This is a suggested fee and engagement letter for use by an attorney in joint representation of spouses.

Before this form is used, the drafting considerations in Chapter 4 and all Notes on Use for this form should be carefully read.

ENGAGEMENT LETTER (JOINT REPRESENTATION)

Dear New Clients:

Thank you for asking this firm to represent you for purposes of your estate planning. This letter confirms the terms of our representation with respect to the estate planning for which you have recently engaged us. Under the terms of our engagement, the scope of representation will include **[**insert description of work to be completed**]**.

Our representation under this agreement will be limited to the above described scope of representation. The estate plan will be based on the financial and personal information you provided to us. Without a specific direction to do so, we will not conduct an independent investigation regarding asset titles, beneficiary designations, or the special circumstances of the beneficiaries of your estate plan. If the information you provide to us is incorrect, the estate plan may not work as intended.

The fee for these services will be **[**insert a description of the manner in which the fees will be charged and the amount of the fees to be charged**]**.

While it is common for spouses to employ the same law firm to assist them in planning their estate, ethical rules governing attorneys limit the circumstances in which such joint representation can occur. We may not, for example, jointly represent a married couple whose interests are directly adverse, unless (1) we reasonably believe our services will not adversely affect our representation of either party, and (2) both parties consent after consultation regarding the advantages and risks involved.

We have discussed with you the differences between "joint" and "separate" representation, including the fact that, if you were represented separately, each of you would have an advocate for your positions, and information given by each of you to his or her separate attorney would remain confidential and could not be obtained by the other spouse.

In most cases, spouses' estate planning interests are not adverse. However, spouses can have differing, and sometimes conflicting, interests and objectives regarding estate planning. For example, spouses may have different views on how property should pass after the death of one or both. In addition, we may recommend changes in title to certain assets, or changes in beneficiary designations with respect to certain assets, in order to take advantage of tax planning opportunities. The changes may involve gifts from one of you to the other,

and the gifts may affect the classification of the gifted property under marital property laws, which in turn (in the absence of a marital agreement) may affect the division of such property in the event of a divorce or legal separation.

The information you have provided to us so far suggests that you have no directly adverse interests, and we agree to represent you jointly. Each of you will be considered our client, and the following ethical considerations will apply:

1) Matters that either of you discusses with our firm will not be protected by the attorney-client privilege from disclosure to the other of you. In order to properly represent you both, we cannot agree with one of you to withhold information from the other if it is relevant to your estate planning. We cannot give legal advice to either of you or make any material changes in any of your estate planning documents without your mutual knowledge and consent. Matters that either of you discuss with us will be protected from disclosure to third parties to the extent provided by the rules and laws governing the attorney-client privilege.

2) If there are differences of opinion between you about your proposed estate plan, we may discuss the differences with both of you and point out the pros and cons of your respective positions. However, we may not advocate the position of one of you over the position of the other.

3) If a conflict between you does arise that, in our judgment, renders it impossible for us to continue to represent you jointly, we will withdraw as your joint attorney and advise each of you to obtain separate counsel.

4) Upon the death of either of you, the survivor's statutory rights to a share of the deceased spouse's estate may differ from, or be greater than, the rights granted to the survivor by the deceased spouse's estate plan. In this or similar cases, the ethical rules compel us to counsel the surviving spouse regarding his or her statutory rights.

In addition to the above ethical considerations, please be aware that we do not keep original estate planning documents in our files, and any original documents you provide to us will be returned to you. Your "client file" may consist of paper or electronic copies of your executed estate planning documents; drafts of such documents prepared prior to signature; and documents such as deeds, beneficiary designation forms, and business agreements. Our notes and internal memoranda are proprietary to us and not a part of your client file. [Insert description of firm's file retention policy.]

We may make certain recommendations that it will be up to you to implement (for example, changing beneficiary designations or transferring assets to a trust). Once the recommendations have been made, we will not be responsible for ensuring that you follow our advice.

Once your estate planning documents have been executed, our representation of you with respect to the scope of work we have identified in this letter will come to an end. We will, of course, be pleased to have the opportunity to represent you again if the need arises. You should be mindful of the fact that the nature and extent of your assets will change in the future. The services we are providing you as described above will be based on your current estate planning goals and the present state of the law. However, laws may change in the future, in which case your estate planning documents may need to be revised. Although we may, periodically send you general updates regarding changes in the law, because of the large number of clients we represent, we cannot undertake to advise you if changes in the law occur that affect your specific estate plan, nor will we review your file annually or on any other regular basis. Accordingly, we recommend that you call us or another attorney if your estate changes in size or type of assets, if your estate planning goals change, or if you read about changes in the law you think may affect you.

