

## Estate Planning Retainer Agreements and Engagement Letters

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A KEY ESTATE PLANNING GUIDE

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## Estate Planning Retainer Agreements and Engagement Letters

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**Pre-Engagement**

**Steps Before Being Engaged**

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**Questions You Might Ask Prospects**

- Did anyone refer you to me and if so who?
- Have you previously consulted with an estate planner?
- Has anyone ever assisted you in planning for the disposition of your assets? If yes, who?
- Have you ever filed for bankruptcy or been insolvent?
- Have you ever been, or are you presently, the subject of a lawsuit?
- Are there currently any outstanding judgments or pending claims against you?
- Have you ever been convicted of a crime?
- Are there any current conditions, medical or otherwise, that may impair your ability to sign legal documents?
- Do you currently take any medications, prescribed or otherwise, which could impair your cognition?
- If married, is this your first marriage?

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**Questions You Might Ask Prospects**

- If you have children, were any from different relationships?
- Do you retain rights with regard to all of your children?
- Were you adopted?
- Are you or have you ever been a party to a civil union or common law relationship?
- If married, are you contemplating divorce?
- Are you requesting that we only represent you and not your spouse/partner?
- Have you filed personal income tax returns for each of the past 5 years?
- Have you ever had an IRS audit resulting in adjustments or are you currently under audit?
- Are you a US citizen?

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**Questions You Might Ask Prospects**

- Do you have any assets or interests located outside of the United States?
- Are you a current or future beneficiary under the estate plan of another?
- Do you hold any interests jointly with others, and if so with whom?

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**Introduction to Estate Planning Retainer Agreements**

**Some Practical Observations**

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**Introduction to Estate Planning Retainer Agreements**

- Why so critical?
- When might you use them?
- What process do you use in your office and why?
- How often do you revise them?
- Do you use a "no engagement" letter?

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**Tailor To Your Practice**

- Adapt or modify engagement letter articles, comments, etc., to your practice.
- A paperless, cloud based practice will necessarily have to handle these issues differently than a practice that still has yellow pads and Redwelds.
- A practice that predominantly focuses on a large volume of flat fee, smaller wealth, clients will have a different emphasis than a boutique firm serving a limited number of ultra-high net worth clients seeking a different level of service and relationship.
- What unique nuances does your practice have?

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# Privilege and Confidentiality

Points to Consider

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# Privilege and Confidentiality

- MRPC 1.6 requires attorneys to safeguard client confidences. This goes beyond the need to protect attorney client privileged information.
- Addressing in the engagement letter circumstances when communication of confidential information may occur can be helpful, especially since the privilege belongs to the client and not the attorney.
- Consider alerting the client that use of a corporate or employer's computer or email may, under some circumstances, waive the privilege.

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# Privilege and Confidentiality

- Address whether they want (and to what extent) information shared with other professionals so that there can be a coordinated approach to the plan and obtain authorization to do so where appropriate.
- Discuss what communications will be permitted in the event of disability and upon death.

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**Joint Representation Issues**

**Conflict Check and More**

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**Ask the Client Some of the Following**

- Are you married or in a committed relationship?
- Do you or your significant other have any separate property interests, such as premarital assets, gifted or inherited property?
- Do you (or your significant other) have interests in any closely held business entities?
- Do (either of) you have children from a prior relationship?
- Are you requesting that we represent you alone or you and your significant other together?
- Do you hold any interests jointly with others, and if so, with whom?
- Run a conflict check!

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**Responses That Indicate Interests May Not be Aligned**

- Conduct the initial meeting with one of the prospective clients.
- Attempt to determine if their interests are mutually aligned.
- If interests appear aligned, discuss the distinctions between separate and joint representation.

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## Disclose What Could Happen in Separate vs. Joint Representation

- With separate representation:
  - Each would have an advocate.
  - Each would receive independent advice.
  - Confidences generally would not have to be disclosed.
- With joint representation:
  - Lawyer/firm can't advocate for either spouse against the other.
  - Generally, efforts must be made to develop a coordinated plan and encourage resolution of differing interests in an equitable manner.
  - The lawyer may only act as a facilitator.
  - Confidential information may need to be shared, so that each can make an informed decision about the provisions of the estate plan.
  - Withdrawal of representation may be required.

