as to whether you feel joint representation is appropriate. I hope you will find it interesting and informative.

Note that either of you may ordinarily revoke or amend your Will or sign a new Will, without penalty or obligation. Occasionally clients execute what are known as election Wills or put provisions in a Will or trust for the benefit of a spouse contingent upon what the other spouse has done in his or her Will. If that is the case in the estate planning documents I prepare for you, I will take pains to make you aware of it. Each of you must assume the risk that the other may secretly revoke his or her Will or trust through the assistance of another lawyer, or that the surviving spouse will alter his or her estate plan after your death.

By both of you signing this letter each of you assumes the duty to report to me any fact or circumstance which may affect my impartial representation of you both, and any fact or circumstance that indicates that your interests are in conflict with one another.

Each of you are advised of the hazards of multi-party representation by one attorney. I cannot represent you both and be an advocate for one of you to the exclusion of the other. An attorney is required to be impartial, loyal, and to exercise independent judgment with regard to the client group as a whole. If I represent you jointly I may not promote the interest of one of you to the disadvantage of the other.

Confidences.

If I undertake to represent you jointly, both of you will have free access to any documents I prepare for either of you, and it must be understood that any communication that one of you makes to me will not be confidential with respect to your spouse. This is a condition of my undertaking joint representation.

It is theoretically possible for a lawyer to undertake the separate (as opposed to joint) representation of a husband and wife after full disclosure and if consent is obtained, but I have found that this is not only awkward but that it lacks some of the principal advantages that joint representation offers, such as the advantage offered by full disclosure of a commonly understood plan.

Each member of a family may serve as the spokesman for all. I will assume in the absence of clear evidence to the contrary that each of you is communicating to the other respecting any conversations of a material nature that may occur between me and only one of you.

Form 6. ABA Model Incorporation Engagement Letter

[Date]
[Client Name and Address]
____
____
____

Dear _______________:

We are pleased to have the opportunity to be of service to you in forming and representing your new [state] corporation. We look forward to working with you and will do our best to provide the highest quality legal services in a responsive, efficient manner.

Fundamental to a sound relationship is a clear understanding of the terms and conditions upon which we will be providing legal services. Accordingly, the purpose of this letter is to clarify and confirm the terms and conditions under which we will form and represent the corporation.

Scope of Services

You asked us initially to incorporate a [state] corporation. We will prepare the charter, bylaws, action by the incorporator, and initial action by the board of directors; file the charter with the [state] Secretary of State; assist in issuing the capital stock; and, if an exemption from the more extensive filing requirements applies, prepare and file an appropriate notice under the [state] securities law. We will not be responsible for other organizational matters like securing permits or local business licenses, the Federal Taxpayer Identification Number or the [state] employer account number, or for filing annual reports or other statements with the Secretary of State. [You are relying on ________________________ for tax advice for the incorporation, including the choice of entity and whether to make an election as an S corporation. You acknowledge that we have no responsibility as to these matters.]

When formed, we will represent the corporation with respect to such matters as may be referred to us. These terms and conditions will apply to any additional legal services that we may provide.

Staffing

I will be the attorney primarily responsible for the representation [, with the assistance of ____________, an attorney (paralegal) in our _____________ practice group and others as appropriate from time to time]. When questions or comments arise about our services, staffing, billings, or other aspects of our representation, please contact me. My direct telephone number is ___________. It is important that you are satisfied with our services and responsiveness at all times.

We intend to provide quality legal services in an efficient, economical manner. This necessitates involving other firm attorneys with the requisite expertise, and paralegals, who are not attorneys but are experienced in the preparation of documents and the completion of various tasks.

[Option - Attorney Conferences/Meetings] From time to time, internal conferences will take place among our personnel and two or more may attend meetings or proceedings on your

behalf. Although this approach might seem to result in duplication of effort, it is our belief that this practice facilitates communication, improves the quality of the work, and ultimately is more economical.

Responsibilities

In reliance upon information and guidance provided by you, we will provide legal counsel and assistance to you in accordance with this letter, keep you reasonably informed of progress and developments, and respond to your inquiries.

To enable us effectively to render these services, you agree to fully and accurately disclose to us all facts that may be relevant to the subject of our representation or that we may otherwise request, and to keep us apprised of developments relating to that subject. You also will assist and cooperate with us as appropriate in connection with our representation.

[Option - Opinions and Beliefs] Either at the beginning or during the course of our representation, we may express our opinions or beliefs concerning the matter or various courses of action and the results that might be anticipated. Any such statement made by any [partner] [member] [shareholder] or employee of our firm is intended to be an expression of opinion only, based on information available to us at the time, and must not be construed by you as a promise or guarantee of any particular result.