Please review this letter carefully and if there is anything that is unclear, please let us know so we can discuss it. If the terms outlined above are satisfactory to you, then we would appreciate your signing and returning the enclosed copy of this letter as acknowledgment that you have read and understood it and wish us to proceed to jointly represent you.

Sincerely,

_____

We have read the foregoing letter and we consent to your jointly representing us on the terms and conditions described. We understand the discussion of conflicts set forth above and agree that between us, with respect to information either of us provides to you, there will be no confidential communications.

_____, 20___ _____
New Client

_____, 20___ _____
New Client

***** End of Form *****

NOTES ON USE

1) It is recommended that the list of duties undertaken and the matters that are excluded from representation be as specific as possible to avoid misunderstanding and potential liability on the part of the attorney. The responsibilities of the attorney and those of the client should be specified. Some examples of services that an attorney may want to specifically identify as being excluded from the representation (to the extent applicable) are: funding of a trust, preparation of tax returns, income tax advice, contested issues or litigation, asset protection services such as domestic asset protection trusts or off-shore trusts, Medicaid planning, review of business entity documents, or other services that a client may expect to be included in the engagement.

2) Colorado Rule of Professional Conduct (Colo. RPC or Rule) 1.5(b) requires that, if an attorney has not regularly represented a client, the basis or rate of the attorney's fee must be communicated in writing to the client. The writing does not have to take the form of an engagement letter (*see* Colo. RPC 1.5, Comment [2]) but many attorneys use the engagement letter as a writing to satisfy the Rule. The writing should specify whether the fee is hourly based or a flat fee. Rule 1.5 lists several factors that will be considered in determining the reasonableness of a fee, including the time and labor required, the novelty or difficulty of the questions involved, and the skill necessary to perform the legal service. If it is anticipated that the firm or attorney will raise rates over the life of the engagement, this information must be disclosed. Except as provided in a written fee agreement, any actual material changes to the basis or rate of the fee are subject to Rule 1.8(a), which requires the client to give informed consent, in writing, of any transaction with the attorney. Further, Colorado law requires that if any third party will be attempting to collect the fee owed to the attorney, any interest, charge, or expense incidental to the principal obligation (such as charges for copies, faxes, and telephone calls) must be expressly authorized by the agreement creating the debt or obligation. *See* C.R.S. § 5-16-108(1)(a).

   Advances of unearned fees, which may include "flat fees," are funds that the client pays a lawyer for specified legal services that the lawyer agrees to perform in the future. The lawyer must deposit an advance of unearned legal fees in the lawyer's trust account. The fees are "earned" only as the lawyer provides specified legal services or confers benefits on the client as set forth in the written fee statement, if such a statement is required. For example, the lawyer and client may agree that portions of the advance of unearned fees are deemed earned at the lawyer's hourly rate after the lawyer works for the time prescribed. Alternatively, the lawyer and client may agree to an advanced flat fee that will be earned in whole or in part based on the lawyer's completion of specific tasks or the occurrence of specific events, regardless of the precise amount of the lawyer's time involved. In a trusts and estates matter, a lawyer and client may agree that the lawyer earns portions of the flat fee upon completion of tasks such as client consultation, legal research, completing the initial drafts, and completing the final documents. If there is no further work to be

completed and any portion of the advanced unearned fee remains, the excess should be refunded directly to the client.

As provided in Colo. RPC 1.5, a client must be informed in writing of the basis or rate of the attorney's fee. Consent in writing is not required unless there is a material change to the basis or rate of the fee or unless the client is required to give informed consent to a conflict of interest. Without a signed engagement letter, however, it is more difficult for an attorney to show that the client understood the terms of the engagement.

3) With respect to joint representation of parties whose interests may turn out to be adverse, a letter explaining potential conflicts of interest is required before engagement. *See* Colo. RPC 1.7 and Notes on Use 5 and 7, below.

The rules of conduct that are most relevant for joint representation of spouses for estate planning are discussed in the following Notes on Use. For the full text of the rules and the committee comments, see *Colorado Rules of Professional Conduct/Colorado Rules of Judicial Conduct* (CLE in Colo., Inc. 2017). *See also* Malcolm A. Moore and Anne K. Hilker, "Representing Both Spouses: The New Section Recommendations," *Prob. & Prop.* 26, (July/Aug. 1993), and *ACTEC Commentaries on the Model Rules of Professional Conduct*, 5th ed. (ACTEC Foundation 2016). *See also* "Lawyers' Responsibilities and Lawyers' Responses," 107 *Harvard L. Rev.* 1547 (May 1994); Constance Tromble Eyster, "Engagement Letters and Common Conflicts of Interest in Joint Representation," 38 *Colo. Law.* 43 (Feb. 2009).