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## Dual Representation Additional Considerations

- ACTEC Commentaries (5<sup>th</sup> ed. 2016), Section 1.7, at p. 103, indicates it is only advisable to undertake dual/separate representation when:  
“... the lawyer reasonably believes it will be possible to provide impartial, competent and diligent representation to each client and even then, only with the informed consent of each client, confirmed in writing.”

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## Divorce and Dual Representation

- Given the high rate of divorce, if jointly retained, consider language which informs the clients that you will not be giving either truly independent representation with respect to any interests they might have that conflicts with that of their partner's interests.
- Consider obtaining prospective consent to estate planning and other representation following a divorce, if the representation won't be adverse to the other's interests.
- Inform clients that title changes made as part of an estate plan may have adverse consequences in the event of divorce.

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**More on Conflicts of Interest**

**Points to Consider**

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**Conflicts of Interest**

- While nothing precludes oral communications about potential conflicts and their waiver by the client, or how the privilege will be addressed at a future time, it may be best to address these issues with the client in writing and have written confirmation regarding how such issues will be addressed.

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**Conflicts of Interest**

Consider addressing:

- Potential implications of multigenerational representation.
- What can and can't be communicated with other members of the family who are represented by the same firm.
- Representation of fiduciaries associated with the client plan.
- Conflicting roles of attorney who is also asked to act as fiduciary (trust protector, trustee or agent, etc.).

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## Unwed Couples and Multi-Generational Conflict Issues

- An ACTEC commentary to MRPC 1.7 acknowledges the possibility of separate engagements for representation in multi-generational planning (and perhaps unwed couples.)
- However, with regard to married couples, the commentary indicates that separate engagement by each of the couple, may be inconsistent with a lawyer's duty of loyalty to each client.
- ACTEC recommend that lawyers only represent a couple jointly or only represent one member of the couple.

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## Consents and Waivers

### Points to Consider

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## Consent

- Prospective waiver is possible under appropriate circumstances. See ABA Formal Ethics Opinion 05-436 (2005), interpreting MRPC 1.7(b).
- Waiver contemplates that it will be the result of "informed consent" which represents the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.
- Under certain circumstances it may be advisable to utilize a separate (contemporaneous) Waiver Agreement which reflects the provisions of sufficient information about the potential risks of the joint or dual representation.

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**Consent**

- The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding...

ACTEC Commentaries (5th ed.),  
2016, Comment 22 to MRPC 1.7

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**Unexpected Consequences of Waiver or Consent**

- Think about the implications of what is in your engagement letter.
- Limiting language in an engagement letter came up in the context of a motion for disqualification of counsel in *Ervin v. Bank One Trust Co.*, 2005 Mich. App. LEXIS 528, 2005 WL 433573 (unpublished).
- This decision affirmed the disqualification of a law firm from representing a beneficiary against a bank trustee when the same firm represented an affiliate of the bank trustee and had signed a retention agreement making clear that its representation of one bank affiliate would be deemed representation of all affiliates and subsidiaries and waivers would not be granted.

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**What Else to Consider Putting in Engagement Letters**

**Provisions to Consider**

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**Basic Billing Provisions**

- It is helpful to have an engagement letter that reflects the scope of the engagement and your billing practices.
- If billing on a flat fee or project basis, indicate the fee and what it will (and won't) cover and how extraneous matters will be billed.
- If billing on an hourly basis, indicate your hourly rate.
- Remember to indicate when payment will be expected.
- It can be helpful to indicate that your fee schedule changes from time to time.
- Address that you will bill if called as a witness.

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**Account Stated**

- Consider including language that will help establish a claim premised upon an "account stated":  
"It is our expectation that you will review all monthly invoices issued to you and immediately contact us if you have any questions or concerns regarding the invoice. In the absence of hearing from you within 30 days from the issuance date of any invoice, we agree that you have reviewed the invoice and have no objections."

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**Client Responsibilities**

- Full and accurate client disclosure may be important to your ability to render advice and create a cohesive plan.
- Consider including a provision in the engagement letter that reflects it is the client's responsibility to provide complete and accurate disclosure of financial matters and intentions regarding disposition of your estate.

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### Scope of Engagement

Consider addressing:

- The documents you've been asked to review (or not).
- The documents you will be drafting (or not).
- If this a limited engagement (e.g. only to modify a limited provision).
- Who will be responsible for funding trusts/entities.
- Whether you evaluate and provide advice regarding insurance policies that are part of the plan.
- Re-affirming the scope of engagement (especially if it has changed) when you send the draft documents to the client.

