Drafting Tips for Representation/Fee Agreements and Letters

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Drafting Tips for Representation/Fee Agreements and Letters

Learning Objectives

• Learn best practices in drafting legal services agreements and engagement letters
• Review language samples to improve skill in describing representation’s scope, attorney – client roles, terms of billing and fee payment
Drafting Tips for Representation/Fee Agreements and Letters

Learning Objectives (contd)

• Recognize when an essential element is missing
• Enhance ability to draft legal services agreements/letters that should more effectively withstand client fee challenges and potential bar fee complaints
FIRST, some basics bear repeating. . .

• Before undertaking representation, decide, clarify, and confirm . . .

WHO IS THE CLIENT OR WHO ARE THE CLIENTS?
Who is the client?

- Senior or older person?
- Husband & wife or other joint?
- Friend? Family?
- Fiduciary?
So who’s your lawyer ....?
Rule 1.18 – Duties to Prospective Client

Comment

[5] A lawyer may condition conversations with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See Rule 1.0(f) for the definition of informed consent. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.
DUTY IMPLIES RISK FOR MALPRACTICE
“Miranda warning”
(Courtesy Prof. Kate Mewhinney)

- I, [Daughter], understand that Attorney does not represent me regarding issues that concern my mother. I understand that Attorney may be representing my mother after Attorney meets with her. I also understand that **whatever I say to Attorney may be used against my interests** by Attorney in her representation of my mother. I understand I could hire my own lawyer and I have chosen not to do so. I have read this document and understand its contents.
Is it the family plan?

• Dear:
• I enjoyed meeting you and your brother, , during our previous office conference regarding the above-referenced.
• I have been impressed that you, your parents and siblings have a close and open relationship and that each of you has committed to resolving issues in the other's interest. However, as I confirmed to all of you during our initial office conference, I only represent and can advise your mother and father in connection with this matter. I do not represent and cannot provide legal advice to you or your siblings. Accordingly, you should consult with an attorney if you desire legal advice pertaining to this matter.
Is it the family plan? (contd)

• I believe it is important to clarify the foregoing in order to avoid confusion or misunderstanding. Again, I very much enjoyed meeting you and your brother, . I have done, and will continue to do, my very best to represent your parents in this matter and will be guided by their desires. With warmest regards, I remain

• Very truly yours,

•
Before engagement . . .

Determine whether

• You’re qualified to handle the matter
• You have the time and resources to handle the matter, given your current case load and your other professional and personal responsibilities
• Client’s expectations are reasonable and attainable
• Client is willing and able to pay for your services
• Client is someone you want to work with and for
Client-Lawyer Relationship

Rule 1.1 Competence

• A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
Are you competent to provide the services requested?

- THINK REAL HARD....

- CAN YOU BECOME COMPETENT WITH SOME HELP?
Conclusion of Consultation . . . Engaged or Not

- Legal Representation/Fee Agreement signed, sealed, delivered
- Letter confirming consultation, engagement, scope of representation & terms - ALWAYS!!
- If not engaged, consider letter confirming non-engagement, and if statutes of limitations are involved, refer to same.
If you decide to represent client(s)

• If lawyer and client mutually agree to retention or engagement, confirm in written legal services agreement –
  • Scope of Representation
  • Attorney/Client Roles
  • Fees/Methods – Hourly – Flat – Contingent, or Combination(s)
  • Other Terms of Representation & Billing
  • Review with Client
  • Signatures
  • Copies
Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer

- (a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. . . . .
Rule 1.2 – Scope of Representation

• . . . .

• (c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.
Scope of Representation

• What professional services are you being retained to perform?
  – What does client want the lawyer to do?
  – What are your fees for such services?
Scope of Representation

• What professional services are you not being retained to perform?
  – What if client only desires a limited scope of services?
  – What if client only wants to pay for limited services?
  – What services will you not be providing?
  – What service are you not competent to provide?
  – Bundle of services?
  – Unbundle services?
  – Be clear to avoid confusion and/or misunderstanding.
Legal Representation Agreement
Defining Scope and Role

- What is expressly EXCLUDED can be as important as what is INCLUDED in scope:

Examples:

- Lawyer will not provide tax advice or advice regarding investments or financial planning. Accordingly, as to investments, financial planning, and/or tax advice, Client should consult with a competent professional, such as their tax advisor, C.P.A., tax attorney, and/or reputable licensed financial/investment advisor.
Defining Scope and Role (contd)

• DISCLAIMER OF GUARANTEE. Client understands that Lawyer makes no guarantee that Client or any other person on whose behalf an application for Medicaid or government benefits assistance may be made will qualify or become eligible for Medicaid or government benefits and no guarantee that such eligibility, even if obtained, will continue thereafter. Client acknowledges that Lawyer has given no assurances or guarantees regarding the outcome of this Matter. Nothing in this Agreement and nothing in Lawyer’s statements to Client will be construed as a promise or guarantee regarding the outcome of the Client’s matter. Lawyer makes no such promises or guarantees.
Scope of Representation - Exclusions