For a discussion of issues with representation of non-married couples, *see* Wendy S. Goffe, "Estate Planning for the Unmarried Couple/Non-Traditional Family" (ALI-ABA course materials, June 3, 2005), *available at* www.actec.org/Documents/misc/GoffeNon-TradCouples. pdf-2005-06-03; and Kathleen Ford Bay, "Estate Planning for Unmarried Couples: What's Different and What's the Same?" at 3 (ACTEC Annual Meeting, March 10-15, 2004), *available at* www.actec.org/Documents/CLEMaterials/ShermanFinalEstPlanUnmarrCouples.pdf.

4) A married couple seeking legal advice for estate planning may encounter three possible lawyer/client arrangements for such services:

a) Separate Representation — An arrangement that contemplates that each spouse will be represented by a different lawyer. This form of representation may not be the most cost effective but is best used where conflicting interests of the parties render joint representation impossible or unworkable.

b) Joint Representation — An arrangement that contemplates that both spouses will be represented together by the same lawyer. This form of representation is usually less costly, since only one lawyer is involved, and may be used if there are no conflicts between the spouses or if both spouses have consented to joint representation despite minor conflicts between them.

c) Simultaneous Representation — An arrangement that contemplates that both spouses will be represented by the same lawyer simultaneously but separately. The ethical authority for this form of representation is unclear and for this reason it is not recommended.

The representation letter provided here is intended for use in a joint representation of a spouses, which seems to be the prevailing form of joint representation. ACTEC *Engagement Letters*, referenced in Note on Use 9, below, provides guidance on other forms of representation that may warrant special attention in an engagement letter, such as: representation of multiple generations of the same family, multiple party representation in a business context, representation of a fiduciary, representation of a disabled client, and representations in which the attorney serves as a fiduciary.

5) Colo. RPC 1.7 is the basic rule governing the concurrent representation of clients with potentially adverse or conflicting interests. Comment [27] to Rule 1.7 acknowledges that conflicts may arise in estate planning, where for example, "A lawyer may be called upon to prepare wills for several family members, such as joint representation of spouses, and, depending upon the circumstances, a conflict of interest may be present." The general rule prohibits the representation of a client if the representation of (a) one client will be directly adverse to another client or (b) if the representation may be materially limited by the lawyer's responsibilities to another client, unless (1) the lawyer reasonably believes the representation will not be adversely affected, (2) the representation is not prohibited by law, (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal, and (4) each affected client gives informed consent, confirmed in writing.

Comments [18] and [19] to Rule 1.7, as well as Rule 1.0, state that informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. In particular, when jointly representing multiple clients, the attorney must provide the clients with information explaining the implications of the common representation, including possible effects on loyalty, confidentiality, and the attorney-client privilege.

The comments to Rule 1.7 squarely address the ability of a client to waive a conflict that might arise in the future. Comment [22] provides that the effectiveness of the waiver is determined by the client's understanding of the material risks that the waiver entails. A comprehensive, detailed explanation of the types of future representations that might arise, and the actual and reasonably foreseeable adverse consequences of the representations make it more likely that the client will make a valid waiver of a future conflict. Factors such as the client's familiarity with the type of conflict, the specificity of the consent, and the client's level of sophistication can impact the effectiveness of the waiver. In no circumstances, however, can a waiver of a future conflict be effective if circumstances materialize that would make the conflict nonconsentable under Rule 1.7(b). Whether a conflict is consentable depends

on the circumstances. If the clients are generally aligned in interest, a common representation is permissible despite some difference in interest between them. Colo. RPC 1.7, Comment [28].

6) C.R.S. § 14-10-113(7)(a) provides that, for the purpose of division of marital property in a dissolution proceeding, gifts of property (with the exception of nonbusiness tangible personal property) from one spouse to another, whether in trust or not, are be presumed to be marital property and not separate property. This presumption may be rebutted by clear and convincing evidence. Some practitioners feel that, as a result of this statute, a transfer of marital property for estate planning purposes between spouses does not create a conflict because by statute such transfer is presumed not to convert the transferred property into the separate property of the donee spouse. Accordingly, in applicable circumstances, an attorney might consider deleting the last sentence of the sixth paragraph of the Engagement Letter.