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### Post-Mortem Representation

- It can be helpful to discuss what might happen after disability and death.
- A surviving spouse, child or nominated fiduciary may request the drafting lawyer to act as attorney for a beneficiary or fiduciary. Discuss whether this is desired by the client and the extent to which disclosures can be made.
- In an incapacity situation, representing a beneficiary or fiduciary may result in positions that are adverse to those of the former client – what then?

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### Document Retention

Consider addressing:

- Who will be responsible for retention of original documents;
- Whether there will be a charge for additional copies of documents requested after engagement is completed ;
- How long the contents of a file will be retained;
- Despite having a file destruction policy, remember if you become aware of litigation before destruction occurs, you may have a duty to take steps to safe-guard documentation.

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**No Guarantees**

- If you provide estate or tax planning services, you may wish to include language in your engagement letter which reflects you don't guarantee the plan will work as hoped.
- Tax regimes change.
- A client's failure to properly title assets, change or beneficiary, or other changes can adversely impact the plan.

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**No Guarantees – Sample Language**

- "Many aspects of many, if not most, estate and related plans are not only uncertain, but subject to a wide spectrum of different views by other advisers, the courts, the IRS, and other authorities. Even many common strategies, techniques and transactions are subject to tax, legal, financial, and other risks and uncertainties. While we endeavor to identify some of the risks of a plan, all risks and issues with each component of a plan are not possible to identify or communicate. Creating a collaborative team will help identify more issues with your plan. Further, the fact that we communicate verbally or in writing certain risks should never be interpreted as an indication that any such listing or communication is a comprehensive listing or communication of every risk involved. The risks of any transaction can be further compounded by improper administration of the plan, failure to meet annually to review and update the plan, changes in the tax and other laws, that reduce hoped for benefits or even result in more costly results than had no planning been pursued. Annual meetings with a collaborative advisor team may identify existing or new risks, help modify the plan to address changes in the law, mitigate risks, but still cannot provide certainty."

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**Text Messages**

- Maintaining a record of communications with the client can be important should future litigation ensue.
- Consider a provision in the retainer agreement that says "It is not possible for the firm to maintain a record of text messages. You should assume that any text message directed to personnel of this firm will not be received and will not be read." If texts are received, noting the gist of the text message in the billing system may serve to document the communication. Be mindful, however, that in many jurisdictions, bills aren't considered privileged communication.

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**Client Payment/Allocation of Fees**

- "How you allocate legal fees, to various persons, entities or trusts could affect whether the payment is tax deductible. It is important that you use checks drawn on the appropriate accounts for the appropriate entities or persons when paying legal fees. Paying personal expenses from a business entity could be argued by a claimant or tax authority as evidence of your disregarding the independence and legal integrity of the entity. If you personally, or another entity, pays for legal fees for the services rendered to that trust, the IRS might argue that the payment is equivalent to an impermissible additional gift and that the tax position of the trust should not be respected."

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**Ancillary Documentation**

**More than Just the Engagement Letter**

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**Ancillary Documentation**

- Consider ancillary documentation that backstops/supports the provisions of your engagement letter/retainer agreement.
- Intake sheet.
- Disclaimer/caveat on balance sheet client signs.
- Footers on bills.
- Emails/letters during the engagement clarifying the scope.

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**Ancillary Documentation**

- Estate planning questionnaire.
  - If you send out a written questionnaire as part of the engagement process, remember that use of such forms does not eliminate the need to ask questions at the time of devising the plan as well as at the time of execution, to assure that the client has the requisite capacity to engage in the plan.

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**Document End of Engagement**

- Consider sending written confirmation that engagement has ended or been completed when the executed documents are provided to the client.
- If you find that the engagement stalls because the client becomes unresponsive, you may wish to consider sending written confirmation that you consider the engagement ended and your file closed.

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**Revise Engagement Letters**

Ongoing Process

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**Update is Important**

- Periodically evaluate and update your engagement letters to reflect new ethics rules, changing practices, integration of new technology, and other factors.
- A review of the ACTEC COMMENTARIES, FIFTH EDITION 2016, published by The American College of Trust and Estate Counsel Foundation (ACTEC® Foundation), can be helpful in addressing some of these ethical considerations.

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**Conclusion and Additional Information**

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**Conclusion**

- Retainer agreements (engagement letters) are an important step to the protection of practitioners.
- Forms should be updated and modified to reflect changing law, technology and practices.
- Practitioners should be certain to find provisions and processes that work for their particular practice.

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**Additional information**

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