• Matters Excluded: Except as provided herein, Lawyer's scope of representation does not include gathering necessary documents and information for or otherwise assisting Client with the Medicaid application and the application process, unless Client should hereafter request Lawyer to so assist Client. Likewise, Lawyer is not responsible for providing tax advice to Client. Client will be responsible for final completion of Medicaid application and securing all other information and documentation for application. Client will be responsible for securing all necessary documents for Medicaid application, meeting with DSS caseworker, submitting final application and providing all required supporting documentation to DSS/Medicaid, and consulting with a C.P.A. or tax advisor regarding potential tax implications involved with and relating to this matter.
Sample Provision - Scope of Representation

• __X__ OTHER: Preparation of letter confirming office conference with basic overview of current facts and circumstances and law, options and proposals for Client and overview of special needs trust; preparation of Will with special needs trust in draft for Client review and forward draft to bank trust officer for his review and discussion prior to execution by Client; preparation of necessary and/or appropriate revisions to Will and trust; after Client confirms to Counsel that all assets have been re-titled out of her Revocable Living Trust, then Lawyer to prepare a Revocation of Trust for Client to review and sign; follow up appointment with Client to review and execute Will with special needs trust and Revocation of Trust, final revisions, as necessary, and execution with witnesses and notary; preparation of brief instructions for testamentary special needs trustee.
Sample Provision - Scope of Representation

• Income-Only Trust: Advice and counsel regarding laws relating to statutory Income-Only Trust for Medicaid/ nursing home; preparation of Medicaid Income-Only Trust, review same with Client and supervise proper execution. After the Trust is prepared and executed by client, then Lawyer’s representation of client shall be concluded. Except for the foregoing, Client shall be, and is, responsible for all matters in connection with the Trust, including but not limited to, establishing a bank account, proper funding of the Trust, securing tax advice, maintaining proper and appropriate records and disbursements from the Trust. Lawyer will not provide tax advice.
Sample Provision - Scope of Representation

- __x__ Conference with Client to review incoming trust documents and other estate planning documents previously prepared for Clients by Trust Busters Ltd.; advice and recommendation as to revisions and amendments to foregoing documents; preparation of amendment and restatement to trust, new Pour-Over Will, Certificate of Trust Existence, Durable Power of Attorney, and other documents deemed proper or appropriate by Lawyer and Client and requested by Client; prepare instructions for management and ancillary documents for trust as appropriate for trust and assemble/organize new Trust notebook/organizer with new documents prepared by Lawyer; follow-up conference with clients to review and execute amended/restated Trust and other documents prepared by Lawyer; associate real estate attorney, Tom Realty Lawyer, to advise and assist Client with Deed conveying home into trust. Client will be directly responsible to Tom Realty Lawyer for payment of his professional charges.
Sample - Exclusion

- Revocable Living Trust – Funding/Assets:

Client has not requested and does not desire that Lawyer assist Client with confirming that Client’s assets and property have been properly re-titled into trust. **Client** will be responsible for ensuring that assets/property are properly titled into the trust.
VI. It is agreed and understood that LAW FIRM’s scope of representation is solely to represent, advise, and counsel CLIENT through settlement or the conclusion of a trial or final trial court hearing, if any, as the case may be, in this matter.
In the event CLIENT wishes to appeal from any order, decision, or verdict entered in this matter, LAW FIRM is not obligated under this Agreement to represent CLIENT in any such appeal, unless a new and independent Representation Agreement, upon terms mutually agreeable to both LAW FIRM and CLIENT, is entered into between LAW FIRM and CLIENT pursuant to which LAW FIRM is engaged specifically to undertake representation of CLIENT in such appeal.
What about tax advice?

- Counsel will **not** offer or provide tax advice or advice regarding investments or financial planning. **Client** shall be responsible for consulting with and, if necessary, engaging the services of a tax advisor, C.P.A., or tax attorney regarding tax advice and any tax-related issues. As to investments and financial planning, the Client should consult with another professional, such as tax advisor, C.P.A., tax attorney, and/or reputable licensed financial/ investment advisor.
Legal Services Corporations

HOW ABOUT ATTORNEYS WHO WORK FOR LEGAL SERVICES?
Retainer Agreement - LSC

• § 1611.9 - Retainer agreements.
• (a) When a recipient provides extended service to a client, the recipient shall execute a written retainer agreement with the client. The retainer agreement shall be executed when representation commences or as soon thereafter as is practicable. Such retainer agreement must be in a form consistent with the applicable rules of professional responsibility and prevailing practices in the recipient's service area and shall include, at a minimum, a statement identifying the legal problem for which representation is sought, and the nature of the legal services to be provided.
• (b) No written retainer agreement is required for advice and counsel or brief service provided by the recipient to the client or for legal services provided to the client by a private attorney pursuant to 45 CFR part 1614.
• (c) The recipient shall maintain copies of all retainer agreements generated in accordance with this section.
Rule 1.5 - Fees

• (b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client. [emphasis added]
Rule 1.5 - Fees

• Note that in some states, the Model Rule as adopted may require a written fee agreement or engagement letter addressing the basis or rate of the fees and expenses. For example, in Wisconsin, if the fee will exceed $1,000, the client must be informed in writing.