Fees, Disbursements and Other Charges

Our fee for the incorporation will be $______. In addition to our fee, we will be entitled to payment or reimbursement for disbursements and other charges incurred in connection with the incorporation, including the $______ tax prepayment, filing fees payable to government agencies, duplicating, long distance telephone calls, telecopying, messenger and delivery service, and a corporate set (minute book, stock book, and corporate seal). It is estimated that these disbursements and other charges will not exceed $______.

You [agree to deposit] [deposited] $______ with us as an advance against these [fees and] disbursements and other charges of the incorporation, from which we may pay the [fees and] incorporation costs without further authorization from you.

The above fee will only cover the incorporation and will not include any other legal services which may be required in connection with acquiring or leasing facilities, buy-sell arrangements among the corporation and shareholders, contractual matters that may arise with respect to the business operations, or other matters not directly related to the incorporation. [We have discussed with you the advantages of instituting buy-sell arrangements, but you have chosen to defer implementation of these arrangements at this time.]

Our fees for any additional legal services will be based primarily on the amount of time spent by attorneys and paralegals on behalf of the corporation. Each lawyer and paralegal has an hourly billing rate based generally on his or her experience and any special expertise. The rate multiplied by the time spent, measured in tenths of an hour, will be evaluated by the billing attorney as the [initial] basis for determining the fee.

Our billing rates currently range from $______ an hour for new associates to $______ an hour for senior [partners] [members] [shareholders]. My billing rate is currently $______ an hour. Time devoted by paralegals is charged at special billing rates currently ranging from $______ to $______ an hour. These rates are adjusted from time to time generally to reflect

increased experience and special expertise of the attorneys and paralegals and inflationary cost increases affecting our business, and the adjusted rates will apply to all services performed thereafter.

Other factors may be considered in determining our fees, including the novelty and difficulty of the questions involved; the skill requisite to perform the services properly; the experience, reputation, and ability of those performing the services; the time limitations imposed by you or the circumstances; the amount involved and results obtained; and any other factors that may be relevant under applicable rules of professional conduct. [However, these factors will not result in our fees exceeding the indicated amounts based on our hourly rates without prior discussion with you.]

In addition to our fees, we will expect payment for any additional disbursements and other charges as described in the General Provisions enclosed with this letter.

Each month we will furnish you with a statement describing our services and separately showing disbursements and other charges in a format and with such detail as you may request. There often is an unavoidable delay in reporting disbursements and other charges, and therefore not all disbursements and charges may be billed at the same time as the related legal services.

General Provisions

Enclosed is a statement entitled General Provisions setting forth additional terms and conditions, which are incorporated into this letter and apply to our representation to the extent not expressly inconsistent with this letter.

[Option - Arbitration] Any controversy, dispute, or claim arising out of or relating to our fees, charges, performance of legal services, obligations reflected in this letter, or other aspects of our representation shall be resolved through binding arbitration in [location] in accordance with the rules then in effect of [administered by] the [arbitration body], and judgment on the award rendered may be entered in any court having jurisdiction thereof. [YOU ACKNOWLEDGE THAT BY AGREEING TO ARBITRATION, YOU ARE RELINQUISHING YOUR RIGHT TO BRING AN ACTION IN COURT AND TO A JURY TRIAL.]

[Option - Attorneys' Fees] If any controversy, dispute, or claim arises between us concerning our fees, charges, performance of legal services, or other aspects of our representation, the prevailing party will be entitled to recover from the losing party all costs and expenses it incurs in bringing and prosecuting or defending any litigation or arbitration, including reasonable attorneys' fees and costs at trial and on appeal.

[Option - Conflicts of Interest] Concurrently with this letter, we are delivering another letter to you, which discusses potential or actual conflicts of interest related to this representation. Our agreement to undertake this representation is conditioned on our receipt of a signed copy of the conflicts waiver letter.

* * * *

If this letter correctly reflects your understanding of the terms and conditions of our representation, please confirm your acceptance by signing the enclosed copy in the space provided below and return it [and the deposit of $______] to me. This letter will not become

effective and we will have no obligation to provide legal services until you sign and return the copy of this letter [and the deposit].

Because the corporation will be newly formed and will have limited assets, it is our understanding that you will remain personally responsible for payment of our fees and payment or reimbursement of our disbursements and other charges in the event the corporation should be unable to pay those amounts.

We are pleased to have this opportunity to be of service and to work with you.

Very truly yours,

Enclosure

I/we read and understand the terms and conditions set forth in this letter (including the attached General Provisions) and agree to them.

[Option - Joint and Several] If more than one party signs below, we each agree to be liable, jointly and severally, for all obligations under this letter (including the attached General Provisions).

Form 7: ABA Model Termination Letter (Matter Continuing)

[Date]

[Client Name and Address]

____

____

____

Dear ________________:

My purpose in writing is to memorialize our recent discussions regarding the termination of this firm's relationship as your counsel in connection with . . . .