7) This form letter acknowledges the lawyer's perception, after the initial meeting with the clients, that no significant adversity or conflict is apparent between the parties. It is intended to inform the clients of the ethical ground rules that will govern the representation from this point forward. This letter does not request that clients waive conflicts that might arise in the future. If, during the initial meeting or any subsequent meeting, a conflict does develop that may still allow the joint representation to continue after consultation and consent within the guidelines of Colo. RPC 1.7, then the lawyer should consider documenting the specific nature of the conflict and the consent of the parties after consultation in some different form of memorandum or letter signed or initialed by the parties. However, if a waiver of the conflict is not obtained, or if the conflict is so severe so as to preclude waiver of it under Rule 1.7, then joint representation may not continue, and the lawyer ordinarily must withdraw from representing either party in matters which are in conflict. *See* Colo. RPC 1.7, Comment [29].

Under Colo. RPC 1.9, the lawyer may not continue to represent one spouse in the same or substantially related matter where the spouses' interests are materially adverse without the other spouse's informed consent, confirmed in writing. This would appear to bar a lawyer from continuing to represent one spouse where a conflict had developed in representing both. For discussion of the lawyer's duty to withdraw, see Russell G. Pearce, "Family Values and Legal Ethics: Competing Approaches to Conflicts in Representing Spouses," 62 *Fordham L. Rev.* 1253, 1269 (1994). *See also* "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. J.* 765, 774 (Winter 1994).

8) As stated in Comment [32] to Rule 1.7, it is important when representing clients jointly to make clear that the attorney's role is not one of partisanship that would normally be expected in other circumstances. Jointly represented clients may be required to assume greater responsibility for decisions than if such clients were separately represented.

This letter also makes it clear that when jointly representing spouses, the lawyer cannot agree with one client to withhold confidential information from the other. The receipt of confidential information by the lawyer from one client intending that it be kept confidential from the other presents the greatest threat to the lawyer's independent judgment and to the continued representation of both spouses. Comment [31] to Rule 1.7 provides that the attorney's duty of loyalty to each client almost certainly prohibits continued common representation if one client asks the lawyer not to disclose to the other client information relevant to the common representation. At the outset of the representation, therefore, the comment suggests that the attorney should advise each client that information will be shared among the jointly represented clients. The "Report of the Special Study Committee," cited above, discusses three broad categories of confidences that may cause the lawyer to conclude that the differences between the spouses make their interests adverse and may require the lawyer to either disclose the confidence or withdraw from the joint representation. *See Report* at 784. *See also* Collett, "Disclosure, Discretion, or Deception: the Estate Planner's Ethical Dilemma From a Unilateral Confidence," 28 *Real Prop. & Prob. J.* 683 (Winter 1994), in which the author concludes that the lawyer must disclose confidential information to the nonconfiding client under certain circumstances.

The lawyer may also consider whether the engagement letter should include language authorizing the lawyer to work with the client's named agents or trustees with respect to the carrying out of their duties on the client's behalf, especially when one spouse is unable to act as a fiduciary for the other. For example, the engagement letter may give the lawyer permission, in advance, to disclose relevant incapacity planning provisions of the client's estate plan with the client's named agents or trustees, and give them copies of relevant documents; carry out the provisions of Colorado statutory law allowing the named agents to have access to and copy the client's will, trusts, and other personal papers and records; and disclose relevant information to the client's named agents or trustees that may have been communicated to the lawyer by the client in confidence.

9) Practitioners should be aware that, after the death of a client, the attorney-client privilege may be waived when heirs or devisees make a claim through the decedent. *Swindler & Berlin v. United States*, 524 U.S. 399, 404-05 (1998). Although Colorado has not yet codified this testamentary exception, Colorado courts have recognized such an exception to the attorney-client privilege as early as 1905 in the case of *Estate of Shapter*, 85 P. 688 (Colo. 1905). In that will contest dispute, the trial court permitted the attorney who drafted the will to testify as to the circumstances surrounding the will execution. This ruling was upheld in *Denver National Bank v. McLagan*, 298 P.2d 386 (Colo. 1956), in which the drafting attorney was permitted to testify as to "all matters leading up to the execution of the will including statements of the testator [and] his mental condition, and to facts relating to the issue of undue influence and other matters affecting the validity of the will." *See also Glover v. Patten*, 165 U.S. 394, 407-08 (1897); *Wesp v. Everson*, 33 P.3d 191, 200

(Colo. 2001); “Wills and the Attorney-Client Privilege,” 14 *Ga. L. Rev*. 325, 334 (1980).