• What does your state require?
• The time expended by the Counsel to perform the legal services for the Client in this Matter will be the primary basis for determining the total legal fees to be paid to the Counsel. The following rates will apply:

• . . . .
Hourly Rates

- Elder Law Attorney - $__________ per hour
- Associate Attorneys - $__________ per hour
- Legal Assistants - $__________ per hour
- In-Court Time - $__________ per hour
- Travel Time - $__________ per hour

These rates are subject to change from time to time, and any such change will be reflected on the Client’s billing statements. These rates do not include the other fees, charges and expenses as described in Section II.B herein.
As to Hourly Rates - Maybe Good Idea

• (Lawyer projects/estimates a **minimum** professional fee of $___________, excluding costs/expenses, and that fees could range upward depending on actual time necessarily devoted to foregoing matters. The foregoing range is an estimate and projection and could easily vary depending on the amount of work that is necessarily devoted to this matter.)
Fixed Fee

FIXED FEE ARRANGEMENT

• The total fee to be charged the Client for legal services to be performed by the Counsel in this Matter is $____________, which fee does not include the fees and charges for other services and expenses as described in Paragraph II.B herein.
Rule 1.5 – Fees (Contingent)

• (c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. [emphasis added]
Rule 1.5 – Contingent (contd)

• Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination. [emphasis added]
Contingent Fee

- **CONTINGENCY FEE ARRANGEMENT**

- The Client agrees to pay the Counsel a fee contingent upon the outcome of the Matter. If recovery is made in this Matter on the Client’s behalf, the Client agrees to pay to the Counsel, for legal services rendered, a sum equal to:
Contingent Fee (contd)

- _________% of any and all sums recovered by way of settlement prior to instituting a lawsuit; or
- _________% of any and all sums recovered either as a result of trial or by way of settlement after a lawsuit has been instituted; or
- _________% of any and all sums recovered if any judgment is appealed, either on behalf of the Client or by any adverse party, or if any proceedings after judgment have to be brought to collect the judgment or any portion thereof; or
Contingent Fee (contd)

• __________% of any and all sums recovered if the Matter is the subject of a retrial as ordered by a trial or appellate court

• If there is no recovery, there shall be no fees owed by the Client to the Counsel for representation in this Matter. The Client understands and agrees, however, that, regardless of recovery, the Client is responsible for and will pay all other fees, charges, and expenses as described in Paragraph II.B herein.
Payment of Fees

• By Client or third person?
Rule 1.8 Conflict Of Interest: Current Clients: Specific Rules

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

– (1) the client gives informed consent;
– (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
– (3) information relating to representation of a client is protected as required by Rule 1.6.
Sample Provision - Payment of Fees by Third Party

PAYMENT OF FEES BY THIRD PARTY. If a third party, someone other than the Client, has agreed or will be responsible for payment of Client's fees, costs and expenses, Lawyer has consulted with Client regarding such payment arrangements and Client has fully and voluntarily consented after having consulted with Lawyer. It is further agreed and understood that if a third party is to be responsible for and pay the Client's fees, costs and expenses, Client, Lawyer and third party understand that such payment arrangement shall in no way interfere with the Lawyer's independence of professional judgment or with the Client-Lawyer relationship, and that all information relating to representation of Client is fully protected as required by the South Carolina Code of Professional Conduct.
What if client is fiduciary?

- Trustee
- Guardian/Conservator
- Attorney-in-Fact
- Health Care Agent
- Personal Representative
Sample Provision
Fiduciary Client – Payment of Fees

• The Client agrees that regardless of whether or not estate or fiduciary funds so reimburse the Client, the Client shall in all events be personally responsible for and shall pay all legal fees and professional charges billed and incurred in this matter and such payment arrangement shall in no way interfere with the Lawyer’s independence of professional judgment or with the Lawyer’s relationship to the Client in the Client’s fiduciary role. Lawyer will take all steps necessary to preserve the Client's confidential information.
Fiduciary Client

• What about attorney-client privilege?

• Confidentiality?