We have received payment to date for our services of $______ and payment or reimbursement of disbursements or other charges totaling $______. We will submit within a few days our statement for services to the termination date and for payment or reimbursement of any further disbursements or other charges paid or incurred on your behalf.

We have agreed that our representation of you in this matter has been concluded. You [have engaged] [stated that you wish to engage] new counsel to pursue this matter on your behalf, and, therefore, we have no further obligation to advise you in this matter. In order to transfer papers and documents pertaining to this matter to your new counsel, we will need to obtain from you a letter of authorization and a letter from your new counsel acknowledging receipt and an agreement to retain such papers and documents and make them available to us for examination at reasonable times upon reasonable advance notice. If you wish, we will gladly meet with your new counsel and provide information on this matter to facilitate the transition. For time spent in this manner, [we will not charge for up to ______ hours] [we will charge for the time spent at __% of the billing rates presently in effect].

You should be mindful of deadlines that already apply to this matter, which include the following:

[. . .]

The need for terminating our relationship in this matter clearly was not anticipated by either of us when we began the representation. We regret the need to cease the representation.

We thank you for the opportunity to be of assistance. Please call me if any questions remain.

Very truly yours,

Form 8: ABA Model Termination Letter (Matter Concluding)
[Date]

[Client Name and Address]
____
____
____
Dear _______________:

We are writing to confirm that our representation in connection with . . . has been concluded. Accordingly, the attorney-client relationship between us has ceased and we will have no further obligation to advise you in connection with this matter or as to legal developments that may have a bearing on the matter. [However, unless we hear from you to the contrary, we intend to keep you on our mailing list, which we use to provide our clients and others with information as to various legal developments that may be of interest.] If you wish to have any of the documents supplied by you returned, please so advise us.

Our [final] statement for services rendered and disbursements and other charges is enclosed. If you have questions regarding our statement, please call me. If you wish to have any of the documents that you supplied to us returned to you, please so advise us.

We are pleased to have had the opportunity to have been of service to you, and we thank you for asking us to do so. Should there be matters in the future where we might be of assistance again, we hope you will call upon us and we shall be pleased to consider possible retention with respect to those matters.

Very truly yours,

Form 9: ABA Model Declination Letter

[Date]
[Prospective Client Name and Address]
____
____
____

Dear ________________:

This will confirm that this firm will not represent you in connection with . . . . It is our understanding that we do not currently represent you in any other matter.

Because we are not representing you on any matter currently, we cannot practically monitor any changes in the law or your circumstances as they might affect the strength of your case. We must, therefore, disclaim any duty to do so.

No attorney-client relationship has been created between this firm and you in connection with this matter and nothing in this letter or in our other communications constitutes legal advice to you.

If you wish to pursue your claim with other counsel, you will need to act promptly. There may be several deadlines involved in your claim, one of which is . . . . If you fail to file a suit or take other appropriate action by that date, you may lose permanently some, if not all, of your rights.

We are returning to you the papers and other information that you delivered to us for review in evaluating this matter. As we agreed, there is no charge for our examining the possibility of representing you. [We did, however, incur some costs on your behalf in obtaining necessary information. Pursuant to your agreement to pay those costs, we enclose a statement itemizing them.]

Except for specific information relating to . . ., we do not believe that we have obtained any information either from or about you [or . . .] that must be considered confidential. If you disagree in any respect with that evaluation, please call me right away so we may discuss the point.

We thank you, again, for presenting us with the opportunity to represent you in this matter, and we trust that you understand why we are unable to do so. To acknowledge your agreement to the foregoing and your receipt of the enclosed papers and other information, please sign the enclosed copy of this letter and return it to me.

Very truly yours,

Enclosures
RECEIVED AND AGREED TO:

____
Date:___________________

Form 10: ABA Model Waiver Of Confidentiality

[Date]
[Prospective Client Name and Address]
____
____
____

Dear _______________:

You have expressed an interest in discussing with us the possibility of this firm representing you in connection with . . . . We look forward to meeting with you on [date] to discuss our qualifications and nonconfidential information relating to this matter.

You have indicated that you will be interviewing other law firms and it is therefore possible that you may decide not to retain us in the matter. We understand fully your desire to proceed in that manner. You, in turn, understand and have agreed that no attorney-client relationship will exist unless and until you decide to retain our firm, we agree to represent you in this matter, and an appropriate engagement letter has been executed reflecting the terms of the representation.

You have also agreed that you will not disclose confidential information to us at our upcoming meeting, but only matters of general knowledge and facts already "of record." You have further agreed that nothing occurring at this meeting will be used to prevent us from future representation of others adverse to you if you do not retain us.

Please confirm your agreement with the foregoing by signing the enclosed copy of this letter and returning it to me.

Very truly yours,

AGREED TO AND ACCEPTED:

____
Date:__________________