In 2017, the American College of Trust and Estate Counsel (ACTEC) published a guideline for practitioners titled *Engagement Letters: A Guide for Practitioners* ("ACTEC *Engagement Letters*"). The online version of ACTEC *Engagement Letters* dated April 24, 2017, is available on ACTEC's website at www.actec.org. Based on the above described exception to the attorney-client privilege, the attorney may want to include language in the engagement letter regarding compensation for depositions, testimony, or discovery related to the client's estate plan (sample language in joint representation form in Chapter 1 of ACTEC *Engagement Letters*).

10) It is important that the attorney consider whether a client’s estate plan grants a surviving spouse fewer rights than the statutory rights of the surviving spouse and advise the client accordingly.

11) Colo. RPC 1.16A sets forth the requirements concerning retention of client files. A lawyer may comply with Rule 1.16A by maintaining a client's file in, or converting the file to, electronic form, provided the lawyer can reproduce the file in paper format. If the lawyer’s representation on a matter has terminated and there is no pending or threatened legal proceeding known to the lawyer, Rule 1.16A provides three options to the lawyer regarding destruction of client files regardless of the format in which the files are maintained. The first option is to deliver the file to the client.

A second option is to notify the client in writing of the lawyer’s intent to destroy the file on or after a date stated in the notice, which date may not be less than 30 days after the date of the written notice. The lawyer must make reasonable efforts to locate the client, and if the lawyer cannot locate the client, then notice sent to the last known address of the client is sufficient. The written notice requirement can be satisfied by providing the client with a written copy of the lawyer’s file retention policy or by including that information in a written fee agreement or engagement letter with the client.

The third option is for the lawyer to maintain the file for at least 10 years after the matter is concluded. Without the written notice or the client's authorization in a writing signed by the client, the file cannot be destroyed prior to the expiration of the 10-year period. Under the third option, the lawyer may destroy the file without notice to the client or client authorization at any time after expiration of the 10-year period.

The options set forth in Rule 1.16A do not apply to original estate planning documents, which must be retained indefinitely or returned to the client.

Rule 1.16A does not prohibit the lawyer from keeping the file or portions of the file after written notice has been sent to the client stating the intent to destroy the file or after the ten-year period has expired.

As set forth in the Comment to Rule 1.16A, the rule is not intended to impose an obligation on a lawyer to preserve documents that the lawyer would not normally preserve, such as multiple copies or drafts of the same document.

Because of the nature of estate planning work, the issue of file retention presents practical problems regarding the nature and length of storage of a client's file. Accordingly, lawyers may want to include language in their fee agreements or engagement letters that discloses their office policy regarding file retention and reserves the right to discard client files a certain number of years after the representation has ended or documents have been signed. Such language may help obviate the need to contact clients/former clients if and when a lawyer wants to cull files.

The following article may be consulted to obtain additional guidance on file retention issues: Michael Kirtland, "Changes to Colorado Rules of Professional Conduct: Rule 1.15 Safekeeping Property and New Rule 1.16A Client File Retention," 30 *Council Notes* 12 (March 10, 2011).

12) Unless tasks such as updating beneficiary designations or changing asset titles are included in the scope of representation, it is important to notify the client of the client's responsibility to carry out the lawyer's recommendations. If the estate plan includes a revocable trust, the lawyer may want to consider providing the client with a version of Form 25, Trust Funding Letter.

The attorney may want to consider in advance his or her policy regarding questions that may arise after the representation is concluded. After the estate planning documents have been signed and the representation has ended, clients often contact the lawyer with questions about beneficiary designations and asset titles. The lawyer may want to have a plan about which questions, if any, the lawyer will answer without a new engagement for additional or continuing legal services.

13) During the active part of the representation, an attorney must keep the client reasonably informed regarding developments in the law that might affect the client. *See* Colo. RPC 1.1, "Competence," and Colo. RPC 1.3, "Diligence." Specific language in an engagement letter regarding the termination of an attorney's representation clarifies that an attorney is not responsible for informing the client of changes in the law after the client's estate planning documents have been signed. More information on the termination of an attorney's representation can be found in Chapter 2, "The Client-Lawyer Relationship," of *Lawyers' Professional Liability in Colorado*, 2017 Ed. (Michael T. Mihm ed., CLE in Colo., Inc.), and Form 0124, Termination Letter.

14) Some of the ethical rules that are relevant to the practice of estate planning law are Colo. RPC 1.4 through 1.9.