• Attorney’s duty to Principal, Beneficiary, Heir, Ward?
Sample Provision - Fiduciary Client

C. Fiduciary Representation  If the Counsel has been engaged to represent the Client in a fiduciary role, such as Personal Representative of an estate, Trustee of a trust, and/or attorney-in-fact/agent under a power of attorney, then the Client and the Counsel further agree as follows: Such representation shall not impose upon Counsel any duties or obligations whatsoever to other persons who are or may be interested in the estate, trust estate, or other fiduciary property, including but not limited to heirs, devisees, and beneficiaries, even though fiduciary funds may be used to compensate the Counsel for legal services rendered to the Client as fiduciary. The Counsel represents the Client only in the Client’s fiduciary capacity and Counsel does not represent Client individually and/or personally. The Client should be entitled to reimbursement from estate or fiduciary funds for any legal fees and professional charges billed and incurred in this matter.
Rule 1.7 – Conflict of Interest: Current Client Comment

• [27] For example, conflict questions may 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 be present. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved. [emphasis added]

- SECTION 62-1-109. Duties and obligations of lawyer arising out of relationship between lawyer and person serving as a fiduciary.

- Unless expressly provided otherwise in a written employment agreement, the creation of an attorney-client relationship between a lawyer and a person serving as a fiduciary shall not impose upon the lawyer any duties or obligations to other persons interested in the estate, trust estate, or other fiduciary property, even though fiduciary funds may be used to compensate the lawyer for legal services rendered to the fiduciary. This section is intended to be declaratory of the common law and governs relationships in existence between lawyers and persons serving as fiduciaries as well as such relationships hereafter created.

Whenever an attorney-client relationship exists between a lawyer and a fiduciary, communications between the lawyer and the fiduciary shall be subject to the attorney-client privilege unless waived by the fiduciary, even though fiduciary funds may be used to compensate the lawyer for legal services rendered to the fiduciary. The existence of a fiduciary relationship between a fiduciary and a beneficiary does not constitute or give rise to any waiver of the privilege for communications between the lawyer and the fiduciary.

HISTORY: 2008 Act No. 211, Section 1, eff. May 13, 2008.
Sample Provision
Dealing With Client’s Fiduciary

• *Fiduciary Conflict Waiver.* The Client hereby authorizes the Counsel to represent any fiduciary of Client (such as attorney-in-fact under a Durable Power of Attorney) and to release any and all information and documentation to such fiduciary without limitation in regard to such representation. It is understood that providing advice to Client’s fiduciary may cause a conflict of interest to arise. The Client has carefully considered the possibility of a conflict between Client and Client’s fiduciary. By signing this Agreement, Client acknowledges that such conflict may arise and waives such conflict of interest as it applies to the Counsel.
Rule 1.4 Communication

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.
Sample Letter – PR Attorney to Beneficiary/Heir

- We represent the Personal Representative of the above-referenced Estate. First, we extend our sincere sympathy upon your __’s recent passing. Enclosed is a copy of Proof of Delivery, along with copy of Probate Court Form #305PC, "Information to Heirs and Devisees," which state law requires be delivered to (i) all persons who have an interest in the estate of a deceased person under the deceased person's Will and (ii) all persons who have an interest in the estate of a deceased person where there is no Will (or would have such an interest if there were no Will). This form is for your information and need not be returned to our office.
Sample Letter (contd)

- The Will of the decedent has been admitted to probate in informal proceedings. You are not a beneficiary under Decedent’s Will.

- If you have general questions regarding the enclosed, please do not hesitate to contact me. However, to avoid confusion or misunderstanding, we cannot provide legal advice or counsel to you in this matter, as we represent only the Personal Representative of the Estate. If you should desire legal advice regarding this matter, you should consult with an attorney.

With warmest regards, I remain

Kathryn C. DeAngelo and Barbara S. Hughes, Nov. 7, 2013
Joint Representation
Rule 1.7 - Conflict of Interest-Current Client
Comments

• [30] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.
(32) When seeking to establish or adjust a relationship between clients, the lawyer should make clear that

– the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented and

– any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. See Rule 1.2(c). (emphasis added)
(33) Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.
Lawyers can’t know it all (although some of them may think they do – smile)

• So some helpful tips . . .
• Remember who the client is and isn’t
• Carefully and cautiously consider the issue of joint representation
• Resist urge to help just for the sake of helping
• Don’t act on autopilot
• Stay alert to signals of misunderstanding
And a few more helpful tips . . .

• Use engagement and, when necessary, non-engagement letters to eliminate confusion
• Confirm client, scope of representation, roles, fees, and other terms in writing
• Don’t let another person’s crises or lapses become yours AND . . .
The Reason for All This?

“A lawyer’s time and advice are his stock in trade.”
- Abraham Lincoln

To avoid malpractice and grievances and to provide quality services to quality clients, who appreciate your work, pay for your services, and refer like-minded clients to you.
AND TO HELP YOU . . . .
Smile, get paid for your hard work, and sleep well.
Drafting Tips for Representation / Fee Agreements And Engagement Letters

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LEARNING OBJECTIVES

 Learn best practices in writing letters of engagement and legal services agreements

 Review and discuss sample language, with the goal of improving skills in drafting your engagement letters and legal services agreements so that these become true attorney-client communication devices and opportunities, leading to more educated and satisfied clients who can be more actively engaged and cooperative in their case or legal matter

 Recognize readily when one or more essential elements of an agreement/engagement letter are missing and develop some ready sample language to add

 Have effective answers if a client questions or complains about a fee, and a fee agreement that you can readily defend if there is a later bar complaint about the fees

__________________________________________________

In The Beginning….

The primary question ALWAYS is:

Who is the client—OR—Who are the clients?

 The senior or older person?
 Husband and wife, or domestic partners?
 Friend?
 Family member, such as child or children, sibling
 Fiduciary?
  • Trustee
  • Personal Representative
  • Guardian or Conservator
  • Agent under Power of Attorney

The duty runs to the client. If there’s a duty, a breach of duty can result in malpractice.
Rule 1.18 – Duties to Prospective Client: Comment

[5] A lawyer may condition conversations with a prospective client on the person’s informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See Rule 1.0(f) for the definition of informed consent. If the agreement expressly so provides, the prospective client may also consent to the lawyer’s subsequent use of information received from the prospective client.

Sample “Miranda warning” (courtesy of Professor Kate Mewhinney):

“I, [Daughter], understand that Attorney does not represent me regarding issues that concern my mother. I understand that Attorney may be representing my mother after Attorney meets with her. I also understand that whatever I say to Attorney may be used against my interests by Attorney in her representation of my mother. I understand I could hire my own lawyer and I have chosen not to do so. I have read this document and understand its contents.

Sample letter clarifying for the family the identity of the client:

Dear [xyz]:

I enjoyed meeting you and your brother, [abc] during our previous office conference regarding the above-referenced.

I have been impressed that you, your parents and siblings have a close and open relationship and that each of you has committed to resolving issues in the other’s interest. However, as I confirmed to you during our initial office conference, I only represent and can advise your mother and father in connection with this matter. I do not represent and cannot provide legal services to you or your siblings. Accordingly, you should consult with an attorney if you desire legal advice pertaining to this matter.

I believe it is important to clarify the foregoing in order to avoid confusion or misunderstanding. Again, I very much enjoyed meeting you and your brother, [abc]. I have done, and will continue to do, my very best to represent your parents in this matter and will be guided by their desire. With warmest regards, I remain

Very truly yours,

_______________________________
When parent requests inclusion of children in conferences or disclosure of information:

Explain the normal duty to maintain confidences and attorney-client privilege. Consider having the parent sign a letter in which confidentiality is waived and the parent can mark choices as to which children’s presence, as well as list the names of the persons to whom client wants to authorize you to make disclosures.

Before engagement, determine whether:

- You’re qualified to handle the matter
- You have the time and resources to handle the matter, considering your current case load and your other professional and personal responsibilities
- Client’s expectations are reasonable and attainable
- Client is willing and able to pay for your services
- Client is someone you want to work with and for

Client-Lawyer Relationship

Rule 1.1 - Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Can you become competent with some help?

At Conclusion of Consultation: Engaged or Not?

- Legal Representation / Fee Agreement signed, sealed, delivered
- Letter confirming consultation, engagement, scope of representation and terms – ALWAYS!

- If you are not being engaged, or if you are declining to represent the prospective client, consider writing a letter confirming non-engagement. If statutes of limitation are involved, always write the non-engagement letter and reference the relevant limitations period(s). See Togstad v. Vesely, Otto, Miller & Keefe, 291 N.W.2d 686 (Minn. 1980).
When Engagement is Agreed Upon:

If the lawyer and client mutually agree to retention or engagement, confirm the following in a written legal services agreement:

- Scope of representation
- Attorney/Client Roles
- Fees/Methods – Hourly – Flat – Contingent, or Combination(s)
- Other Terms of Representation & Billing
- Review with Client
- Signatures
- Copies

Rule 1.2 - Scope of Representation and Allocation of Authority Between Client and Lawyer

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client’s decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. . . . .

(b) . . . .

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

Scope of Representation:
What professional services are you being retained to perform?
- What does the client want the lawyer to do?
- What are your fees for such services?

What professional services are you not being retained to perform?
- What if client only desires a limited scope of services?
- What if client only wants to pay for limited services?
- What services will you not be providing?
- What service are you not competent to provide?
- Bundle of services?
- Unbundle services?
- Be clear to avoid confusion and/or misunderstanding.
Defining Scope and Role in the Legal Representation Agreement:

What is expressly excluded can be as important as what is included in scope!

Samples of Exclusion Language:

- Lawyer will not provide tax advice or advice regarding investments or financial planning. Accordingly, as to investments, financial planning, and/or tax advice, Client should consult with a competent professional, such as their tax advisor, C.P.A., tax attorney, and/or reputable licensed financial/investment advisor.

- DISCLAIMER OF GUARANTEE. Client understands that Lawyer makes no guarantee that Client or any other person on whose behalf an application for Medicaid or government benefits assistance may be made will qualify or become eligible for Medicaid or government benefits and no guarantee that such eligibility, even if obtained, will continue thereafter. Client acknowledges that Lawyer has given no assurances or guarantees regarding the outcome of this Matter. Nothing in this Agreement and nothing in Lawyer’s statements to Client will be construed as a promise or guarantee regarding the outcome of the Client’s matter. Lawyer makes no such promises or guarantees.

- Matters Excluded: Except as provided herein, Lawyer’s scope of representation does not include gathering necessary documents and information for or otherwise assisting Client with the Medicaid application and the application process, unless Client should hereafter request Lawyer to so assist Client. Likewise, Lawyer is not responsible for providing tax advice to Client. Client will be responsible for final completion of Medicaid application and securing all other information and documentation for application. Client will be responsible for securing all necessary documents for Medicaid application, meeting with DSS caseworker, submitting final application and providing all required supporting documentation to DSS/Medicaid, and consulting with a C.P.A. or tax advisor regarding potential tax implications involved with and relating to this matter.

- Revocable Living Trust – Funding/Assets: Client has not requested and does not desire that Lawyer assist Client with confirming that Client’s assets and property have been properly re-titled into trust. Client will be responsible for ensuring that assets/property are properly titled into the trust.
Sample Provisions for Scope of Representation:

- **X** OTHER: Preparation of letter confirming office conference with basic overview of current facts and circumstances and law, options and proposals for Client and overview of special needs trust; preparation of Will with special needs trust in draft for Client review and forward draft to bank trust officer for his review and discussion prior to execution by Client; preparation of necessary and/or appropriate revisions to Will and trust; after Client confirms to Counsel that all assets have been re-titled out of her Revocable Living Trust, then Lawyer to prepare a Revocation of Trust for Client to review and sign; follow up appointment with Client to review and execute Will with special needs trust and Revocation of Trust, final revisions, as necessary, and execution with witnesses and notary; preparation of brief instructions for testamentary special needs trustee.

- **Income-Only Trust**: Advice and counsel regarding laws relating to statutory Income-Only Trust for Medicaid/nursing home; preparation of Medicaid Income-Only Trust, review same with Client and supervise proper execution. After the Trust is prepared and executed by client, then Lawyer’s representation of client shall be concluded. Except for the foregoing, **Client** shall be, and is, responsible for all matters in connection with the Trust, including but not limited to, establishing a bank account, proper funding of the Trust, securing tax advice, maintaining proper and appropriate records and disbursements from the Trust. Lawyer will **not** provide tax advice.

- **x** Conference with Client to review incoming trust documents and other estate planning documents previously prepared for Clients by Trust Busters Ltd.; advice and recommendation as to revisions and amendments to foregoing documents; preparation of amendment and restatement to trust, new Pour-Over Will, Certificate of Trust Existence, Durable Power of Attorney, and other documents deemed proper or appropriate by Lawyer and Client and requested by Client; prepare instructions for management and ancillary documents for trust as appropriate for trust and assemble/organize new Trust notebook/organizer with new documents prepared by Lawyer; follow-up conference with clients to review and execute amended/restated Trust and other documents prepared by Lawyer; associate real estate attorney, Tom Realty Lawyer, to advise and assist Client with Deed conveying home into trust. Client will be directly responsible to Tom Realty Lawyer for payment of his professional charges.
Sample Provisions Limiting Scope to Trial Level (not Appeal):

- VI. It is agreed and understood that LAW FIRM’s scope of representation is solely to represent, advise, and counsel CLIENT through settlement or the conclusion of a trial or final trial court hearing, if any, as the case may be, in this matter.

- In the event CLIENT wishes to appeal from any order, decision, or verdict entered in this matter, LAW FIRM is not obligated under this Agreement to represent CLIENT in any such appeal, unless a new and independent Representation Agreement, upon terms mutually agreeable to both LAW FIRM and CLIENT, is entered into between LAW FIRM and CLIENT pursuant to which LAW FIRM is engaged specifically to undertake representation of CLIENT in such appeal.

Sample Provision Excluding Tax Advice:

- Counsel will not offer or provide tax advice or advice regarding investments or financial planning. Client shall be responsible for consulting with and, if necessary, engaging the services of a tax advisor, C.P.A., or tax attorney regarding tax advice and any tax-related issues. As to investments and financial planning, the Client should consult with another professional, such as tax advisor, C.P.A., tax attorney, and/or reputable licensed financial/ investment advisor.

Rule 1.5 - Fees

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client. [emphasis added]

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the
recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. [emphasis added]

Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination. [emphasis added]

- Note that in some states the Model Rules require that fee agreements be in writing. For example, in South Carolina a written agreement is not required, but in Wisconsin it is required if fees are expected to exceed $1,000.
- Do you know your state’s rule?

Sample Fee Provisions:

A. Time Basis Fee Arrangements

TIME BASIS FEE ARRANGEMENT

The time expended by the Counsel to perform the legal services for the Client in this Matter will be the primary basis for determining the total legal fees to be paid to the Counsel. The following rates will apply:

**Hourly Rates**

- Elder Law Attorney - $__________ per hour
- Associate Attorneys - $__________ per hour
- Legal Assistants - $__________ per hour
- In-Court Time - $__________ per hour
- Travel Time - $__________ per hour

These rates are subject to change from time to time, and any such change will be reflected on the Client’s billing statements. These rates do not include the other fees, charges and expenses as described in Section II.B herein.

**Consider adding a protective estimate of the minimum fee:**

- (Lawyer projects/estimates a minimum professional fee of $__________, excluding costs/expenses, and that fees could range upward depending
on actual time necessarily devoted to foregoing matters. The foregoing range is an estimate and projection and could easily vary depending on the amount of work that is necessarily devoted to this matter.)

B. Fixed Fee Arrangements

FIXED FEE ARRANGEMENT

- The total fee to be charged the Client for legal services to be performed by the Counsel in this Matter is $__________, which fee does not include the fees and charges for other services and expenses as described in Paragraph II.B herein.

C. Contingency Fee Arrangements

CONTINGENCY FEE ARRANGEMENT

- The Client agrees to pay the Counsel a fee contingent upon the outcome of the Matter. If recovery is made in this Matter on the Client’s behalf, the Client agrees to pay to the Counsel, for legal services rendered, a sum equal to:
  - _________% of any and all sums recovered by way of settlement prior to instituting a lawsuit; or
  - _________% of any and all sums recovered either as a result of trial or by way of settlement after a lawsuit has been instituted; or
  - _________% of any and all sums recovered if any judgment is appealed, either on behalf of the Client or by any adverse party, or if any proceedings after judgment have to be brought to collect the judgment or any portion thereof; or
  - _________% of any and all sums recovered if the Matter is the subject of a retrial as ordered by a trial or appellate court

- If there is no recovery, there shall be no fees owed by the Client to the Counsel for representation in this Matter. The Client understands and agrees, however, that, regardless of recovery, the Client is responsible for and will pay all other fees, charges, and expenses as described in Paragraph II.B herein.

Who Pays the Fees?

Can a third party pay the Client’s fees?
Rule 1.8 - Conflict Of Interest: Current Clients: Specific Rules

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

Sample Provision for Payment of Fees by Third Party:

PAYMENT OF FEES BY THIRD PARTY. If a third party, someone other than the Client, has agreed or will be responsible for payment of Client's fees, costs and expenses, Lawyer has consulted with Client regarding such payment arrangements and Client has fully and voluntarily consented after having consulted with Lawyer. It is further agreed and understood that if a third party is to be responsible for and pay the Client's fees, costs and expenses, Client, Lawyer and third party understand that such payment arrangement shall in no way interfere with the Lawyer's independence of professional judgment or with the Client-Lawyer relationship, and that all information relating to representation of Client is fully protected as required by the South Carolina Code of Professional Conduct.

What if the Client is a Fiduciary?

- Trustee
- Guardian/Conservator
- Attorney-in-Fact
- Health Care Agent
- Personal Representative

Issues with Fiduciary Clients:

- What about the attorney-client privilege?
- What about confidentiality?
- Does the attorney have a duty to the Principal, the Beneficiary, an Heir, or a Ward?
Rule 1.7 – Conflict of Interest: Current Client: Comment

[27] For example, conflict questions may 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 be present. *In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries.* In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved. [emphasis added]


**SECTION 62-1-109. Duties and obligations of lawyer arising out of relationship between lawyer and person serving as a fiduciary.**

Unless expressly provided otherwise in a written employment agreement, the creation of an attorney-client relationship between a lawyer and a person serving as a fiduciary shall not impose upon the lawyer any duties or obligations to other persons interested in the estate, trust estate, or other fiduciary property, even though fiduciary funds may be used to compensate the lawyer for legal services rendered to the fiduciary. This section is intended to be declaratory of the common law and governs relationships in existence between lawyers and persons serving as fiduciaries as well as such relationships hereafter created.

**Fiduciary-Attorney Privilege**

The attorney-client is the oldest of the privileges recognized under common law. Jurisdictions differ as to whether an exception exists for the fiduciary-attorney relationship, with a minority of states having recognized it by case law in some circumstances. In some states there are statutes eliminating any fiduciary exception. See, e.g., New York Civil Practice Law and Rules § 4503(a)(2) (added in 2002); Florida Stat. 90.5021, 733.212 and 736.0813 (added in 2011); South Carolina (see below). See also *ABA Trust & Investments*, May-June 2012, 7-12.

S.C. Code §62-1-110

**Fiduciary-lawyer privilege.**

Whenever an attorney-client relationship exists between a lawyer and a fiduciary, communications between the lawyer and the fiduciary shall be subject to the
attorney-client privilege unless waived by the fiduciary, even though fiduciary funds may be used to compensate the lawyer for legal services rendered to the fiduciary. The existence of a fiduciary relationship between a fiduciary and a beneficiary does not constitute or give rise to any waiver of the privilege for communications between the lawyer and the fiduciary.

HISTORY: 2008 Act No. 211, Section 1, eff. May 13, 2008.

Sample Provision for Payment of Fees with Fiduciary Client:

The Client agrees that regardless of whether or not estate or fiduciary funds so reimburse the Client, the Client shall in all events be personally responsible for and shall pay all legal fees and professional charges billed and incurred in this matter and such payment arrangement shall in no way interfere with the Lawyer's independence of professional judgment or with the Lawyer’s relationship to the Client in the Client’s fiduciary role. Lawyer will take all steps necessary to preserve the Client's confidential information.

Sample Provision for Fiduciary Client:

C. Fiduciary Representation  If the Counsel has been engaged to represent the Client in a fiduciary role, such as Personal Representative of an estate, Trustee of a trust, and/or attorney-in-fact/agent under a power of attorney, then the Client and the Counsel further agree as follows: Such representation shall not impose upon Counsel any duties or obligations whatsoever to other persons who are or may be interested in the estate, trust estate, or other fiduciary property, including but not limited to heirs, devisees, and beneficiaries, even though fiduciary funds may be used to compensate the Counsel for legal services rendered to the Client as fiduciary. The Counsel represents the Client only in the Client's fiduciary capacity and Counsel does not represent Client individually and/or personally. The Client should be entitled to reimbursement from estate or fiduciary funds for any legal fees and professional charges billed and incurred in this matter.

Sample Provision Dealing with Client's Fiduciary:

Fiduciary Conflict Waiver. The Client hereby authorizes the Counsel to represent any fiduciary of Client (such as attorney-in-fact under a Durable Power of Attorney) and to release any and all information and documentation to such fiduciary without limitation in regard to such representation. It is understood that providing advice to Client’s fiduciary may cause a conflict of interest to arise. The Client has carefully considered the possibility of a conflict between Client
and Client’s fiduciary. By signing this Agreement, Client acknowledges that such conflict may arise and waives such conflict of interest as it applies to the Counsel.

Rule 1.4 – Communication

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
(3) keep the client reasonably informed about the status of the matter;
(4) promptly comply with reasonable requests for information; and
(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Sample Letter – PR Attorney to Beneficiary or Heir:

We represent the Personal Representative of the above-referenced Estate. First, we extend our sincere sympathy upon your __’s recent passing. Enclosed is a copy of Proof of Delivery, along with copy of Probate Court Form #305PC, "Information to Heirs and Devisees," which state law requires be delivered to (i) all persons who have an interest in the estate of a deceased person under the deceased person's Will and (ii) all persons who have an interest in the estate of a deceased person where there is no Will (or would have such an interest if there were no Will). This form is for your information and need not be returned to our office. The Will of the decedent has been admitted to probate in informal proceedings. You are not a beneficiary under Decedent's Will.

If you have general questions regarding the enclosed, please do not hesitate to contact me. However, to avoid confusion or misunderstanding, we cannot provide legal advice or counsel to you in this matter, as we represent only the Personal Representative of the Estate. If you should desire legal advice regarding this matter, you should consult with an attorney.

With warmest regards, I remain
What about Joint Representation?

Rule 1.7 – Conflict of Interest-Current Client: Comments

[30] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

[32] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that

- the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented and
- any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. See Rule 1.2(c). (emphasis added)

[33] Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.

IN SUMMARY--

Lawyers can't know it all (although some of them may think they do!)

Some helpful tips:

- Remember who the client is and isn’t
- Carefully and cautiously consider the issue of joint representation
- Resist urge to help just for the sake of helping
- Don’t act on autopilot
- Stay alert to signals of misunderstanding
And a few more helpful tips . . .

• Use engagement and, when necessary, non-engagement letters to eliminate confusion
• Confirm client, scope of representation, roles, fees, and other terms in writing
• Don’t let another person’s crises or lapses become yours AND . . .

The Reason for All This?

“A lawyer’s time and advice are his stock in trade.”

- Abraham Lincoln

To avoid malpractice and grievances and to provide quality services to quality clients, who appreciate your work, pay for your services, and refer like-minded clients to you.